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**Access to Justice and Sustainable Development:
the National Green Tribunal of India**

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This thesis comes after a long journey spent through the meanders of two passions developed during my studies: on the one hand, an interest in comparative legal systems of Asia, a subject that I endeavoured to cultivate in the past seven years; on the other hand, the concern toward environmental degradation, a topic high in the political agenda, that I attempted to study in my own field of expertise, constitutional law. The present doctoral dissertation constitutes an opportunity to take stock of the last years.

Academically, my heartfelt thanks goes to two people that proved fundamental in choosing this path: Fulco Lanchester, Professor of Comparative Constitutional Law at the University of Rome "La Sapienza", and Mahendra P. Singh, former Director of the National University of Juridical Sciences in Calcutta. To the former, I owe the choice of India as the case-study for my Master's thesis, a decision that came almost by hazard, destined to my devoting energies to topics that manifestly became a never-ending intellectual encounter. To Professor Singh, I am grateful for the possibility of spending fruitful time in Calcutta at the end of my Master's, an uncommon yet lifetime experience for a European student, that was crucial for attempting to understand the subjects I focused on in the last five years. To the eyes of many, Professor Singh is a major figure among those scholars that lead by example: I am thus privileged insofar as I had the chance to exchange views with him, on my studies and on my perceptions while there.

As I started my Ph.D., the initial project was centred on constitutional rights and democratisation. The decision to turn to a more restricted yet challenging topic, environmental jurisdictions, came as a way to accomplish my doctoral duties following my recruitment at the Italian Ministry of Foreign Affairs, at the end of the second year.

Working at the Service for Legal Affairs of the Farnesina became a chance to reorient my project into a single-issue study that could account for the influences of both domestic and international law and, most of all, to critically appraise these matters, as my daily tasks were now mainly directed to the latter field. For this, I am indebted to my colleagues: in particular, Stefania and Andrea endeavoured to be initial guides in the vast ocean of diplomatic affairs: their teachings, each in

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Vita and Publications

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Abstract

With the adoption of the 2030 Agenda for Sustainable Development, the relevance of the notion of sustainable development – that bridges environmental, economic and social dimensions - has risen to the status of programme for the international community. In this framework, a “fourth”, legal leg of sustainable development has been envisioned as a necessary complement to realise the 2030 Agenda, through the role of inclusive and effective institutions.

The role of tribunals and of access to justice assumes a significance insofar as it guarantees the respect of the rule of law that has been highlighted as the fundamental aspect for achieving sustainable development. In this regard, experiences of national implementation of the principle of sustainable development in the field of human rights are crucial for understanding current developments and for studying legal systems that are mutually influencing and reinforcing each other.

Concerning the guarantee of environmental rights, three main strategies can be outlined: the maintenance of general jurisdictions; the establishment of “green benches” as sections of ordinary tribunals dealing with environmental cases; the creation of specialised tribunals, with experts in scientific subjects and judges specifically trained in this field.

In light of its experience of “low-yielding” judicial institutions, characterised by delays, backlogs and insufficient capacities of case management, India undoubtedly constitutes one of the leading cases for assessing the validity of institutional measures aimed at the application of the concept of sustainable development in the legal field. In this regard, the Parliament of India chose to pursue the third path and enacted the National Green Tribunal Act in 2010. The experience of India is thus analysed considering, on the one hand, the constitutional framework embodied in the protection of environmental rights within the right to life enshrined in Article 21 of the Constitution, with Articles 48A and 51A(g) and, on the other hand, the interpretation of the courts regarding international law principles (sustainable development, polluter pays and precautionary principle), that are statutorily applied by the National Green Tribunal.

The thesis thus analyses the advantages brought forward by the newly established tribunal - expanded access to tribunals, through new rules and a more flexible procedure; enhanced expertise due to the change in the composition of courts; consistency in decisions, thanks to the specialisation - as well as possible drawbacks caused by the resort to creeping jurisdiction and by the monopolisation of the interpretation of sustainable development by a single environmental court.

Introduction

2015 marked the beginning of a renewed phase in the life of the United Nations, with the convention of the Sustainable Development Summit, held from the 25th to the 27th of September, and the adoption of the 2030 Agenda for Sustainable Development.¹ After the fairly successful initiative of the Millennium Development Goals, aimed at reducing poverty and enhancing enabling tools for development, the General Assembly of the United Nations approved a new ambitious and universal agenda that should constitute the working programme toward the principal goal, poverty eradication. The plan to be implemented is made of 17 “Sustainable Development Goals” and of 169 targets that integrate the three dimensions to be upheld, namely the economic, social and environmental aspects of development. Among these statements, Goal 16 deserves a particular mention insofar as it establishes an institutional ambition that was in the background until now. States and stakeholders are now invited to *“promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”*.

The inauguration of the programme that should lead the international community to a more equitable progress in the next fifteen years with the cornerstone of sustainable development is indicative of the relevance that the concept assumed as a guiding light in the realm of international law and politics and as the most comprehensive notion that bridges economic, social and environmental aspects. As known, sustainable development has been defined in the *Brundtland Report* in 1987 as *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs”*.² Since then, the notion has been thoroughly employed in international and national law as the embodiment of the objective of public policies

¹ United Nations General Assembly, Doc. A/RES/70/1.

² UN Document A/42/427, *Our Common Future: Report of the World Commission on Environment and Development*.

integrating economic development and environmental protection. Moreover, it has risen to the status of overarching principle, often interchangeable with environmental law itself.³ In this sense, the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* adopted by the International Law Association in 2002 is a testimony of the growing relevance of the concept and of a nascent “law of sustainability” that is overlapping with the more established field of international environmental law. The *New Delhi Declaration* expressed a series of principles aimed at the sustainable use of natural resources and at the protection of the environment that included the principle of equity, the eradication of poverty, the precautionary approach, the principle of good governance and of integration with human rights.⁴

The necessity of integrating sustainable development within national systems brings to the forefront the linkage existing between good governance and human rights. Indeed, this was the core principle contained in the Ksentini Report on the human right to the environment, approved by the Commission on Human Rights in 1994, that “*human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible*”.⁵ In this regard, experiences of national implementation of the principle of sustainable development in the field of human rights are crucial for understanding current developments and for studying legal systems that are mutually influencing and reinforcing each other. Indeed, the recognition of the principle of sustainable development at the national level and its application in observance of the rule of law is a stepping stone in strengthening its existence in international law. Moreover, the integration of sustainable development in domestic systems contributes

³ Prieur, M., *Droit de l'environnement, droit durable*, Bruxelles, Bruylant, 2014, p. 295.

⁴ United Nations General Assembly, Doc. A/CONF.199/8, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002.

⁵ UN Document E/CN.4/Sub.2/1994/9, *Draft Principle 1 on Human Rights and the Environment*.

to the birth of a truly “environmental rule of law” constituted of procedural devices and substantive guarantees that are aimed at the protection of natural resources and of a safe environment.

India undoubtedly constitutes one of the leading cases for assessing the validity of institutional measures aimed at the application of the concept of sustainable development in the legal field. The challenges to address by this country are manifold: first of all, the goal of eradication of extreme poverty, in a country where demography is ballooning; then, the rapid industrialisation and urbanisation linked to population growth; finally, the ecological threats to the environment and to human health caused by the change in modes of production and consumption, resulting in what Gadgil and Guha defined “*a fissured land*”.⁶ To efficiently face these challenges, India possesses an *about maître* that is fundamental in integrating sustainable development at the domestic level: a legal tradition characterised by the respect of the rule of law and a Constitution that guarantees access to justice and fundamental rights that include environmental rights and duties as a part of the right to life.⁷

Among the institutional devices aimed at upholding environmental rights, the role of the judiciary as the guardian of legal principles and the protector against pollution and degradation of the environment is growingly relevant, especially in light of the poor implementation of laws. Concerning the guarantee of environmental rights, three main strategies can be outlined: the maintenance of general jurisdictions; the establishment of “green benches” as sections of ordinary tribunals dealing with environmental cases; the creation of specialised tribunals, with experts in scientific subjects and judges specifically trained in this

⁶ Gadgil, M., Guha, R., *This Fissured Land: An Ecological History of India*, New Delhi, Oxford University Press, 1992.

⁷ Austin, G., *The Indian Constitution – Cornerstone of a Nation*, New Delhi, Oxford University Press, 1966; Jain, M. P. *Indian Constitutional Law*, LexisNexis Butterworths Wadhwa Nagpur, 6th Edition, 2010.

field.⁸ In 2010, the Parliament of India chose to pursue the third path and enacted the National Green Tribunal Act, implemented the following year with the creation of this specialised environmental court with a broad jurisdiction on civil matters relating to the environment. In a country where the role of the Supreme Court in protecting human rights has been paramount,⁹ the creation of a specialised jurisdiction intended at enhancing access to justice and adjudicating a considerable amount of disputes in light of international principles – including sustainable development¹⁰ – is an institutional innovation that deserves an enquiry insofar as it forms a precedent in attaining Goal 16 of the 2030 United Nations Agenda for Sustainable Development.

Thus, the analysis herewith proposed will focus on the examination of the experience of India as far as the creation and implementation of a specialised court having jurisdiction in environmental matters is concerned, in light with the previous steps undertaken at the international and national level for the development of a right to a wholesome environment. As it is typical of a monographic work in Comparative Constitutional Law, the present analysis aims at delivering an assessment of a single experience – in this case, the passage from the activist judicial power of the Supreme Court to the establishment of a specialised environmental tribunal in 2010 – while taking into account both the external sources that led to the creation of the National Green Tribunal (as the role of international instruments and the similar examples of other countries related to environmental jurisdictions) and the domestic developments in the field of environmental law (in particular, the role of the tribunals in implementing environmental statutes – considering the activism of the Supreme Court of India and, since 2011, the new jurisprudence initiated

⁸ Amirante, D., *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, in *Pace Law Environmental Law Review*, 29, 2012, pp. 441-469.

⁹ Sathe, S.P., *Judicial Activism in India*, New Delhi, Oxford University Press, 2nd Edition, 2004; Verma, K, Verma, S.K. (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach*, New Delhi, Oxford University Press, 2000.

¹⁰ Lok Sabha, The National Green Tribunal Act, Act No. 19 of 2010, Section 20.

by the National Green Tribunal). By investigating the analogies and differences of the two experiences (general jurisdiction of the Supreme Court vs. specialised jurisdiction of the NGT), the study should shed light on the broader phenomenon of the effectiveness of the creation of specialised judicial institutions dealing with environmental cases.

Theoretical framework

With this in mind, the study will rely on a comparative method. As known, comparison in constitutional law is operationalised in two different ways: in a synchronic orientation or by means of a diachronic perspective.¹¹ In our case, a distinction should be made between the two methods. As for the creation of the National Green Tribunal, a synchronic perspective on the experiences of other countries with the proposal and institution of environmental tribunals is imposed. Concerning the judicial production, the main analysis of the thesis will explore the differences of the experience of the Supreme Court and of the newly established Green Tribunal by means of a diachronic study of the two jurisprudential bodies – through a thorough assessment of the judgments made by the NGT since 2011, in order to outline its initial evolution. The study will thus aim at evaluating the effectiveness of the institutional change operated by the Indian Parliament, while keeping in mind the traditional judicial activism in the field of social and environmental rights.

Basically, the thesis will be developed as a case study of the foundation of a judicial institution, firstly by briefly analysing the construction of the legal body on the environment prior to the creation of the court, then by focusing on its jurisprudence. If one considers the classes of methodological approach – classificatory, historical, normative, functional and conceptual¹² – the study of the National Green Tribunal is mainly a historical work (for its inception), coupled by a functional analysis (for the corpus of judicial decisions).

¹¹ Lanchester, F., *Gli strumenti della democrazia*, Milano, Giuffrè, 2004.

¹² Jackson, V.C., *Comparative Constitutional Law: Methodologies*, in *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012.

In fact, on the one hand, the first part of the thesis will be devoted to a historical understanding of the developments in environmental law for India, eventually leading to the decision of establishing a new judicial institution as a legal transplant/migration of the experience of the New South Wales of Australia (Land and Environment Court). On the other hand, the second part of the study will be based on a functional analysis. Although typical of large-N studies, the use of the functional method is also valid for detailed case studies. In our case, keeping in mind the classical political activism of the judicial institutions in India, especially concerning environmental matters, the aim is to assess how the operation of a different institution (the National Green Tribunal) in a pattern of a similar doctrine of environmental judicial activism enhances the effectiveness of judgments, the conceptual development of sustainable development and the actual impact on the plaintiffs, and generally on the constitutional system, for a more effective and comprehensive protection of fundamental rights.

Moreover, an additional focus on both the historical and functional sides of the evolution of environmental law will be on the influence of international law in domestic courts and legislation, especially since the National Green Tribunal is bound to use also international law principles in its judgments, according to Section 20 of the foundational Act.

Research questions and relevance

The dissertation will engage critically with the themes of institutional change and particularly with the introduction of special jurisdictions in the field of the protection of environmental rights. If before the introduction of the National Green Tribunal the features of the judicial system (as far as the environment is concerned) resided in the absence of specialisation of the courts, the evolution of new procedures and the role of the bar,¹³ the introduction of a new judicial institution dedicated to environmental matters (and characterised by a broad jurisdiction)

¹³ Divan, S., and Rosencranz, A., *Environmental Law and Policy in India: Cases, Materials and Statutes*, New Delhi, Oxford University Press, 2nd Edition, 2002.

should positively impact through a tentative enhanced effectiveness of the protection of rights. The NGT breaks with the traditional Euro-American view of a generalist jurisdiction, in order to deal with cases by means of a court composed of both judges and environmental experts coming from the scientific field.

The thesis delves into several interrelated subjects. Firstly, the dominance of the judicial system in enforcing environmental rights is to be considered, especially if compared with the apparent expansion of the legislation on those issues since the 1980s and the enormous development of administrative authorities, capable of dealing with the most challenging questions on paper, but in fact unable to answer to the needs of the system because of the lack of implementation.¹⁴ Then, the growing debate on rule of law and access to justice as an integral part of the concept of sustainable development comes at the forefront.¹⁵ In this regard, the establishment of the NGT is certainly one of the most relevant achievements in the constitutional field for developing countries in the struggle for guaranteeing a development which is sustainable, hence relying on the respect of the rule of law - if one follows the logic behind Goal 16 of the Sustainable Development Goals. For this, ensuring a fairer access to justice (due also to the creation of environmental sub-tribunals, as sections of the NGT, on a regional basis) to the citizens and highlighting the role of the judiciary as the watchdog of the rule of law (when faced to poor implementation of statute law) is certainly one of the main aspects of the proposed investigation. Finally, the aim of analysing the creation and working of a new court by means of both a historical and a functional perspective should be a further challenge in order to reach conclusions on a case study which is of a certain relevance in the field. In addition to these aspects, the mutual influence of international and domestic law is a crisscrossing force that delineates the evolution of environmental law in India and constitutes the *fil rouge* of the argument of the thesis.

¹⁴ Amirante, D., *op.cit.*.

¹⁵ International Development Law Organisation, *Achieving a Transformative Post-2015 Development Agenda: The Contribution of the Rule of Law to Equity and Sustainability*, Report of the Conference, 2014.

In light of such considerations, the experience of India is crucial for several reasons. First of all, the typical judicial activism of the Supreme Court as for the protection of rights was deemed insufficient for environmental rights by the apex tribunal itself, that suggested the creation of special courts.¹⁶ The attempts at promoting reforms introducing a special jurisdiction, that started in the 1990s, produced a complete result only in 2010. This fact sheds light on the difficulties of putting forward an abrupt institutional change in major constitutional systems bearing with them the myth of the general jurisdiction, in spite of the critical situations concerning the protection of rights. Moreover, the peculiarity of India as a federal system constitutes an additional reason for considering it as a case study – keeping in mind the possibility of it being an example of a successful innovation in constitutional law for both big systems of the common law tradition and countries facing the challenge of sustainable development (such as Brazil or China, for instance). Another specificity of India lies in the traditional focus on the protection of the environment since the catastrophe of Bhopal, especially embodied by a strengthened attention by the judicial institutions of the country.

Research paradigms for environmental courts

Constitutionalists have delved into the analysis of the developments of the judiciary in environmental matters through a series of research paradigms. Often, these explanations of the rise of the role of the judiciary in the field of environmental law stem from a historical perspective, delivering an assessment of the single experiences from the international law side, the domestic one, or both. Thus, the comprehensive relevance of the judiciary is considered in the light of the international instruments adopted by the states introducing new

¹⁶ *Vellore Citizens' Welfare Forum vs. Union of India*, AIR 1996 (5) SCC 647. For an assessment of the jurisprudence, see the study of the Law Commission of India, 186th Report on Proposal to Constitute Environment Courts, 2003.

principles in the domestic legal systems.¹⁷ The phenomenon of the explosion of specialised environmental jurisdictions is generally assessed through several approaches – and the case of India constitutes one of the capital examples in the global trend.

Constitutionalists come to an agreement on the considerable growth in the number of specialised tribunals for the environment (around 360 in 42 countries, in 2010). Following an authoritative classification of the phenomenon of the role of the judiciary in the field,¹⁸ three paths can be identified. First of all, the maintenance of general jurisdictions dealing with all cases, including those related to the environment; then, the internal specialisation of the courts, through the creation of “green benches” with judges trained in the domain of environmental sciences; finally, the creation of environmental courts, with a partial composition of scientific experts, characterised by the speed of the proceedings, the efficiency and the competence of the organisation. On this basis, the same author distinguishes between a Western model, epitomised by the myth of the generalist judge, and an “Australasian” model, more eager to develop new institutional solutions. While rejecting this geographical approach, that takes into account the fact that the most accomplished examples of environmental tribunals have their seat in the Australasian area (Australia, New Zealand and India), consideration should be made on the conditions facilitating the creation of specialised courts, namely the presence of a common law system, of a federal type of government and of a social sensitivity towards this kind of institutions (three characteristics shared by the three countries listed above). Moreover, the argument supporting the growth of specialised environmental jurisdictions in new democracies is certainly appealing, but does not find sufficient evidence if confronted with the experience of Australia, New Zealand and India, systems with a fairly old democratic tradition.

¹⁷ Carnwath, R., *Institutional Innovation for Environmental Justice*, in *Pace Law Environmental Law Review*, 29, 2012, pp. 555-565; Markovitz, K.J., and Gerardu, J.J.A., *The Importance of the Judiciary in Environmental Compliance and Enforcement*, in *Pace Environmental Law Journal*, 29, 2012, pp. 538-554.

¹⁸ Amirante, D., *op.cit.*.

What is to be kept in the research paradigm of the studies on environmental tribunals is the general deeds arising from the establishment of those jurisdictions: fast tracks for discussion and decision of cases; enhanced expertise due to the change in the composition of those courts; expanded access to tribunals, through new rules and a more flexible procedure; consistency in decisions, thanks to the specialisation.¹⁹ The experience of the NGT, that will be the object of the present work, will attempt to shed light on these aspects.

The debate over India's judiciary and the protection of environmental rights

Apart from the general trend sketched above, the establishment of the National Green Tribunal stems from the peculiar history of India and of its judiciary.

In comparison with other apex judicial bodies in constitutional systems, the Supreme Court of India is certainly one of the organs with the broadest powers – from the draft constitution²⁰ to the development of spaces of action that were only implied in the text of the fundamental law of India.²¹ With a view to implementing the “social” programme inscribed in the constitution, with the Fourth Part of the fundamental text axed on the “Directive Principles for State Policy”, the Supreme Court intervened in the legislative and political arena through its judgments. However, this judicial activism, taking a considerable place

¹⁹ Pring, G., and Pring, C., *Specialized Environmental Courts and Tribunals: the Explosion of New Institutions to Adjudicate Environment, Climate Change and Sustainable Development*, Working Paper, University of Denver, 2011.

²⁰ Shiva Rao, B., *The framing of India's Constitution – Select Documents*, Volumes 1 to 5, Delhi, Universal Law Publishing Co. Pvt. Ltd., 1967; Austin, G., *The Indian Constitution – Cornerstone of a Nation*, New Delhi, Oxford University Press, 1966; Basu, D.D., *Introduction to the Constitution of India*, Nagpur, LexisNexis Butterworth Wadhwa, 20th Edition, 2008; Amirante, D., *India*, Bologna, Il Mulino, 2007.

²¹ Jain, M. P. *Indian Constitutional Law*, Nagpur, LexisNexis Butterworths Wadhwa, 6th Edition, 2010; Dhavan, R., *Supreme Court and Parliamentary Sovereignty*, New Delhi, Sterling Publishers, 1976.

in the 1970s, has been extensively criticised, since the scope of action of the negative legislator had been substantially enlarged by the court itself, by means of a judicial review power seen as both a possibility to abrogate statutes and of suggesting new legislative actions, as a positive legislator.²²

On judicial review, if several limits to the powers expressly derived from the text itself, the so called “explicit limits” (having a reference in Article 13 of the Indian Constitution), the Supreme Court expanded the possibility of protecting fundamental rights and the structure of the Constitution from the amending powers of the Parliament in a landmark judgment, *Kesavananda Bharati vs. State of Kerala*, defining the “basic structure doctrine”.²³ Through the use of this doctrine as a standard of review in order to assess the limits of state power, the Supreme Court managed to establish and enlarge the hurdles placed in front of the legislative and executive powers to amend the Constitution – holding that the basic features of the Constitution (and especially the fundamental rights enshrined in Part III) shall remain inviolable.²⁴

This judicial activism, inherent in judicial review, eventually led to the enactment of a panoply of remedies in order for the Supreme Court to supervise the orders it delivered, in a manner considered as infringing the prerogatives of the executive and of the legislature. Setting the scene since the 1970s with such powers, the fields of environmental regulation and environmental case law, in their very first start, could not but be affected by these premises, especially in a socio-economic atmosphere characterised by a certain neglect of concerns towards the environment on the part of the authorities.

²² Sathe, S.P., *Judicial Activism in India*, New Delhi, Oxford University Press, 2nd Edition, 2004; Verma, K, Verma, S.K. (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach*, New Delhi, Oxford University Press, 2000.

²³ *Kesavananda Bharati vs. State of Kerala*, AIR 1973, 4 SCC 225.

²⁴ A development which is parallel to the doctrine ideated by the German Federal Constitutional Tribunal, and suggested by German legal scholars with links to India, such as Dietrich Conrad. On this, see Krishnaswamy, S., *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, New Delhi, Oxford University Press, 2009.

As for the environment, the activism of the Supreme Court resulted in a thorough protection of citizens' rights and in suggestions for the legislature to draft acts eager to enhance the defence of the environment. This was done less by taking advantage of the basic structure doctrine than by issuing writs for the protection of fundamental rights, on the basis of Article 32 of the Constitution,²⁵ defined by Bhimrao Ambedkar as "*the very soul of the constitution and the very heart of it*" – since the legislature had been substantially inactive in the field of environmental law.

To this situation, the facts of Bhopal surely are a remarkable watershed. After the tragedy of Bhopal, Indian public authorities, whether pertaining to the legislative, the executive or the judiciary, gained an enhanced insight over environmental issues and apprehended the urgency not only of solving problems, but also of preventing harm. Landslide legislation followed – basically in two periods, in the 1970s²⁶ and then from the 1980s²⁷ – which was characterised by its poor implementation.²⁸ If the legislation was typically conceived for protecting the environment through state intervention and the imposition of limits to socio-economic activities,²⁹ the case of India followed the general experiences of common law countries – leaving the floor to legislative solutions implementing administrative organs and also control by the judiciary.³⁰ India witnessed a series of thorough

²⁵ For a comprehensive study of the system of writ jurisdiction, Ramachandran, V.G., *Law of Writs*, Lucknow, Eastern Book Company, 5th Edition, 1993.

²⁶ Parliament of India, Wild Life (Protection) Act, 1972; Water (Prevention and Control of Pollution) Act, 1974; Water (Prevention and Control of Pollution) Cess Act, 1977.

²⁷ Parliament of India, Air (Prevention and Control of Pollution) Act, 1981; Environment (Protection) Act, 1986; Public Liability Insurance Act, 1991.

²⁸ Sahasnaman, P.B., *Handbook of Environmental Law*, New Delhi, Oxford University Press, 2nd Edition, 2012; Divan, S., Rosencranz, A., *op.cit.*.

²⁹ Cordini, G., Foïs, P., Marchisio, S., *Diritto ambientale – profili internazionali, europei e comparati*, Torino, Giappichelli, 2008.

³⁰ In this sense, India introduced environmental rights in the Constitution and placed them in a framework of judicial protection that other common law

drafts of administrative institutions dealing with specific problems – each statute dealing with one issue and having one body supposed to follow suits on that specific environmental problem.³¹

The result of this “overshooting” of legislative action was scarce implementation and a dominant role of the judiciary – as the constitutional guarantee of environmental rights allowed citizens to use judicial remedies such as the device of Articles 32 and 226 of the Constitution: the possibility for the Supreme Court and the High Courts to issue writs to protect rights and the expansive interpretation given to those norms rendered the Supreme Court “a public educator, policy maker, public administrator and, more generally, *amicus environment*”.³²

The extensive use of this kind of judicial remedies brought to an inflation of lawsuits – the court itself encouraging such actions thanks to its decisions enlarging the scope of environmental protection and the access to justice through innovative features (such as Public Interest Litigation, to be understood as the use of litigation for attaining social reform).³³ Thus, the necessity of establishing a specialised court for environmental cases, already perceived in the 1990s and suggested by the Supreme Court itself, resulted in several attempts to create such tribunal and in the eventual enactment of the National Green Tribunal Act of 2010.

countries did not share – leaving this branch of rights a mere ordinary legislative protection.

³¹ Divan, S., Rosencranz, A., *op.cit.*, offer a detailed account of each of the branches of environmental law in India.

³² *Ibidem*, p. 23.

³³ On Public Interest Litigation, deeply analysed in Chapter III, see Rajamani, L., *Public interest environmental litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability*, in *Journal of environmental law*, 19, 3, 2007, pp. 293-321; Feldman, D., *Public interest litigation and Constitutional theory in Comparative Perspective*, in *The Modern Law Review*, 55, 1, 1992, pp. 44-72; Bhagwati, P.N., *Judicial activism and public interest litigation*, in *Columbia Journal of Transnational Law*, 23, 1984, p. 561; Denvir, J., *Towards a political theory of public interest litigation*, in *NCL Review*, 54, 1975, p. 1133.

Outline of the chapters

Once exposed the main theoretical framework and research questions, it is possible to introduce the thesis outline. The structure of the thesis follows a division in five chapters:

- 1) The review of the relevant international environmental law principles from the Stockholm Declaration in relation with the concept of rule of law and sustainable development;
- 2) The analysis of the constitutional experience of India concerning the right to life and environmental rights, with a focus on legislative measures, administrative action and judicial decisions;
- 3) The path toward the creation of the National Green Tribunal, through the evolution of the jurisprudence on sustainable development and the idea of a specialised court;
- 4) Technicalities: access to justice, procedural devices and the role of experts in the NGT;
- 5) Environmental principles in action: international and domestic law principles in the main streams of the decisions of the court since 2011.

First Chapter

The first chapter will lay out the international law foundations of the analysis. Starting from the first steps of contemporary international environmental law, the chapter outlines the concept of sustainable development in relationship with the constitutional notion of rule of law. The very recent developments of the concept of rule of law as understood in the United Nations documents show how the relevance of it gained momentum through the connection with a renewed vision of sustainable development, especially through the 2030 Agenda for Sustainable Development.

This chapter delves into the concept of sustainable development as understood from its emergence in the international arena, along with the draft of several international instruments concerning environmental law. It shows how the concerns for the protection of the environment

are shared among countries and how they enter and influence the single legal systems. This notion – an “umbrella concept”³⁴ – will be further assessed in light of the integration of the rule of law as a fourth necessary aspect that blends economic, social and environmental concerns. The particular focus on human rights and access to justice – it being the main reason for the establishment of the National Green Tribunal in India – will be the main argument mirroring the process of intersection of the two legal systems (the international and the Indian ones) moving from the international and UN law notions to the domestic elaborations in the field of environmental rights in connection with sustainable development, in order to set the scene for further constitutional developments.

Second Chapter

The second chapter will be the core of the pure constitutionalist analysis of the legal system of India as for environmental topics. The starting point of the analysis is the concept of rule of law in the Constitution of India, as it constitutes the main innovation in the fundamental text arising from the independence from British rule. Although not directly related to the right to the environment as developed in the Indian system, the study will begin by the debates in the Constituent Assembly, as the elaboration of the rule of law is central in anchoring all individual and collective rights. Hence, notwithstanding its apparent irrelevance in the framework of the thesis, because of the time of the debates (end of the 1940s) if compared to the emergence of environmental rights (the 1970s), an analysis of the primary sources – centred on the right to life enshrined in Article 21 of the Constitution – will be helpful for shaping the subsequent parts of the dissertation and the argument. Moreover, the birth of the Indian Constitution as a peculiar social pact explains the developments of the legislation concerning the environment and of the judicial activism of the Supreme Court.

³⁴ Sands, P., and Peel, J., *Principles of International Environmental Law*, Cambridge, Cambridge University Press, 3rd Edition, 2012.

The focus will then turn to the amendments to the Constitution introducing environmental rights and protection in the legal system and their legislative developments. The constitutional theory exposed beforehand and the international law framework shown in the previous chapter will be useful in explaining the introduction of Articles 48A and 51A(g) of the Constitution and their judicial interpretation in connection with Article 21. In addition to the amendments to the Constitution, the several texts enacted by the Parliament from the 1970s on environment will show how the measures chosen were mainly leading to the establishment of commissions entitled to control public and private action, with scarce success. Throughout the chapter, the vicissitudes of the legislative history will be thus traced back, showing the ineffectiveness of the institutions created, as well as the working of the administrative framework, characterised by a persistent elusiveness.

Third Chapter

The central chapter of the dissertation will be dedicated to the analysis of the environmental jurisprudence of the Supreme Court. As hinted in the introduction and in the literature review section, the role of the judiciary is capital in shaping the institutional developments of India. A first section of the chapter will deal with the expansion of the judicial decisions in the field of environmental protection, by attempting to deliver a systematisation of the whole corpus. A thorough study of the judgments since the 1970s and of the directions issued as part of its writ jurisdiction in cases pertaining to diverse fields of environmental protection will give the sense of the role of the Supreme Court, also with a view to the pronouncements of the apex court in relation with the international law instruments and concepts, that originated a peculiar construction of the notion of sustainable development.

In parallel with its conceptual analysis, the Supreme Court endeavoured to suggest institutional developments related to environmental legislation to the Parliament, such as the proposal for environmental courts, leading to unsuccessful attempts as the National Environment Tribunal, that prepared the ground for the establishment of the NGT.

The eventual creation of this court will be the object of a comparative study by considering the various environmental courts implemented so

far in the other constitutional systems. To this purpose, a comparative study of the New South Wales Land and Environmental Court and of New Zealand's Environment Court imposes as the typology of tribunal chosen by the Indian legislature is very close to that implemented in the two countries – bearing in mind the hermeneutical distinction made in the literature between the ways of acting for creating specialised jurisdictions.

Fourth Chapter

The analysis of the working of the National Green Tribunal will be divided in two different moments: firstly, an appraisal of the procedural and technical peculiarities of the environmental court; then, a substantive analysis of the principle of sustainable development, precaution and polluter pays, with reference to actual cases and to the jurisprudence of the Supreme Court.

Hence, the fourth chapter is devoted to the technical devices that embody the effectiveness of Goal 16 of the 2030 Agenda for Sustainable Development, ensuring a fair access to justice. These “technicalities” are divided in two categories. On the one hand, the typical judicial instruments and characteristics: the scope of jurisdiction according to the cases liable to be admitted (jurisdiction *ratione materiae*), the subjects (*ratione personae*) and the time limits for filing a case (*ratione temporis*); on the other hand, the role of technical experts in the decisions, that constitute the watershed between the previous experience of the Supreme Court and the new National Green Tribunal. The analysis of the value of expertise in decision-making will be pursued following the elaboration of the Tribunal on the process of Environmental Impact Assessment, the administrative procedure leading to the approval of developmental projects. As it can be easily inferred, the weak link in the chain is indeed administrative implementation: to counter this tendency, the pathological phase is analysed by the judiciary by giving clear indications and directives on the manner institutions should apply regulations and international principles in the single cases. In this framework, the role of experts in courts is crucial, as they are the only instance that can scientifically assess the quality of decisions and constitute the main difference from previous experiences of environmental litigation.

Fifth Chapter

Mirroring the first chapter and following the third, the final analysis of the dissertation consists of a systematisation of the body of judicial decisions of the National Green Tribunal. As the Tribunal is statutorily bound to apply the principles of sustainable development, precaution and polluter pays, its decisions carefully reflect this indication and constitute a precious example of implementation and elaboration of international principles in a domestic system. Hence, a study of the jurisprudential corpus will shed light on the continuity with the work of the Supreme Court (in the substantial interpretation of sustainable development and its linked principles as well as in the relevance of Article 21 of the Constitution) and on the enhancement in the quality of access to justice and of substantive justice itself, achieved thanks to a new institution. The analysis will thus delve into the decisions showing the different approaches - both human- and eco-centric - the Tribunal took in adjudicating the pathological situations presented in its first five years.

Chapter I

The environment and sustainable development in international and constitutional law

The institution and the current spread of specialised environmental jurisdictions is a phenomenon that relates to domestic legal systems, but has a solid theoretical basis in the concepts that emerged in international law from the 1970s. In particular, the notion of sustainable development and its elaboration in linkage with the idea of rule of law – particularly in the sources of the United Nations – are crucial in order to understand the institutional developments of the single countries. Thus, this first part will be divided in four sections. Initially, the analysis will dwell on the emergence of the principles of international environmental law, through both a short chronological presentation and a thematic analysis of the main crystallised notions. Then, the fundamental principle for the scope of the present work, the concept of sustainable development, will be the object of a second paragraph, starting from the introduction of the concept in the Brundtland Report and looking into the results of the Rio+20 Conference of 2012. As these last advances associated the principle of sustainable development to the notion of rule of law, the third part of the chapter will delve into an inquiry of this notion in the framework of constitutional law and in the unfolding of it in international law, by outlining its gradual introduction in the instruments drafted and approved by the competent organs of the UN system. A final paragraph will be devoted to the introduction of environmental rights and the increased appeal for the enhancement of access to justice as part of the rule of law and as a right connected to environmental issues, in order to establish the link between sustainable development and access to justice. This linkage sets the scene for the implementation of the umpteen international recommendations on environment and rule of law in the domestic systems, that found their embodiment in India by the establishment of the National Green Tribunal.

I) Principles of international environmental law

a) The emergence of international environmental law

International environmental law as a distinct branch of international law has emerged only from the 1970s, with slow but growingly relevant advances since the United Nations Conference on the Human Environment, held in Stockholm in 1972.³⁵ Before this first summit exclusively devoted to the subject, concerns on the protection of the environment had only been occasionally dealt with in international law and international relations, in connection with particular and localised issues (the two most relevant cases being the proceedings between the United States and Great Britain on the *Behring Fur Seal* arbitration and the *Train Smelter* case between the United States and Canada).³⁶ Apart

³⁵ Kiss, A-C., Sicault J-D., *La Conférence des Nations Unies sur l'environnement (Stockholm, 5/16 juin 1972)*, in *Annuaire Français de Droit International*, Volume 18, 1972, pp. 603-628. The Conference was convened by means of a Resolution of the General Assembly, proposed by Sweden, a country that had long been at the forefront of the environmental questions, as the other Scandinavian States. At the end of this conference, three instruments were adopted: a Declaration with 26 principles, an Action Plan providing 109 recommendations, and a Resolution for the institutional and financial provisions. The Conference has namely been a stepping stone for the creation of UNEP, the United Nations Programme on the Environment, created by UN General Assembly Resolution 2997 (XXVII). See also Kiss A-C., and Sicault, J-D., *Post Stockholm: Influencing National Environmental Law and Practice Through International Law and Policy*, in *Proceedings of the American Society of International Law*, 66, 1, 1972; Sohn, L., *The Stockholm Declaration on the Human Environment*, in *Harvard International Law Journal*, 14, 423, 1973.

³⁶ The first case concerned the exploitation of a specific resource, the fur seal, risking extinction. In 1893, an *ad hoc* international tribunal decided in favour of Great Britain on the impossibility of extending US regulation outside national jurisdiction but adopted specific regulation for the protection of that resource. The second case, arising from the transboundary effects of sulphur dioxide fumes produced by Canadian smelter plants in farms located in the State of Washington, was decided in favour of the US in 1941. On the origins of

from the single issues of the protection of specific resources or ecosystems (wildlife, seas and rivers) or concerning transboundary pollution, that forced the states affected to cooperate according to the principle of good neighbourliness and to adopt limited solutions, calls for a more globally sustained address to environmental protection found a first stage in Stockholm.

Gathering representatives from both industrialised and developing countries, the Conference adopted a text on the 16th of June 1972, the “Declaration of Principles for the Preservation and Enhancement of the Human Environment” (Stockholm Declaration), containing general statements on the protection of the environment and on the issues of development.³⁷ The Stockholm Declaration is the first international document underlining the necessity of a “*common outlook*” and of “*common principles*” in order to deal with environmental policies. Although a definition of environment is not provided, the concept is characterised by two sides, natural and man-made, the latter affecting the former. It is this very understanding of the impact of human actions that brought to the adoption of the document, embodying the concern for inter-generational and intra-generational equity as a fundamental guidance.

Among the 26 principles listed in the Declaration, a classification can be made according to the concerns to whom they respond. First of all, the issues concerning the protection of natural resources are dealt with in Principles 2 to 7, that distinguish between renewable and non-

international environmental law, refer to Halvorssen, A.M., *The Origin and Development of International Environmental Law*, in Shawkat, A., Bhuiyan, J., Chowdhury, T., and Techera, E. (eds.), *Routledge Handbook of International Environmental Law*, London, Routledge, 2012; Sands, P., *Principles of International Environmental Law*, Cambridge, Cambridge University Press, 2003, 2nd Edition, Chapter II; Spatafora, E., *Tutela ambientale (diritto internazionale)*, in *Enciclopedia del Diritto*, Vol. XLV, Giuffrè, Milano, 1992, pp. 441-464. On the relationship between sovereignty and international environmental law, Dupuy P-M, *Sur des tendances récentes dans le droit international de l'environnement*, in *Annuaire Français de Droit International*, Volume 20, 1974, pp. 815-829.

³⁷ UN Document A/Conf. 48/14/Rev. 1, 1972.

renewable resources and tackle traditional problems such as the extinction of species (Principle 4) and pollution (Principles 6 and 7). Then, a second category responds to the challenge of development for post-colonial states (Principles 8 to 10): the link between environment, development and social needs is already established, although *in nuce*, paving the way for the elaboration of the concept of sustainable development from the end of the 1980s.³⁸ Apart from the substantive assertion of environmental criteria, a third set of principles focuses on policy (Principles 11 to 19). International statements have to be applied nationally: economic and environmental assessment is necessary in order to hamper environmental degradation and promote a development that meets the requirements of the people. Finally, albeit reaffirming states' sovereignty over natural resources, the last principles provide for international cooperation, a fundamental shift from the single issues of international environmental law arising in the past, such as the *Train Smelter* case. In this scenario, the draft of bi- and multilateral treaties dealing with global environmental effects (Principle 24) is the most relevant and pervasive advance.

The Stockholm Declaration provides the international community with a new understanding of environmental issues, seen for the first time as common threats to human development. Nevertheless, the nature of the declaration is that of a soft law instrument, without binding effect upon states: it constitutes, as Dupuy states, "*the normative program for the world community*" in the field of environment.³⁹ In fact, the document poses basic principles, that in later periods crystallised into customary international law (e.g. intergenerational equity), and calls for international cooperation among states, in order to further detail normative instruments on the protection and usage of the environment. The principles were stated but, as Philippe Sands noted, the documents

³⁸ See *infra*, section II).

³⁹ Dupuy, P-M., *Soft Law and the International Law of the Environment*, in *Michigan Journal of International Law*, 12, 420, 1990.

issued in Stockholm did not provide for assessed techniques so that states and international organisations could apply them effectively.⁴⁰

The legal consequences of the Conference on the Human Environment were basically two-fold: on the one hand, the Declaration resulted in an attempt by several states to translate soft law principles into binding domestic law;⁴¹ on the other hand, a blossoming of multilateral treaties on specific environmental branches, inaugurating one of the main characteristic of environmental law, the existence of separate regimes for different issues, some of them region-based. In fact, during the 1970s and the 1980s, a series of international agreements on environmental protection were signed and entered into force. Among many, suffice it to cite the International Convention for the Prevention of Pollution from Ships (MARPOL), negotiated in 1973 within the cadre of the International Maritime Organisation; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of the same year; the 1979 Convention on the Conservation of Migratory Species of Wild Animals; the Convention on Long-range Trans-boundary Air Pollution of the Economic Commission for Europe of 1979; the United Nations Convention on the Law of the Sea of 1982; the Vienna Convention for the Protection of the Ozone Layer of 1985, completed by the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987. Those treaties establish both a “hard law”, listing specific commitments for states (e.g. CITES and UNCLOS), and binding commitments sketching guidelines and principles and institutions for furthering cooperation in the field, in the form of framework agreements (for instance, the Vienna Convention).⁴² Thus, the first

⁴⁰ Sands, P., *op.cit.*, p. 38: “The Stockholm Principles are weak on techniques for implementing environmental standards, such as environmental impact assessment, access to environmental information and the availability of administrative and judicial remedies”. On the nature of soft law, Koivurova, T., *Introduction to International Environmental Law*, London, Routledge, 2014, pp. 58-60.

⁴¹ For the case of India, see *infra*, Chapter II.

⁴² Hossain, K., *The International Environmental Law-making Process*, in Shawkat, A., Bhuiyan, J., Chowdhury, T., and Techera, E. (eds.), *Routledge Handbook of International Environmental Law*, *op.cit.*, pp. 61-76; Leanza, U., Caracciolo, I., *Il*

years of international environmental regulation were characterised by the sector-specific outline of the agreements, with the consequent absence of cross-cutting issues, although mitigated through the gradual formation of general principles (such as the no-harm principle in transboundary pollution and the sovereignty of states on natural resources).⁴³

Apart from the specific agreements, the trend toward the formation of general principles materialised only twenty years after Stockholm. In fact, the stepping stone in the field of international environmental law was certainly the United Nations Conference on Environment and Development (UNCED, also known as Earth Summit), convened in Rio de Janeiro in 1992, as a result of a renewed consciousness on environmental issues linked to the challenges of developing states arose since the end of the 1980s, with the several initiatives undertaken under the aegis of the United Nations.⁴⁴ The Rio Conference rekindled the single issues dealt with in the most relevant international agreements while shaping them in a common framework of action. This meeting resulted in a series of international instruments adopted by consensus, reflecting the careful balance between developed and developing states and between the concerns for environmental protection and the aspirations toward economic development. First of all, three non-binding documents: the Rio Declaration on Environment and Development, a text including 27 principles descending from the Stockholm Declaration; the UNCED Forest Principles, arising from the concerns on deforestation; and Agenda 21, an action plan for the

diritto internazionale: diritto per gli Stati e diritto per gli individui, Vol. 2, Torino, Giappichelli, 2010, pp. 377-392; Kiss A-C., *Les traités-cadre : une technique juridique caractéristique du droit international de l'environnement*, in *Annuaire Français de Droit International*, Volume 39, 1993, pp. 792-797.

⁴³ Kiss A-C., *Dix ans après Stockholm - une décennie de droit international de l'environnement*, in *Annuaire Français de Droit International*, Volume 28, 1982. pp. 784-793; Spatafora, E., *op.cit.*.

⁴⁴ For instance, the Brundtland Report that “inaugurated” the principle of sustainable development. See *infra*, section II).

incoming century.⁴⁵ The Rio Declaration marked some important improvements from the meeting of Stockholm, starting from the emphasis dedicated to the right to information (Principle 10) and to the role of citizens in each country and the statement of other principles of environmental law. Namely, the concepts introduced during the negotiations in Rio were the precautionary approach (Principle 15) and the common but differentiated responsibility of states (Principle 7, that introduced a new approach to improve the situation of the environment, by means of a bigger commitment of the industrialised States, responsible of environmental degradation in a higher share than developing countries).⁴⁶

In addition to the non-binding documents, the UN Conference on Environment and Development endeavoured to draft and adopt two specific treaties open to accession during the meeting: the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. Both conventions had been drafted by two different negotiating processes in the framework of Intergovernmental Committees that met between 1991 and 1992, in preparation of the UNCED. Although pertaining to separate fields of law, the two conventions are broader than those drafted in previous years, because of the general nature of the objects they deal with (biodiversity and

⁴⁵ On the negotiations leading to the adoption of the documents in Rio, refer to Politi, M., *Tutela dell'ambiente e "sviluppo sostenibile": profili e prospettive di evoluzione del diritto internazionale alla luce della Conferenza di Rio de Janeiro*, in *Scritti degli allievi in memoria di Giuseppe Barile*; Padova, Cedam, 1995, pp. 447-580; Kjellén, B., *A New Diplomacy for Sustainable Development*, London, Routledge, 2007, pp. 35-38.

⁴⁶ UN Document A/CONF. 151/5/Rev. 1, 1992. On the Rio Conference, refer to Adede, A., *International Environmental Law from Stockholm to Rio: an Overview of Past Lessons and Future Challenges*, in *Environmental Policy and Law*, 22, 88, 1992; Marchisio, S., *Gli atti di Rio nel diritto internazionale*, in *Rivista di diritto internazionale*, 3, 1992; Porras, I-M., *The Rio Declaration: A New Basis for International Co-operation*, in *Review of European Community and International Environmental Law (RECIEL)*, 1, 245, 1992; Sand, P.H., *International Environmental Law After Rio*, in *European Journal of International Law*, 4, 1993, pp. 377-389.

climate change, encompassing the whole natural environment), contributing to avoid the dispersion of the norms in numerous single-issue multilateral conventions. Moreover, both texts reflect the developments of the principles of Rio, with the inclusion of articles on the precautionary principle and on common but differentiated responsibility of states.⁴⁷

The contribution of the Rio Conference was thus considerable: enunciations of rules on common resources of the international community were confirmed and given scope for application; a link between international environmental law and international economic-commercial law was established; and all the actions for the enactment of the principles stated was embodied in an “action plan”, Agenda 21, which, in spite of its non-binding character, is permeated by strong statements that aim at securing the adherence to the expectations of the states.⁴⁸

The Conference on Environment and Development was both the origin of a special branch of environmental law, the law of sustainability, and the start of promising developments in the two leading areas of international environmental law, climate change and biodiversity. The

⁴⁷ Conference on Biological Diversity, signed in Rio on June 5, 1992; United Nations Framework Convention on Climate Change, 1992, signed on June 9, 1992. For a critical view of the first convention, Hermitte, M-A., *La convention sur la diversité biologique*, in *Annuaire Français de Droit International*, Volume 38, 1992, pp. 844-870. Both the UNFCCC and the Biodiversity Convention can be ascribed to the typology of framework treaties, considered to be an instrument of soft law: the implementation of the content of the conventions is left to the will of the single parties; more particularly, the negotiation of further agreements or protocols is left to the meeting of periodical conferences of the states parties. See Kiss A-C., *Les traités-cadre : une technique juridique caractéristique du droit international de l'environnement*, in *Annuaire Français de Droit International*, Volume 39, 1993, pp. 792-797.

⁴⁸ On the characters of the Rio documents, refer also to Politi, M., *op.cit.*, pp. 571-580. The author proposes the thesis of the nature of “atypical instruments” of the non-binding documents adopted at UNCED, in particular as far as Agenda 21 is concerned.

twenty years from the first to the second Rio Conference (“Rio+20”, or United Nations Conference on Sustainable Development) witnessed the attempt at defining and broadening the notion of sustainable development while finding instruments and means of implementation for applying the several principles of international environmental law. The main concerns in the field, object of the two multilateral treaties opened to signature in Rio, saw a growing production of instruments. In fact, already a decade after the general principles stated in Rio de Janeiro some results could be seen by means of the approval of protocols (for climate change, the Kyoto Protocol; for biodiversity, the Cartagena Protocol on Bio-safety).⁴⁹ Concerning climate change and the reduction of gas emissions, a further improvement could be observed at the periodic conferences of the parties to the UNFCCC. Opposed to this, on the side of the definition of sustainable development and of the other principles, the agenda focused more on implementation than on the drafting of documents. The World Summit on Sustainable Development, held in Johannesburg in 2002, is the demonstration of this trend, since the two declarations issued at the end of the conference were non-binding and dedicated to the topic of the implementation at the national level.⁵⁰ The current unfolding of the discipline is thus two-fold: on the one hand, the necessity of adopting additional international instruments is far from being exhausted; on the other hand, the side of implementation still witnesses a flawed application. Nevertheless, the path traced from the Stockholm Conference shows how the principles of environmental law were gradually enshrined in general international law, through treaties and soft law instruments, such as General Assembly recommendations.⁵¹

⁴⁹ Kyoto Protocol to the UNFCCC, 1998. Cartagena Protocol on Bio-safety to the Convention on Biological Diversity, Montreal, 2000.

⁵⁰ UN Document A/CONF.199/20*, 2002.

⁵¹ On the nature of the resolutions of the UN General Assembly, see among many Crawford, J., *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2012, p. 42.

b) Principles of international environmental law

The fragmented nature of international environmental law did not thwart the emergence of general principles. Besides the principle of sustainable development – which for its own nature encompasses the entirety of the subject – and the difficult task of defining the status and the scope of the other principles stated in international law sources, several notions arose and became part of customary international law – although the debate among scholars is open on their nature.⁵² Here, we will rely on the “non-orthodox” account of customary law (reflecting less the survey of state behaviours than the declarations and the verbal practice) to focus on the most relevant principles emerged from the 1970s: *ratione materiae*, the precautionary principle; *ratione temporis*, the principle of intergenerational equity; *ratione personae*, the principle of common but differentiated responsibilities and the polluter pays principle.

The importance of these international principles arises in particular from the attempt of organising in a coherent structure the varied field of environmental law by means of them, providing a common thread. The principles have this nature of generality because of their meaning and content. As Boisson de Chazournes says, they purport a “*high degree of abstraction and they have to be concretised on a case basis*”.⁵³ The principles are often part of agreements – and on such ground they have the nature of treaty law – but also of soft law documents – where they found their initial statement. In order to test their nature of customary law, it is opportune to consider the perspective of “declarative law”, as Bodansky assumes, not only through the practice of states, but mainly through the international negotiations of instruments, the role of guidance for the national legislator and the reflects in the decisions of

⁵² Bodansky, D., *Customary (and not so customary) international environmental law*, in *Indiana Journal of Global Legal Studies*, 1995, pp. 105-119.

⁵³ Boisson de Chazournes, L., Maljean-Dubois, S., *Principes du droit international de l'environnement*, in *Jurisclasseur Environnement et Développement Durable*, Genève, 2011, pp. 1-20.

international and domestic courts (which should demonstrate their nature of customary law).⁵⁴

The **precautionary principle** is certainly one of the most contended for both its inherent content and the nature of customary law. The principle emerged as a response to the concerns about scientific certainty, capital in facing the global threats, from pollution to climate change and biodiversity. If already in Stockholm the problem of assessment and of the use of scientific evidence was posed in negotiations and resolved with the statement of Principles 18 and 20 – safeguarding the prerogatives of developing states in accessing technological innovation in order to enhance economic development – the Rio Declaration introduced the concept of precaution in Principle 15.⁵⁵ Two sides of the precautionary principle can be highlighted, through a *ratione temporis* analysis: on the one hand, the notion of prevention (or anticipatory action), that comes into being when the threat is known and estimated before the undertaking of a certain action; on the other hand, in case of lack of scientific evidence, the precautionary approach should contribute to the safeguard of the environment by limiting potentially adverse actions or by promoting restrictive measures.⁵⁶

The extent of the notion is not defined in the text of the Rio Declaration (dealing with a general “*precautionary approach*”), although the content, if analysed in a comparative perspective with the subsequent international agreements referring to precaution, could be identified in four elements: risk, damage, scientific uncertainty and different

⁵⁴ Bodansky, D., *op.cit.*.

⁵⁵ “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

⁵⁶ Sands, *op.cit.*, pp. 266-279. See also Hey, E., *The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution*, in *Georgetown International Environmental Law Review*, 4, 303, 1992; Cameron, J., and Abouchar, J., *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, BCICLR, 14, 1, 1991.

capacities.⁵⁷ Risk is to be defined as the possibility of the occurrence of a danger. It is strictly linked to the uncertainty derived by the scientific studies, that cannot forecast unexpected events. Damage is the consequence of the risks unforeseen or underestimated (or estimated, when the risk was foreseen but the action nevertheless undertaken): the concepts of risk and damage force the authorities to attempt at defining a threshold that is linked to precaution. Precautionary measures are thus bound both to scientific knowledge (if dealing with prevention) and to scientific uncertainty and absence of data (if dealing with precaution *stricto sensu*). It is this very nature that renders the principle in constant evolution in line with scientific advances and impact assessment, impeding the statement of a constant definition. Finally, the question of the different capacities arises *a posteriori*, on the possibility of a state to apply the principle in relation to the economic and social situation of that country. In addition to these four elements, what is capital for a “strong” definition of the principle is the shift of the burden of proof: the new approach of the precautionary principle introduces the onus of proof that the activity carried out is not harmful to the environment upon the person (polluters, or polluter states) that wishes to realise such project. This interpretation is gradually imposing as one of the constituent characteristic of the principle, posing new challenges and a different paradigm to international trade law.⁵⁸

The debate among scholars on the nature of the notion is still ongoing. According to Philippe Sands, the precautionary principle is evolving, and it is still questionable whether it crystallised into a general principle of customary law: although there is evidence of state practice, international and national courts are not univocal in explicitly stating

⁵⁷ Boisson de Chazournes, L., *Precaution in international law : reflection on its composite nature*, in Ndiaye, T.M., et al., *Law of the sea, environmental law and settlement of disputes: Liber amicorum judge Thomas A. Mensah*, Leiden, M. Nijhoff, 2007, pp. 21-34; Boisson de Chazournes, L., *Le principe de précaution : nature, contenu et limites*, in Leben, C., Verhoeven, J., *Le principe de précaution: aspects de droit international et communautaire*, Paris, Panthéon-Assas, 2002, pp. 65-94.

⁵⁸ Sachs, N.M., *Rescuing the Strong Precautionary Principle from its Critics*, in U. Ill. L. Rev., 2011, pp. 1285-1338.

and accepting its nature.⁵⁹ Moreover, the statement of the principle in soft law instruments does not concur in assessing the precautionary principle as customary, because of the absence of obligation arising from them. Nevertheless, its diffusion in the most relevant conventions on environmental protection since the 1990s and the reference to it in several judgments (from the International Court of Justice in the *Gabčíkovo-Nagymaros* case to the WTO Appellate Body in the *Beef Hormones* case and the Indian judgment *Vellore Citizens' Welfare Forum v. Union of India and Others* of 1996 – this latter clearly affirming the nature of customary international law)⁶⁰ witness the essential character of the notion in the field of international environmental and trade law and the nature of emerging principle of customary law, in light with the most recent judgements issued by the International Court of Justice (*Pulp Mills on the River Uruguay* of 2010) and by the European Court of Human Rights (*Tatar v. Romania* case of 2009) and considering the different legal systems and instruments in which it is enshrined.⁶¹

A second principle around which the debate on the nature is open is intergenerational equity. Time and fairness are the dimensions taken into account in this case: in order to safeguard natural resources for future generations, states have to leave the environment in a condition not worse than it previously was. Already in the Stockholm Declaration, the principle of intergenerational equity was considered one of the cornerstones of the text, the vagueness of the notion not being relevant for its impact: Principle 1 states that “*man bears a solemn responsibility to protect and improve the environment for present and future generations*”. The theory underlying the principle of intergenerational equity relies on the idea that we “*hold the Earth in trust for future generations*”, but “*at the same time, we are beneficiaries entitled to use and*

⁵⁹ Sands, *op.cit.*, pp. 278-279.

⁶⁰ See *infra*, Chapter III.

⁶¹ de Sadeleer, N., *et al.*, *L'émergence du principe de précaution*, in *Journal des tribunaux*, 6010, 2001, pp. 393-401; de Sadeleer, N., *Réflexions sur le principe de précaution*, in Zaccaï, E., Missa, J-M., (eds.), *Le principe de précaution. Significations et conséquences*, Bruxelles, Presses de l'ULB, 2000, pp. 117-142.

benefit from it”, as Brown Weiss argues.⁶² Moreover, the principle can be divided according to intergenerational and intra-generational approaches: on the one hand, the responsibility lies for future generations; on the other, it is valid also toward present generations unable to enjoy a full access to natural resources. Finally, if one follows a *ratione materiae* analysis, three elements come to the forefront. The principle of intergenerational equity encompasses aspects of conservation of options, which means the necessity to maintain natural diversity; conservation of quality, that is stated in Principle 1 of the Stockholm Declaration; conservation of access, relating to the possibility to access the resources for present and future members of a generation.⁶³

This general principle of environmental law could be seen as a specification of the notion of equality of rights, stated in numerous international human rights documents starting from the Universal Declaration of Human Rights. Moreover, intergenerational equity was incorporated in several treaties and later found a further emphasis and specification in the development of the notion of precautionary principle, the main concern for the notion being its applicability.

In line with the concerns of equity and fairness but in contrast to the principle of intergenerational equity, the principle of **common but differentiated responsibility** deals with the protection of natural resources and the division of the burden with a focus on the subjects. From the notion of common heritage of mankind,⁶⁴ that considers the environment as a indivisible unity, the concerns of the developing states for an equitable share of the economic responsibilities of the

⁶² Brown Weiss, E., *Intergenerational equity: a legal framework for global environmental change*, in Brown Weiss, E. (ed.), *Environmental change and international law: New challenges and dimensions*, Edited by Edith Brown Weiss. Tokyo: United Nations University Press, 1992, Chapter 12.

⁶³ Brown Weiss, E., *op.cit.*; Kravchenko, S., Chowdhury, T., Bhuiyan, J., *Principles of International Environmental Law*, in Shawkat, A., Bhuiyan, J., Chowdhury, T., and Techera, E. (eds.), *op.cit.*.

⁶⁴ Kiss, A-C., *La notion de patrimoine commun de l'humanité*, Leiden, Martinus Nijhoff, 1982 ; Spatafora, E., *op.cit.*.

protection of the environment with a different legal treatment were eventually embodied in Principle 7 of the Rio Declaration.⁶⁵ The statement of the principle was the result of long negotiations between developed and developing countries (particularly Brazil, India and China); while in Stockholm a vague remark on the different situation of the countries was inserted in Principle 23 with reference to the application of norms, in Rio the shift is patent.

The notion of common but differentiated responsibility is composed of two elements:⁶⁶ the shared obligation of states for the protection of resources and the differential treatment of states in dealing with the environmental issues according to their objective economic capacity. As for its nature, the principle is mainly addressed to interstate relations, without application in domestic legislation or courts. Notably, several treaties have reflected the differential approach, the United Nations Framework Convention on Climate Change being the most consistent example. Recognising climate change as a "*common concern of humankind*" in the Preamble, the Convention is a pioneering instrument in sharing responsibilities among countries, separating developed (Annex I Parties) from developing countries (non-Annex I Parties). Several provisions demonstrate the application of the principle: in particular, Article 4.7 relates to the commitment of industrialised countries to transfer technology and financial resources to developing countries, and Article 4.1 allows developing countries the absence of

⁶⁵ "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

⁶⁶ Sands, P., *op.cit.*, pp. 285-289. See also D. French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, in ICLQ, 49, 35, 2000; Magraw, D., *Legal Treatment of Developing Countries: Differential Contextual and Absolute Norms*, in *Colorado Journal of International Environmental Law and Policy*, 1, 69, 1990.

quantitative commitments.⁶⁷ Moreover, the follow up of the UNFCCC is the manifestation of the implementation of the principle of common but differentiated responsibility, with the adoption of the Kyoto Protocol on the emission of greenhouse gases and the annual Conferences of the Parties, negotiating different commitments and reporting requirements for the national action plans.⁶⁸

Finally, a principle that has mostly domestic significance but also international recognition is the **polluter pays principle**.⁶⁹ According to it, the responsible of acts causing pollution needs to compensate the costs of the action toward the environment. This approach, inaugurated by the OCDE in the 1970s and embodied in Principle 16 of the Rio Declaration,⁷⁰ aims at internalising the costs of the so called “externalities” arising from an investment or an action – the cost of environmental degradation, including prevention. The definition of the principle is contested *ratione personae*, since the notion as it is stated in the Rio Declaration hints at an application mainly domestic, with limited relevance in interstate relations. Three elements are to be

⁶⁷ Kjellén, B. *op.cit.*. See also, Boisson de Chazournes, L., *The United Nations Framework Convention on climate change : on the road towards sustainable development*, in Wolfrum, R., *Enforcing environmental standards : economic mechanisms as viable means?*, Berlin, Springer, 1996, pp. 285-300.

⁶⁸ Boisson de Chazournes, L., *De Kyoto à la Haye, en passant par Buenos Aires et Bonn: La régulation de l'effet de serre aux forceps*, in *Annuaire français de relations internationales*, 2000, pp. 709-718; Breidenich, C., Magraw, D., Rowley A., Rubin, J-W., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, in *American Journal of International Law*, Vol. 92, No. 2, 1998, pp. 315-331; Bodansky, D., *The United Nations Framework Climate Change Convention: A Commentary*, in *Yale Journal of International Law*, 18, 451, 1993; Sands, P., *The United Nations Framework Convention on Climate Change*, RECIEL, 1, 270, 1992.

⁶⁹ Sands, *op.cit.*, pp. 279-285; Gaines, S.E., *Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, in *Texas International Law Journal*, 26, 1991, p. 463.

⁷⁰ “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

considered for the definition of the polluter pays principle: firstly, the need for preventive action, that internalises the potential costs of damages caused to the environment; then, the rectification of environmental damage at the initial stage; finally, the cost of damages *ex post*.

If the definition of the elements seems evolving from a commonsense approach that aims at the most comprehensive protection of the environment, the nature of the principle poses several questions: the polluter pays principle has been integrated in domestic legal systems by means of legislation, but its place in international law raises doubts. In contrast with the precautionary principle, and in spite of its complementary nature to this latter, international courts⁷¹ or arbitration proceedings have not referred to the polluter pays principle in judgments or awards, the principle finding its place in several international agreements (such as the Energy Charter Treaty of 1994). From this assessment, Sands concludes that the principle does not possess the status of customary international law and has not achieved the same international endorsement as the precautionary principle.⁷² Nevertheless, the polluter pays principle has to be considered as a policy tool and a soft law principle that guides states and investors in their economic actions, through the introduction in domestic legislation and the consequent use in internal judgments.⁷³

The review of the principles analysed so far points out to some of the critical aspects of the subject and chiefly to the difficulty in classifying the emerging notions. In fact, the four principles are part of international environmental law, whether with the status of custom or of soft law, inasmuch as they guide the behaviour of international and domestic actors. In addition to them, the evolution of international law

⁷¹ The exception is the European Court of Justice, that referred to the polluter pays principle in relation to the interpretation of EC directives or of state legislation.

⁷² Sands, P., *op.cit.*, p.280.

⁷³ The Indian Supreme Court being one of the national courts referring to the principle, namely in the case *Indian Council for Enviro-Legal Action vs. Union of India* of 1996, on toxic chemical industries. See *infra*, Chapter III.

has contributed to another fundamental concept that is the object of the present work and aims at comprehending most of the notion presented thus far: sustainable development.

II) Sustainable Development: a definitional conundrum?

a) The origin of the notion: relating economics to the environment

The notion of sustainable development has emerged from the late 1980s, in a context characterised by the persistent concerns on environmental degradation, the will of both developed and developing states of maintaining and improving their economic performance and the evidence of the need for social action. The worldwide appearance of the concept relates to the Report “Our Common Future”,⁷⁴ issued by the Brundtland Commission (World Commission on Environment and Development), defining the notion of sustainable development as:

“development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”⁷⁵

The concept could be analysed as nature-centred or human-centred: since the first characteristic is its relation to the environment and to natural resources, this seems to be the critical aspect of sustainable development. Nevertheless, a human-based construction is at the forefront. The key concepts, needs and limitations, are related to the role of humankind in the planet, especially of the people living in developing countries that strive to find their path toward a sustained

⁷⁴ The original term came into prominence in 1980 in the World Conservation Strategy of the International Union for the Conservation of Nature and Natural Resources.

⁷⁵ UN Document A/42/427, Our Common Future: Report of the World Commission on Environment and Development.

growth enabling to diminish the rate of poverty. Moreover, sustainable development as defined in the Brundtland Report finds its most solid link in the principle of intergenerational equity, stemming from Principle 1 of the Stockholm Declaration. Although the starting point of the report is the assessment of global, “*interlocking*” crises that blurred the compartments of energetic, environmental, agricultural and commercial areas (§11), the focus is mainly human-centred, as the environment is seen as the *milieu* where the human development takes place. The very idea of limitations, the second key concept of sustainable development, demonstrate the human nature of the concept, as it is understood as relative to an era or a technological state that could evolve and a social organisation that is not fixed.

While the Stockholm Declaration initially poses the challenges of environment, the Brundtland Report integrates economic aspects within the ecological framework, referring to “*environment-development challenges*” (§34). The areas of action identified in the document are the demographic growth in its connection with the exploitation of natural resources, food security, biodiversity, the energy pathway, industrialisation, production patterns and urbanisation. As it could be observed, the only issue essentially linked to the environment is biological diversity, a characteristic of the environment by itself, the other areas typically pertaining to the realm of human activity.

From the understanding of the common threats and the intertwined aspects of sustainable development, the actions proposed in the report are two-fold: on the one hand, the use of multilateralism as a method for dealing with common environmental and economic issues affecting the entirety of the international community; on the other hand, the design of national measures in order to implement the principles gradually emerging from the international legal and political system. This double system arises from the evidence that the systemic features of the global challenges call for action at the international, national and local level. Concerning the actions to be undertaken, the report distinguishes between an “*effects-oriented standard agenda*”, tackling the degradation of environmental quality, and a policy design focused on the sources of environmental issues, in order to prevent degradation.

Several areas of action encompass the institutional and legal proposals of the Brundtland Report.⁷⁶ First of all, common features for national institutions dealing with sustainable development. These should include the incorporation of sustainable development in the agendas of national policy and economic committees, the draft of annual reports on natural resources and the idea of a foreign policy related to the environment. At the international level, the report suggests the development of regional and global institutions and programmes, such as UNEP and environmental cooperation institutions in general. A third area of intervention is risk management and information, concerning not only public authorities, but also the scientific community and the non-governmental actors. Finally, strictly legal measures to be adopted at the national level should consist of legislation stating the respect of rights and responsibilities of individuals and states concerning sustainable development (such as the right to information and to participation in decisions, the extension of existing laws on the environment and the elaboration of procedures for dealing with environmental disputes).

The Brundtland Report, introducing the concept of sustainable development, endeavoured to build a notion correlated to environmental law while at the same time integrating economic concerns. It is possible to see this as a first “phase” of evolution of sustainable development, that at its birth related to the field of environmental protection rather than to the other aspects of social and economic interest.⁷⁷ This initial phase ended in 1992 with the Earth Summit: in Rio, the legal and political documents adopted, in spite the valence of some principles as a consolidation of international environmental law, spring from a renewed interest in liberal policies and deal extensively with economic aspects. It is the very concept of

⁷⁶ The Brundtland Report lists six areas. Here the analysis will be focused on the main relevant aspects related to international and domestic law.

⁷⁷ However, the concept already raised criticisms because of a perceived lack of consistency, due to vagueness and to the assumption that sustainability could enter *ipso facto* in developmental goals. See Lélé, S.M., *Sustainable Development: A Critical Review*, in *World Development*, Vol. 19, No. 6, 1991, pp. 607-621.

needs, fundamental in the definition of sustainable development delivered in the Brundtland Report, that allow for shifts in the meaning of sustainable development: needs can be understood as environmental, social, economic or generally human; starting from this assumption, the notion of sustainable development can vary according to the theories and to the issues on top of the political agenda.⁷⁸ Principle 27 of the Rio Declaration shows how this shift can be translated in action: assuming that there exist a branch of “*international law in the field of sustainable development*” to be developed, the consensus on the notion is not acquired. On the contrary, as Philippe Sands notes, indications on the content and on the nature of the concept, whether procedural or substantive, are absent from the Declaration of the Earth Summit.⁷⁹

The Earth Summit, devoted both to environment and development, contributed to the shift towards a definition of sustainable development that prominently put development on a higher ground. Exhausting the push towards the establishment of environmental principles, by means of a wide range of multilateral agreements (culminating in Rio with the discipline on climate change, biological diversity and, later, on desertification), the Rio Declaration introduced – as a soft law instrument – two innovations that were to be a key tool for starting the subsequent phases of the notion of sustainable development. As mentioned previously, Principle 27 opened the path to multiple definitions and applications. If this principle is read in junction with Principles 3 and 5 and the developments that followed the Earth Summit, the shift toward a purely anthropocentric vision becomes conceivable. On the one hand, Principle 3 introduces a right to development that brings the logic of the protection of rights and individual and collective positions in the discourse on environment and

⁷⁸ See *infra*, section c), for the definitions of sustainable development. Refer also to Redcliff, M., *Sustainable Development (1987-2005): An Oxymoron Comes of Age*, in *Sustainable Development*, 13, 2005, pp. 212-227. The shift toward a centrality of liberal policies is highlighted in the text of Agenda 21.

⁷⁹ Sands, P., *International Courts and the Application of Sustainable Development*, in *Environmental Law*, 3, 1, 1994.

sustainable development – integrating sustainable development in the field of human rights. On the other hand, the emphasis on poverty eradication as a precondition for sustainable development is a key factor for pushing forward the appeals for economic and social action – confirmed twenty years later in the final declaration of the Conference on Sustainable Development, that indicates poverty eradication as the main objective to be achieved.

This double direction is manifest in the second document issued at UNCED – Agenda 21.⁸⁰ Since the motives for convening the Earth Summit relied on the assumption that all countries shared a common interest in the preservation of the environment, in spite of the factual situation dividing developed and developing countries as far as means of implementation and financial resources are concerned (epitomised in the principle of common but differentiated responsibilities), the Conference on Environment and Development approved a plan of action, a *“dynamic programme”* whose purpose is the application of measures for a sound development along the principles of the Rio Declaration. The document is divided in four sections: social and economic dimensions; management of resources; role of major groups; means of implementation. It is apparent that the social and economic aspects are on top of the list: the first concern in the agenda is the integration of developing economies in the international trade system, since the cooperation among states in the coordination of economic policies is deemed to be a precondition for growth and consequently for sustainable development (§2.2).

The key statement relating to the three dimensions of sustainable development and their implementation is §2.6, indicating sound economic policies, an effective public administration, the integration of environmental concerns, the progress toward a democratic government and participation in decision-making process as the conditions for fulfilling the objectives of the Agenda (especially the economic part). Apart from the relevance of liberal policies and of a multilateral trading system, the concerns on environment and development are the object of a specific section (§8). What is required in order to integrated

⁸⁰ UN Document A/Conf. 151/26.

environmental and developmental policies is a restructuration of the processes of decision-making at the national level, through reviews and plans to be adopted in all administrative branches, by keeping in mind the requirements of transparency and of broad participation, with a national strategy for sustainable development as an umbrella document for fostering the implementation of Agenda 21. Particular attention should be devoted to the draft of legislation, to be preferably improved through the integration of social, economic, environmental and scientific principles and the favour for framework legislation instead of piece-meal texts.

As for the means of implementation, financial resources are obviously at the forefront (nation-based, but with the traditional emphasis on the requirements of official development assistance and of other international-based funding mechanisms), but legal instruments find increased relevance (§39). Apart from the domestic instruments referred to in the section for social and economic action, the field of international law is concerned with a supplementary effort. The call for the development of international law is reiterated, with a special accent on the integration of environmental instruments and principles with social and economic agreements and on the participation of developing countries in the process. Moreover, assuming the lack of implementation typical of soft law documents (where principle of environmental law are embodied) and the considerable number of multilateral treaties, Agenda 21 envisions means for reporting and monitoring the implementation of international law, suggesting the United Nations Programme for the Environment, or other international bodies, as possible institutions to be entrusted with this task.

The Rio process thus witnesses of a strong will of states for renewing their commitments for the environment, especially through the conventional instrument, but also and prominently of an inclination for shifting the concept of sustainable development toward the evolution of international trade law – Agenda 21 being the tool for implementing this preference for economic issues and neo-liberal conceptions over purely environmental concerns. The follow up of the Conference consisted in the creation of a Commission on Sustainable Development

as a subsidiary organ of the Economic and Social Council⁸¹, to be convened annually. The Commission was endowed with competences ranging from discussions of budgetary issues, agenda-setting, monitoring and identifying indicators for sustainable development to the incorporation of the Rio principles in Agenda 21,⁸² but testified of the lack of interest from states, that considered it as an organ mainly dealing with secondary environmental issues and lacking coherence because of the large competences.

From the Earth Summit of 1992, the second occasion for a general conference took place in Johannesburg in 2002, with the World Summit on Sustainable Development from the 26th of August to the 4th of September. In the ten-year period between Rio and Johannesburg, action concerning the protection of the environment experienced insufficient means of implementation, not only as far as financial instruments are concerned, but also because of political decisions setting aside the relevance of Agenda 21. Similarly to the conventional experiences, characterised by the statement of principles often left to the states for definition, substantial application and temporal, flexible implementation, the plan of implementation set in Agenda 21 was still open for discussion and application. The Conference in Johannesburg constituted a manner to draw up an inventory of the results of a process lasting thirty years.

As prefigured in the interpretation of Principles 3 and 5 of the Rio Declaration, environmental concerns were overshadowed by social and economic necessities. In contrast to the previous phase, the Johannesburg Summit evidenced the “conventional fatigue”: while multilateral instruments had been fundamental in bringing forward the calls for protecting the environment, the World Summit on Sustainable Development made apparent the general agreement in limiting the instrument of multilateral treaties on environmental subjects, in spite of the awareness of the continuing degradation of the global environment.

⁸¹ By means of General Assembly Resolution 47/191.

⁸² Among the reports of the Commission on Sustainable Development, see UN Document E/CN. 17/1997/8, on the application and implementation of the Rio declaration, as a “mid-term” assessment between UNCED and WSSD.

This assessment testifies of the dispersion of the discipline among umpteen documents and international bodies and systems, with mixed results according to the scope of the provisions of each treaty.

As a result of this shared analysis, the documents adopted in Johannesburg – a political declaration and a plan of implementation⁸³ – did not provide for an advance in the field of sustainable development, but merely registered the state of the art at the beginning of the new millennium. The Johannesburg Declaration, as a linking point between the two Declarations of Rio, proclaims the prominence of economic concerns over plainly environmental issues: poverty eradication, changes in production and consumption and the management of natural resources are considered as objectives and requirements of sustainable development (§11). Concerns for environmental degradation are expressed only in §13, as a result of the globalisation of the world economy – that was praised in Agenda 21 as the precondition for achieving economic growth and sustainable development itself. Moreover, the second dimension introduced *in nuce* in Rio, the integration of human rights in the notion of sustainable development, are partially present in §19 and 20, on health and gender equality.

Within this political framework, the Plan of Implementation reflects this blurred situation: in spite of the classical statement on the equal interdependence of the environmental, social and economic pillars of sustainable development, the focus is on poverty eradication and production patterns. As a result of the strengthened support of the United Nations organs on good governance and human rights (§8, 9),⁸⁴ this dimension too is integrated in the actions concerning sustainable development, assuming the existence of a right to development with a subsidiary character that paved the way for future evolutions. The rhetoric of rights marks a watershed in the understanding of sustainable development, since it includes the notion in the wider range of activities of the United Nations for the new millennium. The reference to the “Millennium Declaration”, adopted by the General

⁸³ UN Documents A/Conf. 199/L. 6/Rev.2 and A/Conf. 199/20.

⁸⁴ See *infra*, Section III).

Assembly on the 18th of September 2000,⁸⁵ constitutes a bridge toward another paradigm shift for sustainable development: starting from the environmental concerns and pursuing its evolution according to economic conceptions, the notion of sustainable development sees linkages with the respect of human rights and the calls for good governance. In fact, the right to development is recognised in the Millennium Declaration with a particular mention (§24, *"respect for all internationally recognised human rights, including the right to development"*), opening the way for international and national policies on this aspect.

In spite of this opening, the Plan of Implementation focuses on capacity-building from a predominant economic perspective: the means of implementation converge on the access and use of financial instruments and on the integration of countries in the trading system, more than on a fully comprehensive notion of capacities that takes into account the three dimensions of sustainable development (§81-136). The only mention of rights related to rule of law and the environment is made in §128: a right to access to justice and administrative proceedings and the principle of public participation in decision-making processes is considered in line with the statements made at the Earth Summit of 1992. Nevertheless, a broader vision for institutional and legal measures is provided in §162-167, considering the role of national, regional and local authorities for the enhancement of rule of law and sustainable development, confirming the interpretation of a third paradigm shift at its infancy.

In summary, the Johannesburg Summit confirmed the economic and anthropocentric vision of sustainable development, registering the end of the drive for environmental action as a means of itself. As far as international law is concerned, the absence of developments and advances is patent, since the summit exclusively dealt with political action and testified of the relativity of the understanding of the different notions pertaining to the domain of environmental law – which were overshadowed by socio-economic concerns. In spite of this

⁸⁵ UN Document A/RES/55/2.

stalemate in legal evolutions,⁸⁶ and especially as far as international law is concerned, the World Summit on Sustainable Development finds its relevance in opening the way for the integration of a fourth dimension in sustainable development, namely the accent on development seen as a human right connected to governance.

b) The shift of paradigm: Rio+20

The period from the World Summit on Sustainable Development and the United Nations Conference on Sustainable Development, held in Rio de Janeiro from the 20th to the 22nd of June 2012, witnessed the same difficulties experienced from the Earth Summit. The Commission on Sustainable Development continued its tasks of promoting the notion of the UN level, but as for concrete results, implementation of Agenda 21 and of the Johannesburg Plan was still incomplete, because of the absence of commitments and of a reporting mechanism built on a voluntary basis. The Rio Summit of 2012 was thus the catalysing moment for both making an assessment of the international action on the environment and for attempting at rescuing a *tous azimuts* definition of the concept of sustainable development that could finally bridge the three dimensions – namely the economic, environmental and social aspects of the notion, with the linkages to the rule of law. The final declaration of the conference, “The future we want”,⁸⁷ outlines the results achieved so far and proposes new sectors to be connected with sustainable development.

First of all, the social and civil dimension of sustainable development is put to the forefront, in order to further affirm the strength of the social dimension embodied in the notion. Instead of emphasising the environmental aspects of sustainable development and economic

⁸⁶ Maljean-Dubois, S., *Environnement, développement durable et droit international. De Rio à Johannesburg: et au-delà?*, in *Annuaire Français de Droit International*, Volume 48, 2002, pp. 592-623. For a critical view, Pallemmaerts, M., *International Law and Sustainable Development: Any Progress in Johannesburg?*, in *RECIEL*, 12, 1, 2003.

⁸⁷ UN Document A/Conf.216/XX.

growth, that were foundational of the documents approved in Stockholm in 1972 and in Rio in 1992, the resolution of 2012 focuses on the challenge of poverty for the world population – the eradication of poverty being the objective of sustainable development, as stated in Johannesburg. The notion proposed is clearly anthropocentric: “*people are at the centre of sustainable development*” (§5). As for the legal aspects, the linkage to human rights is clearly established, since the concept advanced in “The future we want” reaffirms rights linked to the anthropocentric vision and the objective of poverty eradication, such as the right to development, the right to food, the rule of law,⁸⁸ rights related to women and the importance of democratic values (§8).

As for the corpus of international law, apart from the general commitment to the respect of international law and the previous declarations adopted at the end of the summits, the most relevant principle reaffirmed is the principle of common but differentiated responsibilities (§15), still to be considered as the key for action at the international level, and the conventions issued from the Rio Conference of 1992 – the Framework Convention on Climate Change (epitomising the principle of common but differentiated responsibilities), the Convention on Biological Diversity and the Convention to Combat Desertification. This reaffirmation of differentiated responsibilities is nevertheless counterbalanced by the assessment of the uneven progress achieved so far, that calls for action at the national level, through the strengthening of legislation and institutions (§22).

Another capital departure from the previous texts is the role of actors in the promotion of sustainable development. Instead of focusing only on governments, the Rio+20 Declaration lists a range of subjects favouring a bottom-up approach based on subsidiarity (§42): this soft law document addresses both local and community levels (vertical subsidiarity) as well as instances of civil society and private actors (horizontal subsidiarity). Particularly, for the role of institutions, the document outlines not only the relevance of the executive, but also the participative action of the public at the local level, including access to

⁸⁸ For the relevance of the rule of law in the legal instruments of the United Nations system, see *infra*, section III).

justice through the judicial branch (§99). Moreover, principles of transparency and accessibility – typical of the rule of law understood as a concept for states – are considered to be applicable also to the private sector, for public-private partnerships and for corporations and enterprises (§46-47).

Economically, the focus is on the notion of green economy (§56), aimed at encompassing the three aspects of sustainable development. Although consequent to the objectives and the principles stated in Stockholm and Rio, namely the respect of international law and of the national sovereignty on natural resources, the concept of green economy is consubstantial to the purpose of poverty eradication and to the renovated understanding of sustainable development with different approaches and paths for each country. Attention is paid to the traditional themes such as technology dependence (to be overcome) and management of natural resources, but the focus on the means comprises both international cooperation, national institutions and private stakeholders (from the micro to the macro level) – since the objective should be to sustain economic growth through a result-oriented approach that takes into account the social needs of the populations. In order to achieve this and operationalise the notion of green economy, two main innovations find their place in the 2012 declaration. On the one hand, financial instruments ought to be available so that sustainable development could be prioritised in national policies (§91, 253, 261). On the other hand, the new nation-oriented approach underlies the creation of indicators that should be designed with the purpose of measuring the results (§76).

As far as the social aspect is concerned, a green economy should consist of a universal access to social services. Key elements of a well implemented sustainable development path should include the enhancement of food security, linked to the human right to food (§108); access to sanitised water (§119); capacities for sustainable energy services (§126); an upgraded understanding of urban policies (§134), aimed at improving the quality of human settlements; health coverage (§139); access to education and protection of workers (§152). This list covers a significant number of issues related to sustainable development and to the experiences of developing countries in the 40 years from the Stockholm Declaration, that include the environmental concerns in itself.

Finally, environmental issues are addressed as intrinsic to the concepts of development and sustainability. Key factors of concern for economic development are the preservation of oceans and seas, as a source of biodiversity (§158) and as a means for achieving food security (§173); climate change, traditionally seen as the threat constantly impacting on food security, eradication of poverty and sustainable development (§190); the management of forests and land, because of its double role in contributing to ecological balance and in maintaining human communities (§193, 205); biological diversity, inasmuch as it has a capital role in safeguarding ecosystems that contribute to social services (§197); finally, human activities endangering the planet, such as mining and the production of chemicals, that ought to be regulated in a sound manner, in order to protect the environment and human health (§213, 227).

The completeness of the Rio Declaration of 1992 calls for a shift of paradigm in the understanding of the implementation and measurement of sustainable development. “The future we want”, encompassing all the aspects of development seen from the human perspective, calls for actions on institutions and private actors at all levels. While the declarations of 1972 and 1992 were designed with the purpose of establishing principles of international law, Rio+20 is the result of the collection of the experiences of the twenty years preceding the summit, where the constant analysis resided in the lack of implementation of the principles. If the Stockholm Declaration marked the dawn of international environmental law and the Rio Declaration constituted the consolidation of environmental principles, the environment is not the main focus of the declaration adopted in 1992 because environmental concerns and principles are intrinsic to the concept of sustainable development and to the understanding of the social needs expressed in the Brundtland Report. While several of the principles of environmental law crystallised into customary law or were embodied in a considerable number of multilateral agreements, Rio+20, following the Johannesburg Plan of Implementation, focuses on the role of states and of their constituent parts and on the necessity of capacity building (§277).

From the shift of paradigm the subsequent step was implementation, since the general assessment of the UN member states pointed at the drawbacks of the institutional experiences, bringing along them the

lack of clear definitions that resulted in the poor application of principles. The major organs dealing with sustainable development responded to the challenge by outlining a new strategy aimed at overcoming the Millennium Development Goals, to be substituted with the Sustainable Development Goals, paving the way for a process leading to 2030.⁸⁹ As a result, the General Assembly, by means of Resolution 67/203, requested the Secretary-General to issue a report on the working of the Commission on Sustainable Development, the organ of the Economic and Social Council supposed to be replaced by a high-level political forum after the Conference of Rio+20.

After twenty years of activity, the Commission, originally instituted as an organ mandated to deal with the newly born concept of sustainable development and to provide guidance for states and the UN system on integrating the notion in governance, proved capable of maintaining a prominent role for sustainable development in the international agenda, but was characterised by several shortcomings. While its role in furthering Agenda 21 and in monitoring progress made by member states has to be accounted by keeping in mind the breadth of the fields engaged in the process, the lessons learnt from the experience of the Commission on Sustainable Development can be summarised into three categories, namely the review and monitoring of Agenda 21, the setting of the policy agenda and the participation of major groups.⁹⁰

As for the task of monitoring national measures in line with Agenda 21, the Commission has not been able to equally assess all countries, because of the implementation of a system of voluntary reports deprived of clear guidelines. This uneven result stems also from the absence of fixed indicators for comparing data. As for the international level, the lack of coordination among international bodies (including those pertaining to the UN system) partly accounts for the poor implementation of Agenda 21. In contrast to monitoring issues, the

⁸⁹ On the role of the UN for the Millennium Development Goals and the Sustainable Development Goals, see Jeremić, V., Sachs, J.D., *The United Nations in the Age of Sustainable Development*, in *The Economic and Social Review*, Vol. 45, No. 2, 2014, pp. 161-188.

⁹⁰ UN Document A/67/757.

political track of the Commission has certainly been more relevant: in some cases, specific fields (e.g. forests, sea, energy) have successfully been put to the forefront of the political agenda. Nevertheless, the decision-making process of the Commission did not allow a progress in all fields, since all thematic issues – the agenda being exceedingly large – were dealt with in a single document, where lack of consensus on one topic blended the entirety of it. As a result, the three dimensions of sustainable development did not emerge and the organ was perceived as an environmental institution. Finally, considering the participation of major stakeholders, the same reasoning applies, since the environmental sector covered most of the arena.

In order to overcome these drawbacks, the Commission on Sustainable Development was replaced by the new High-Level Political Forum on Sustainable Development, in the framework of the Economic and Social Council, on the basis of Resolution 67/290 of the General Assembly. Its main task is the negotiation and drafting of the Post-2015 Development Agenda, based on an integrated and people-centred approach in line with the principles enucleated in “The Future We Want”.⁹¹ The process stemming from Rio+20 and leading to the Post-2015 Agenda relies on two interlinked directions: on the one hand, an inclusive approach that takes into account the instances of the non-governmental actors through an “Open Working Group”; on the other hand, the traditional intergovernmental negotiation, enriched of the reflections of non-state actors.

The Open Working Group issued a report containing indications and proposals for the implementation of sustainable development.⁹² Following the mandate of the United Nations Conference on Sustainable Development and the principles of common but differentiated responsibilities and of intergenerational equity, the Open Working Group was in charge of proposing a set of Sustainable Development Goals that would substitute the Millennium Development Goals for the Agenda Post-2015. The result is a list of 17 goals that can be hermeneutically classified into five categories:

⁹¹ UN Document E/HLPF/2014/2.

⁹² UN Document A/68/970.

essential goals (poverty eradication, hunger, health, water – Goals 1, 2, 3, 6); spiritual goals (education and gender equality – Goals 4 and 5); economic goals (energy, growth, industrialisation, urbanisation, consumption – Goals 7, 8, 9, 10, 11, 12); environmental goals (climate change, marine resources, terrestrial ecosystems – Goals 13, 14, 15); legal goals (access to justice, rule of law and accountability – Goal 16). In addition to these objectives, Goal 17 aims at strengthening the means of implementation (financial and social) of sustainable development.

The Sustainable Development Goals are an ambitious plan that lists actions and concepts without defining the aspects of sustainable development. A first summary that bridges the results of the Open Working Group and the intergovernmental process started in 2012 is the Report of the Secretary-General “The Road to Dignity by 2030”, that embodies the main conceptual achievements of the UN system for preparing the negotiations leading to the Post-2015 Agenda.⁹³ In reaffirming the anthropocentric character of sustainable development, the lessons learnt crystallised in “The Future We Want” and the relevance of the conditions of each country, the document is based on the five “*transformative shifts*” for the Post-2015 Development Agenda: the eradication of extreme poverty; the central role of sustainable development; the transformation of the economy; the establishment of accountable governance and the new global partnership for sustainable development (§37).

In order to facilitate negotiations for the summit on sustainable development, six essential elements are derived from the proceedings of the Open Working Group: dignity, people, planet, partnership, justice and prosperity (§66). As stated in the Rio+20 Declaration, the eradication of poverty is the main goal linked to sustainable development, since the elimination of inequalities is deemed as the key challenge in every society. As for people and planet, the report of the Secretary-General quotes the domains linked to the social and environmental aspects of sustainable development, while prosperity is evidently correlated to the economic aspect of the notion. At last, justice and partnership are factors related both to procedure and substance:

⁹³ UN Document A/69/700.

procedurally, access to justice, democratic principles, accountability, participation and solidarity are a manner of attaining sustainable development; substantially, justice is conceivable as a part of the notion of rule of law, while partnership – between public and private actors – is an element of the paradigm shift inaugurated in Rio in 2012.

As in “The Future We Want”, the document of 2014 focuses on the means of implementation, as a result of the developmental experiences of the past 40 years. Economically, the report relies more on international flows and financing for national policies: if the means of implementation are reflected (small and medium enterprises, financial regulation), emphasis is placed on official development assistance (§98). Institutionally, the document follows the conclusions of Rio+20, since the concept of capacity-building is centred on the enhancement of the performance of executive, legislative and judicial organs as well as private subjects (§129).

Finally, “The Road to Dignity” underscores the necessity of building indicators for measuring progress on sustainable development. This conclusion is drawn from the discussions of the Open Working Group, that issued a considerable quantity of goals and targets and posed the question of measurement. Diverging from the mere statement of principles of the 1990s, the reports from Johannesburg pragmatically pose the problem of implementation and estimation of results, calling on states and civil society to present a set of indicators and on the UN system to develop a programme on data collection (§139, 143). The report thus focuses more on the “deliverables” than on the principles, in line with the paradigm shift of Rio+20.

As a result of this hectic period of intense reelaboration of legal concepts and socio-economic instruments, the General Assembly of the United Nations approved the 2030 Agenda on the 25th of September 2015: the text, “Transforming our world: the 2030 Agenda for Sustainable Development”,⁹⁴ is a testimony of the manifest aim of the international community, driven toward a transformative agenda that takes into account the legal dimension, in order to “*build peaceful, just*

⁹⁴ UN Document A/RES/70/1.

*and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions”.*⁹⁵

Hence, the evolutionary path traced so far marks the relativity of the concept of sustainable development from the perspective of time and of subjects. The principle of sustainable development, unlike other principles of international environmental law, is characterised by a broader content and consequently by a lesser binding nature. In fact, the nature of the notion in international law is vastly discussed and is the object of numerous critiques.

c) Definitional conundrums and legal status of sustainable development

The notion of sustainable development, as outlined in its historical evolution, is aimed at the integration and interaction of three different fields of international law and politics – economy, environment and society – in a balanced manner. As observed previously, the balance has never been achieved and this assessment impacts on the definition of the notion, that could vary according to an interpretation stressing one dimension to the detriment of the other two, and on its nature as principle of international law. As Philippe Sands noted in a foundational definition, known as the integrative approach, international law in the field of sustainable development consists of “*a broad umbrella accommodating the specialised fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights*”.⁹⁶ Its characteristics are non-coherence, non-comprehensiveness and ambiguity, since the notion coalesces principles arising from different branches of international law.

⁹⁵ Ibidem, para. 35.

⁹⁶ Sands, P., *International Law in the Field of Sustainable Development*, in *British Journal of International Law*, LXV, 1993, p. 303.

In fact, the notion has also been considered as an oxymoron:⁹⁷ the coordination of environmental concerns with developmental needs proves to be difficult to attain, if not unachievable. The very concept of sustainable development thus witnesses the same paradox: it should bear in itself the two facets of environment and development, but usually ends up in a broader coverage of the latter. For this purpose, the notion is disputed as for its nature: as analysed for the Brundtland Report, sustainable development, since it is based on the concept of needs, is an anthropocentric notion. In spite of this, several authors maintain that sustainable development, since it is related to environmental protection, should be based on an eco-centric view, considering that nature has an intrinsic value in itself.⁹⁸

The tension between an anthropocentric and an eco-centric vision of sustainable development resides in the theoretical understanding of the notion of justice. Sustainable development implies the adoption of solidarity and justice in international law, as far as the management of common goods is concerned: solidarity in the context of sustainable development means a form of inter-state relation that is cooperative; justice is to be understood as fairness to future generations – implying the principle of intergenerational equity – and as distribution of resources and burdens among the entire global community – with a view to prolonging the principle of intra-generational equity. The anthropocentric nature of sustainable development is derived from the two senses of justice, as inter- and intra-generational equity, aimed at safeguarding present and future generations. This is what Bosselmann calls “weak sustainability”.

In order to envision an eco-centric sustainable development, Bosselmann proceeds with a theoretical step forward: since the intergenerational component of sustainable development aims at the protection of the environment for future generation, the safeguard of nature is to be seen as an end in itself, with an intrinsic value not to be

⁹⁷ Redcliff, M., *op.cit.*; Latouche, S., *Le pari de la décroissance*, Paris, Fayard, 2006.

⁹⁸ Among many, Bosselmann, K., *The Concept of Sustainable Development*, in Bosselmann, K., Grinlinton, D., Taylor, P., (eds.), *Environmental Law for a Sustainable Society*, New Zealand Centre for Environmental Law, 2013.

considered as an instrument for human activities. In this way, the focus of the notion shifts from anthropocentrism to eco-centrism.⁹⁹

In spite of the philosophical interest of this speculative analysis, its relevance for defining sustainable development in international law lies in the ability to catch discordances in the notion. Since sustainable development is based on the concept of needs and has evolved in an attempt to integrate environmental concerns but mainly referring to economic and social objectives (lastly through the objective of poverty eradication), the anthropocentric vision seems to be the most adherent to the concept. Nevertheless, the notion still remains elusive as for its content, and consequently for its status in international law.

In international jurisprudence, the International Court of Justice has dealt with the principle of sustainable development in the *Gabčíkovo-Nagymaros* case of 1997.¹⁰⁰ As known, the judgment of the ICJ concerned the suspension of the works on the project of two barrages on the Danube, planned to be jointly operated by Hungary and Czechoslovakia on the basis of a Treaty dating back to 1977. The Court was asked to address three legal aspects: first, the unilateral suspension of the project by Hungary on environmental grounds; then, the unilateral decision by Czechoslovakia to diverge the waters of the Danube in absence of consent by Hungary; finally, the legal effects of the Hungarian declaration stating the termination of the 1977 Treaty. Within this broad range of issues encompassing the law of the treaties, international responsibility, the regime of watercourses and international environmental law, the ICJ relied on the concept of sustainable development for suggesting a solution for future disputes.

In particular, paragraph 140 of the judgment addresses the question of environmental protection at the international level. The Court takes into account the development of international law from the Stockholm Conference, “the new norms and standards (...) developed, set forth in a great

⁹⁹ Beyerlin, U., *Bridging the North-South Divide in International Environmental Law*, in *Zeitschrift für Ausländisches und Öffentliches Recht*, 66, 2006, pp. 259-296.

¹⁰⁰ International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997.

number of treaties in the last two decades", that have to be applied not only to new activities but also to the continuation of activities started in past periods. Moreover, the ICJ tackles, although briefly, the concept of sustainable development, defined as the expression of *"the need to reconcile economic development with the protection of the environment"*.

In spite of the significance of the statement – sustainable development finding here a first international judicial acknowledgment – the definition of the International Court of Justice is remarkable for its briefness and for its character of *obiter dictum*. As Philippe Sands notes, there is no indication as for the substantive content of the concept as well as for its status in international law: sustainable development is addressed as a concept, not as a principle or a rule.¹⁰¹ An advance in the understanding of sustainable development is delivered, though, in the separate opinion of Vice-President Weeramantry, who joined the decision of the Court while elaborating on the "principle" (not on the concept) of sustainable development.¹⁰²

According to Weeramantry, sustainable development is a *"principle with normative value"*, implying as a juridical basis the right to development and the right to environmental protection and being part of modern international law. The role of the principle lies in the harmonisation of the *"needs of development and the necessity to protect the environment"*. Both the right to development and the protection of the environment are part of international law: the former is enshrined in the Declaration on the Right to Development of 1986, the latter is part

¹⁰¹ Sands, P., *International Courts and the Application of the Concept of Sustainable Development*, *op.cit.*. Refer also to Fuyane, B., Madai, F., *The Hungary-Slovakia Danube River dispute: implications for sustainable development and equitable utilization of natural resources in international law*, in *International Journal of Global Environmental Issues*, 1, 3, 2001, pp. 329-344; Maljean-Dubois, S., *L'arrêt rendu par la Cour internationale de Justice le 25 septembre 1997 en l'affaire relative au projet Gabčíkovo-Nagymaros (Hongrie c./ Slovaquie)*, in *Annuaire Français de Droit International*, Volume 43, 1997, pp. 286-332.

¹⁰² International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, *Separate Opinion of Vice-President Weeramantry*.

of the human rights doctrine since it is correlated to the right to life and the right to health. Stemming from these assumptions, the principle of sustainable development coordinates the two rights inasmuch as it leads to an interpretation of the right to development as a relative right – its relativity residing in the respect for the environment. In addition to the definition of sustainable development, Weeramantry delves into the status of the principle: thanks to its recognition in multilateral treaties (binding by their own nature), declarations, practice of states and international organisations and the existence of it as an heritage of different cultures, the judge states the “*wide and general acceptance*” of sustainable development as a principle of international law.

This optimistic and forward-looking vision is not shared in the academic debate. While some authors support the view that sustainable development is a principle *erga omnes* (as in the Separate Opinion of Judge Weeramantry) or to be classified within the range of Art. 38, par. 1, c), of the Statute of the International Court of Justice,¹⁰³ it is generally considered that sustainable development has indefinite contours due to its cross-cutting essence and it is questionable whether it fulfils the threshold of normativity by virtue of the lack of criteria for determining the attainment of international standards and for the question of the enforcement on determining international responsibility in case of unsustainable practices carried on by states.¹⁰⁴ A survey of the content of the principle (concept) of sustainable development has been made by Sands, that finds four recurring elements in the notion, namely the principle of intergenerational equity, the principle of sustainable use

¹⁰³ Marchisio, S., *L'ONU. Il diritto delle Nazioni Unite*, Bologna, Il Mulino, 2000, p. 380. See also Osofsky, H.M., *Defining Sustainable Development after Earth Summit 2002*, in *Loy. L.A. Int'l & Comp. L. Rev.*, 26, 2003, pp. 111-128; Singh, N., *Right to Environment and Sustainable Development as a Principle of International Law*, in *Journal of Indian Law Institute*, 29, 1987, p. 290.

¹⁰⁴ Conforti, B., *Le Nazioni Unite*, Padova, Cedam, 2012, p. 359; Boyle, A.E., Freestone, D. (eds.), *International law and sustainable development: past achievements and future challenges*, Oxford, Oxford University Press, 1999; Handl, G., *Environmental security and global change: the challenge to international law*, in *Yearbook of International Environmental Law*, 1, 1, 1991, pp. 3-33.

(the exploitation of natural resources in a sustainable manner), the principle of intra-generational equity (accounting for the necessities of all states) and the principle of integration (the integration of environmental considerations into economic and social needs, and *viceversa*).¹⁰⁵

In this framework, sustainable development takes the contours of an “umbrella concept” where principles of international environmental law find a more or less coherent organisation. Notwithstanding the interpretive value of the survey effectuated by Sands, the principle of sustainable development has gained a larger role almost since its inception, by virtue of the reiterated emphasis not only on environmental considerations, but chiefly on socio-economic application. As Boisson de Chazournes notes, the principle has a status of its own and is destined to a growing role in international law, but its characters of generality and abstraction make its “*normative threshold*” depend on the concretisation enacted through legislation and judicial decisions.¹⁰⁶

The characters of generality and abstraction are thus at the origin of the discussions on the normative value of sustainable development. Notwithstanding this critique, in a perspective *de lege ferenda*,¹⁰⁷ it is noticeable that the process starting from “The Future We Want” and leading to the draft of the Post-2015 Agenda shows how sustainable development has a multifaceted nature and now integrates four dimensions, the rule of law entering *de facto* as an additional aspect in the content of the notion. The evolution from 2012 witnesses the possibility of designing indicators and standards for measuring the attainment of the substantial dimensions of sustainable development,

¹⁰⁵ Sands, P., *Principles of International Environmental Law*, *op.cit.*, p. 253.

¹⁰⁶ Boisson de Chazournes, L., Maljean-Dubois, S., *Principes du droit international de l'environnement*, in *Jurisclasseur Environnement et Développement Durable*, *op.cit.*.

¹⁰⁷ Refer also to Leanza, U., Caracciolo, I., *Il diritto internazionale: diritto per gli Stati e diritto per gli individui*, Vol. 2, Torino, Giappichelli, 2010, pp. 374-376.

in a way to assess it internationally.¹⁰⁸ In contrast to this approach specifically tackling *in abstracto* the single elements composing the patchwork of sustainable development, another possibility lies in the mere analysis, on a case basis, of the decision-making process, by studying the elements of public participation, environmental impact assessment and intergenerational equity, as in the Separate Opinion to the *Gabčíkovo-Nagymaros* case.¹⁰⁹

Since Rio+20, sustainable development has thus become a notion/principle encompassing the main objectives of action of the United Nations, as a sound development has been integrated and is considered to be a condition also for peace and security. More specifically, it could be noted how the concept has substituted in international discourses the notion of human development, through the integration of human rights in the original backbone of sustainable development as elaborated by the Brundtland Commission. If human development was seen as a concept bringing together the interaction of human rights, democratic principles and social and economic development,¹¹⁰ sustainable development, due to the integrative nature underlines by Sands, has, on the one hand, synthesised the rhetoric of rights in the three dimensions of environment, society and economic in a procedural approach and, on the other hand, has added a fourth dimension, embodied in the substantive notions of rule of law and good governance.

¹⁰⁸ Although the task seems herculean, due to the elaboration of 17 general goals, each of them implying additional specific targets.

¹⁰⁹ Cadin, R., *L'evoluzione storico-giuridica del concetto di sviluppo nel diritto internazionale*, in Spatafora, E., Cadin, R., Carletti, C., *Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano*, Torino, Giappichelli, 2007, p. 99.

¹¹⁰ Cadin, R., *op.cit.*, pp. 112-119. On human development and the right to development, refer to Zanghì, C., *La protezione internazionale dei diritti dell'uomo*, Torino, Giappichelli, 2006; Dupuy, R. (ed.), *Le Droit Au Développement Au Plan International. Colloque, The Hague, 16-18 Octobre 1979*, Vol. 79, Dordrecht, Martinus Nijhoff Publishers, 1980.

A survey of the principle on the basis of the outcome of the Post-2015 agenda negotiations results in the consideration of sustainable development as an “umbrella concept” aimed at the primary objective of poverty eradication and characterised by the systemic interaction of the pillars of development, democratisation, good governance (rule of law), human rights and environmental law, by means of the incorporation of the following principles:

- The integration of environmental and economic aspects;
- The principle of equity (inter- and intra-generational);
- The principle of sustainable use of resources;¹¹¹
- The principle of common but differentiated responsibilities;
- Procedural principles related to the rule of law and to human rights (public participation, access to justice, administrative action, e.g. environmental impact analysis).

What could be looked at as the conundrum of sustainable development, integrating four dimensions that could be considered as mutually exclusive (and in state practice have often been so, as a result of a strengthened emphasis on the economic dimension to the detriment of environmental considerations),¹¹² is in fact a tool for furthering not only the challenge of development – by the new theme of “green economy” as outlined in “The Future We Want” – but also for improving the standard of economic, social and environmental rights by strengthening the application of the rule of law at the international and national levels. This innovative dimension is the object of an in-depth analysis in the framework of both the international level, since the

¹¹¹ A principle that, according to Beyerlin, may have assumed the status of customary international law (in contrast to the broader concept of sustainable development) due to its incorporation in international environmental agreements. See Beyerlin, U., *Bridging the North-South Divide in International Environmental Law*, *op.cit.*.

¹¹² Bosselmann, K., Brown, P.G., Mackey, B., *Enabling a Flourishing Earth: Challenges for the Green Economy, Opportunities for Global Governance*, in *Review of European Community & International Environmental Law*, 21, 1, 2012, pp. 23-30.

United Nations has endorsed the implementation of the notion also in interstate relations, and at the national level, as the rule of law is a concept derived from constitutional law as the basis of the relationship between a democratic state and its citizens.

III) The Rule of Law at the national and international levels

a) A constitutional perspective

Notwithstanding the burgeoning production of documents by the United Nations organs on the relevance of rule of law for the attainment of the objectives of the organisation and of the international community as a whole, the notion of rule of law is originally derived in the constitutional evolution of Western legal systems.

The first detailed elaboration of the concept of rule of law is attributed to the British constitutionalist Albert Venn Dicey.¹¹³ According to his theory, the rule of law is articulated in three meanings: the absence of arbitrary or discretionary power, thanks to the predominance of regular law; equality before the law, which means the subjection of all citizens to the law as administered by the ordinary courts; the supremacy of the courts in defining and enforcing the rights of the individuals, since the principles of the constitution are the result of judicial decisions, giving more substantive protection.¹¹⁴

¹¹³ Already in the 13th century, Bracton, in the treaty *De legibus et consuetudinibus Angliae* (*On the Laws and Customs of England*), formulated the idea of the superiority of the law ("*ipse autem rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem*", "*The King himself shall not be under men, but under God and under the law, since the law makes the King*"). In modern times, the classical definition of rule of law is commonly referred to Dicey.

¹¹⁴ Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1961, 10th Edition (originally 1897). For further studies on the concept of rule of law and sovereignty in the English legal system, Leyland, P., *The Constitution of the United Kingdom – A Contextual Analysis*, Oxford, Hart, 2012, 2nd Edition; Mattei, U., *Il modello di common law*, Torino, Giappichelli, 2006; Lanchester, F., *Gli strumenti della democrazia*, Milano, Giuffrè, 2004.

This definition, capital in stressing the three aspects pertaining to the domain of the pre-eminence of law in a legal system and in a democratic society, is nevertheless subject to criticism as it is a concept dating back to the end of the 19th century and peculiar to a specific legal system. In fact, the notion of rule of law has been historically developing in other European contexts, with contiguous meanings but different specifications – through the definitions of *Etat de droit*, *Rechtsstaat* and *stato di diritto* (and *riserva di legge*). If the main body of the notion – the supremacy of law over arbitrariness and the role of parliamentary assemblies in elaborating statute law generally valid – is acquired for all experiences, the rule of law is declined in different countries with several peculiarities: in England, the accent is on the role of judge-made law and on the limits toward state power, stemming from a tradition of constitutional documents restricting the prerogatives of the monarch (especially on due process), as the *Magna Charta Libertatum* and the *Habeas Corpus*; in Germany, the *Rechtsstaat* is a kind of self-restraint from the part of the State itself, that has taken upon itself all power but limits it in the interest of citizens; in France and Italy, the main concern is about parliamentary sovereignty on law and on the statement of liberties: through the principle of legality (*légalité* and *riserva di legge*), statute law itself guarantees freedoms as they are embodied in the law.¹¹⁵

This variety of experiences shows how the main elements enucleated by Dicey are not univocal: while the principles of supremacy of law and of equality seem undisputed, the protection of the rights through judge-made law is clearly questioned by the systems developed in

¹¹⁵ For a comprehensive appraisal of the different constitutional experiences, refer to Leyland, P. *op.cit.*; Amato, G., *Forme di stato e forme di governo*, Bologna, Il Mulino, 2006; Ridola, P., *Libertà e diritti nello sviluppo storico del costituzionalismo*, in Ridola, P., Nania, R. (eds.), *I diritti costituzionali*, Torino, Giappichelli, 2006, pp. 119-124; Lauvaux, P., *Les grandes démocraties contemporaines*, Paris, Presses Universitaires de France, 2004, pp. 52-60; Lanchester, F., *Le costituzioni tedesche da Francoforte a Bonn*, Milano, Giuffrè, 2002; Grimm, D., *Deutsche Verfassungsgeschichte, 1776-1866*, Frankfurt am Main, Suhrkamp, 1993.

continental Europe. Moreover, the increase in the production of statute law for the protection of rights in England¹¹⁶ undermines the reliance on courts for the recognition of the essence of the rights. A common point in the notion of rule of law could thus be embodied in the general protection of rights through legal processes avoiding arbitrariness and guaranteeing equality.

This definition carries in itself a normative approach, since it points to a particular content – the protection of rights to be stated – and not only to a specific process of law supremacy. A second debate in the realm of the rule of law is thus open: apart from the historical definition, questions arise about the content of the notion, understood from a formal or a substantive point of view.

As Endicott argues, the elusiveness of the concept of the rule of law seems to cause the necessary impossibility to attain it.¹¹⁷ Apart from the definition stated by Dicey and the declinations of the single countries, the rule of law constitutes an unattainable ideal because of the vagueness of laws and of the changing character of legal practice. Notwithstanding this vision,¹¹⁸ it is possible to categorise the rule of law according to formal – law-making process, clarity and prospective nature – and substantive characters – on the content of the law, such as justice.¹¹⁹ Following the analysis by Paul Craig, the classical definition

¹¹⁶ For instance, since the approval of the Human Rights Act of 1998.

¹¹⁷ Endicott, T.A.O., *The Impossibility of the Rule of Law*, in *Oxford Journal of Legal Studies*, 19, 1, 1999, pp. 1-18.

¹¹⁸ Nuanced by Endicott himself, identifying a possible way of implementation through official laws pursuing the ideal.

¹¹⁹ Refer to Craig, P., *Formal and substantive conceptions of the rule of law: an analytical framework*, in *Public Law*, 1997, pp. 467-487. “Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm. (was it prospective or retrospective, etc.). (...) Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal

by Dicey bears a formal sense. The first principle of the rule of law – the absence of arbitrariness – although apparently substantive, brings with it a formal meaning, since the British constitutionalist did not take into account discretionary powers, but analysed the formal process of the passing of a law and of its application by impartial courts. As for equality, Dicey intended it as formal access to courts, bearing in mind the possibility for laws to reserve special treatment for particular categories (the Crown, for instance). Finally, the third principle stems directly from the previous two: individual rights are enforced by courts in the sense that a body of jurisprudence ensuring formal guarantees (and not specific substantive rights) could not be swept aside.

Several authors share the premises of this formal conception of the rule of law. Among them, Joseph Raz maintains that the rule of law is a plain formal concept, encompassing procedural features such as openness, clarity, stability and generality, without delving into debates on the necessity of “good laws” or blending into it notions as democracy, justice or equality.¹²⁰ This view is shared by liberal theorists: Friedrich Hayek points to the fact that laws must be fixed and announced, as the main objective of a law lies in the possibility for an individual to foresee the actions of the state and to allow individual behaviours on the basis of such expectation.¹²¹ Finally, Lon Fuller categorises the formal notion of rule of law by underlining eight characters of what he defines the “internal morality of law”: the existence of a system of rules; publicity of rules; a prospective character (avoiding retroactivity); clarity; non-contradiction; practicability; stability; conformity of rules to administrative action.¹²² These principles amount to an ideal-type of rule of law that is merely

attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law.”

¹²⁰ Raz, J., *The Rule of Law and its Virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford, Clarendon, 1979.

¹²¹ Hayek, F.A., *The Constitution of Liberty: The Definitive Edition*, London, Routledge, 2013; Hayek, F.A., *The Road to Serfdom*, London, Routledge, 1944.

¹²² Fuller, L. *The Morality of Law*, New Haven, Yale University Press, 1969.

formal: the eight dimensions allow for a consistent legal system characterised by integrity.

The link between formal and substantive views of the rule of law could be found in this definition: the requirements of clarity, publicity, practicability and conformity carry with them the idea that there must be an interaction between the law-maker and the citizens, in order for the latter to be able to foresee and to rely on a legal set of rules.¹²³ The emphasis on this kind of detailed procedure paves the way for a “thickening” of the concept: albeit classified in the “thin” conception of the rule of law, the definition provided by Fuller already gives a qualitatively relevant account of what the rule of law should be, and in our view this hides the accent on the necessarily democratic nature of the society in which this ideal-type of rule of law should be implemented. Without enquiring into the nature of “good”, “fair” or “just” laws, Fuller already places a high standard for identifying what constitutes a legal system following the rule of law.

In this framework, a gradient between “thinner” and “thicker” conceptions of the rule of law (classifying the different studies by means of a more gradualist approach than dividing on the cleavage formal/substantial) has been introduced by Tamanaha. Starting from the general understanding that the rule of law has become a paradigm of the legitimating ideal in the political sphere in spite of the lack of an agreement on its definition, Tamanaha imagines a scale of the rule of law from the basic formal requirements up to the thickest model encompassing the ideals of a just and equal society. Thus, six models are provided: rule-by-law (the mere existence of a law – a concept usually opposed to rule of law in the documents of the United Nations); formal legality (laws with characters of certainty, clarity and generality); legality and democracy (introducing the element of consent into the definition – as Fuller underlie in his concept); a first substantive notion bringing forward the existence of individual rights; a second,

¹²³ For a critique of these authors, refer to Krygier, M., *Rule of Law*, in Rosenfeld, M., Sajó, A., *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 233-250.

broadier definition that includes justice; a final, comprehensive rule of law corresponding to the communitarian dimension of social welfare.¹²⁴

The last three classifications open the floor for the “contamination” of the rule of law by doctrines of human rights (individual and socio-economic) and theories of justice. From a procedural point of view, stressed in the basic notion of Dicey, the developments of political thinkers such as Dworkin rely on the necessity of allowing a broader reach for the rule of law, that has to incorporate ideals of justice. According to this view, law-makers should respond to the demands for individual rights of the citizens and courts should decide legal matters according to the principles of justice ad not only on the basis of the mere procedure.¹²⁵ This rights-based approach stands in opposition to the formalistic view, since it provides the rule of law with a content and an ideal: apart from being a method for legislation and adjudication, the rule of law becomes a substantive concept, that modifies the requirements themselves and underlies a different perception of what the law is or should be – a regulatory tool for general situations or an instrument for modifying specific positions. Thus, the generality and prospectivity of laws can be outmatched by the necessity of the law-maker to guarantee specific rights or to ensure substantive equality and fairness. Within this framework, the rule of law is to be seen as a procedural mechanism for providing certainty to a legal system and to the citizens while bringing forward demands of rights and fairness.

The substantive view opens a discussion on the position of the rule of law in development theories. As Ringer points out, debate has raged around the notion of rule of law in development studies insofar as theoretical definitions could often not match local realities in which efforts toward reform were implemented.¹²⁶ In the projects favouring

¹²⁴ Tamanaha, B.Z., *On the rule of law, History, Politics, Theory*, Cambridge, Cambridge University Press, 2004. See also Beaulac, S., *An Inquiry into the International Rule of Law*, EUJ Working Papers, MWP 2007/14.

¹²⁵ Dworkin, R., *A matter of principle*, Oxford, Oxford University Press, 1985.

¹²⁶ Ringer, T., *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice*, in *Yale Human Rights and Development Law Journal*, 10, 1, 2007.

the rule of law, key institutional elements such as the judiciary, access to justice, law enforcement and the penal and prosecutorial system were indicated as tangible realisations of the designed policies and as parts of a future stable democratic society. It is manifest that these attempts underlie a normative and ideological approach, since the rule of law is not seen as a procedural and formal concept, rather as an end that embodies the notions of respect for human rights and the value of democracy. What Ringer proposes, criticising both formal and substantial approaches to the concept, is a “thicker” definition of rule of law – similar to what has been stated beforehand on the critic to Fuller’s understanding of the rule of law, since a formal/procedural definition of rule of law hides a normative preference, in spite of its apparent neutral validity. In fact, both approaches seem elusive, as the former leaves aside the inherent ideal surrounding the concept of rule of law, while the latter poses risks of overcharging the notion with excessive normative theory.

To achieve this clarifying goal, the two streams of literature on law and development are to be analysed. On the one hand, the capabilities approach uncovered by Amartya Sen is imbued of ethical concerns, but maintains an hermeneutical validity because of its inherent procedural and pragmatic value. The concept of capability-building identifies a method for the expansion of freedoms and the set of choices each individual possesses. The end is clearly ideal – the guarantee of a list of political freedoms, economic rights and transparency – the very same way of securing elementary rights is procedural, as it is the legal system that should enable citizens to attain rights (and capabilities) conducive to economic development.¹²⁷ On the other hand, Douglas North, herald of the New Institutional Economists, focuses on the enforcement of property rights as the key for economic development. The achievement of economic growth is attained by means of the rule of law, in the sense that it builds institutions whose purpose is the process of social coordination for the clarification of property rights, avoiding abrupt

¹²⁷ Sen, A., *Development as freedom*, Oxford, Oxford University Press, 1999 and Sen, A., *The idea of justice*, Cambridge, Harvard University Press, 2011.

institutional change.¹²⁸ In this conception too, the ideal of “good laws” exists - here, inasmuch as laws protect property - and a procedural part is provided, since the rule of law is seen as a method of law-making and law-enforcement.

These opposite views can be summarised in order to highlight the main characters of the rule of law for development. First of all, in opposition to formal understandings, the inherent existence of an ideal behind the concept of rule of law, that is fairness in order to achieve the goals of economic growth (or enhancement of capabilities, or poverty eradication, as it is referred to in the UN system). Then, the nature of the rule of law as a procedural tool for development, not as an eventual goal. Finally, the importance of institutions (especially the judiciary) as the architecture enabling a fully-fledged deployment of the potentialities of the rule of law.

The historical path of the concept of rule of law, here briefly exposed, shows how a notion born the English legal system, with its own peculiarities, managed to travel different disciplines and contexts while maintaining the validity of its core elements. While the procedural requirements sketched by Dicey are still valid, the rule of law has grown in significance and meaning thanks to the intellectual enterprise of political theorists, constitutionalists and, lately, of practitioners of development theories. Moreover, the concept has not only travelled within domestic legal systems, but has also been applied at the international level. The following analysis will delve into the evolution of the rule of law in the United Nations instruments, so as to identify the links with the underlying development theories and the relative value of the notion for environmental rights and sustainable development.

¹²⁸ North, D., *Institutions, Institutional Change and Economic Development*, Cambridge, Cambridge University Press, 1990. North, D., *Institutions and economic growth: An historical introduction*, in *World development*, 17(9), 1989, pp. 1319-1332.

b) The rule of law in the documents of the United Nations

According to a recent stream of literature,¹²⁹ supported by the profusion of documents drafted within the UN system, the notion of rule of law has gained a double feature: the rule of law as identified by Dicey and developed in the formal meaning possesses not only a domestic validity, but also an international side. As Beaulac says, the core elements of the rule of law in Diceyan terms are externalised in order to be applied to the realm of international law.¹³⁰ Within this framework, a certain degree of normativity should exist at the international level, considering international law as positive law endowed with certainty, stability and predictability and freedom from arbitrariness. Secondly, the creation of laws should be made according to stable principles and should address equally the range of subjects of the international system. Finally, a system of enforcement should exist with provisions on the presence of courts of general jurisdiction.

In spite of the opinions concurring to assess that the formal elements of the rule of law at the national level are reflected in international law – advancing as evidences the large body of customary and treaty law as sources, the principle of sovereign equality of states and the existence of a general jurisdiction with the International Court of Justice (through the clause on compulsory jurisdiction) as the leading tribunal – the premises on the constitutional value of the rule of law lead to a rejection of this view for the purposes of the present work. The focus of the analysis will thus lie on the promotion of the rule of law in the discourse of the United Nations (in particular the General Assembly and the Secretary-General) as far as the domestic sphere is concerned.

¹²⁹ Beaulac, S., *op.cit.*; Chesterman, S., *An International Rule of Law?*, New York University Public Law and Legal Theory Working Papers, Paper 70, 2008; Kumm, M., *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, in *Virginia Journal of International Law*, 44, 2003-2004; Morin, J.Y., *L'État de droit: émergence d'un principe du droit international*, The Hague, Martinus Nijhoff, 1995; Watts, A., *The International Rule of Law*, in *German Yearbook of International Law*, 36, 15, 1993.

¹³⁰ Beaulac, S., *op.cit.*, p. 8.

The starting point of this enterprise, apart from general statements related to the realm of human rights law, is the first report of the Secretary-General on the rule of law, adopted by the General Assembly on the 14th of October 1994.¹³¹ Weaving a fabric of human rights documents that starts with the Universal Declaration of 1948, the Report lists a flourishing number of constituent elements for securing rights through the rule of law. Among these, the three main categories are the constitutional elements, the electoral system and the legal system under the constitution. The “strong constitution” advocated by the Secretary-General should consist in a bill of rights that are justiciable, an independent judiciary and principles of non-discrimination and separation of powers. Then, the electoral system to be envisioned should contain provisions on equal access and equal rights to public service and the guarantee of free, fair, recurrent and competitive elections. As fundamental element, the legal system should reflect the purpose of guaranteeing human rights and democratic values, encompassing civil, criminal and administrative law (§5). Finally, a fourth element to be noted is the attention paid to the formation of the judiciary and on the administration of justice in general (§43).¹³²

As it could be easily observed, the Report of 1994 identifies a substantive notion of rule of law. The aspects on equality and judge-made law stressed by Dicey are incorporated into the protection of human rights as a dimension intertwined to the theoretical concerns on the establishment of a just society. This document has been the first of a series of annual reports endorsed by the General Assembly of the United Nations, witnessing the growing role played by the rule of law

¹³¹ Which testifies the intrinsic relationship between rule of law and human rights, as a substantive notion of rule of law is taken into account. The Report is a consequence of the 1993 World Conference on Human Rights (A/CONF.157/24), as the Secretary-General was asked with concrete proposals for enhancing and strengthening national structures for human rights and rule of law, a programme endorsed by the General Assembly by means of Resolution 48/132.

¹³² UN Document A/49/512.

as a concept able to gather concerns on procedural legal means and substantive rights. While the focus of the reports has often been on the strengthening of the capacities of UN organs in this field (in the late 2000s thanks to General Assembly Resolutions 61/39 and 62/70) and on the emphasis on the international arena (namely on the “international rule of law” and on transitional justice),¹³³ several substantive documents have been key instruments in supporting the spread of the rule of law in domestic systems, especially the Millennium Declaration, the World Summit Outcome and the Declaration of the High-level Meeting of the General Assembly on the rule of law at the national and international levels.

The Millennium Declaration,¹³⁴ as a foundational document for the future of the entire activity of the United Nations, devotes a section to “human rights, democracy and good governance” that epitomises the link between human rights, the rule of law and developmental issues. In fact, by setting as a goal the promotion of human rights and the strengthening of the rule of law as two related aspects, the Declaration also highlights the right to development as part of this legal-political framework, through nationally-based efforts (§24-25). This view is further reiterated in the World Summit Outcome of 2005,¹³⁵ since the link between the concepts is crystal-clear: “*good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger*” (§11).¹³⁶

¹³³ For instance, the 2004 *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616) and the 2006 *Report of the Secretary-General “Uniting our strengths: enhancing United Nations support for the rule of law”* (A/61/636 - S/2006/980).

¹³⁴ UN Document A/RES/55/2, already referred to for sustainable development.

¹³⁵ UN Document A/RES/60/1.

¹³⁶ Nevertheless, there is an unbalance (at least in terms of items listed) between developmental concerns and the other dimensions. Moreover, the rule of law is considered mainly at the international level.

These promising links – considered in the annual reports¹³⁷ - find an accomplished embodiment in the Declaration of the High-Level Meeting of 2012.¹³⁸ Although permeated by the rhetoric of the international rule of law, as it reassess as fundamental the elements of sovereign equality of states, the interest for the rule of law of both states and other international actors, the document reflects the debate and the consensus among states on the interrelationships between rule of law and development: “*rule of law and development are strongly interrelated and mutually reinforcing, (...) the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law*” (§7). Moreover, the declaration includes the procedural – but substantive for its implementation – aspect of the access to justice as a guarantee of human rights (§11, 13, 14).

The Declaration of 2012, with the reports of the Secretary-General, demonstrate the nexus between the rule of law and sustainable development, with a view to the adoption of the Agenda Post-2015. As a final contribution to the assessment of the debate on these topics within the UN, it is useful to analyse the last report of the Secretary-General, “Strengthening and coordinating United Nations rule of law activities”,¹³⁹ highlighting the relevance of rule of law in the activities of the UN system and as a pillar for sustainable development – as well as for peace and security and for human rights. Three fundamental freedoms are listed in the document: freedom to live in dignity, freedom from fear and freedom from want (§8), each of them being reinforced by the rule of law.

As from the freedom to live in dignity, its main object is the granting of human rights and their protection through the rule of law (§10). Principles pertaining to the domain of the rule of law are equality

¹³⁷ UN Documents A/RES/63/64; A/RES/64/298; A/RES/65/318; A/RES/66/102; A/RES/67/290.

¹³⁸ UN Document A/RES/67/1.

¹³⁹ UN Document A/68/213/Add.1.

under the law, accountability before the law and the concept of fairness in protecting rights (§14): the basic factor underlying and making actual the rule of law is their implementation, that is linked to the enjoyment of human rights. As the report states, “*the rule of law and human rights have an indivisible and intrinsic relationship*” (§17). The guarantee of human rights is linked to the administration and access to justice: due process, as in the traditional and original notion of rule of law, ensures effectiveness of human rights, through a judiciary that is impartial, integral and independent (§27).

The second dimension of the rule of law is linked to the freedom of fear, thus to the fundamental task of the United Nations, the maintenance of peace and security. In this sector, the rule of law has a dual value: on the one hand, it constitutes the means for strengthening states, and consequently to prevent conflicts (§42); on the other hand, it is crucial in post-conflict societies, in order to restore peace and rebuild solid institutions (§48).

The third dimension is certainly the most pertinent to the principle of sustainable development. The rule of law is essential for achieving freedom from want and guaranteeing an inclusive and sustainable development (§62). On the aspects of the rule of law related to development, the emphasis is placed on the micro level: property rights and protection of land, enforcement of legal frameworks protecting individual and community legal situations, enhancement of access to justice¹⁴⁰ and guarantee of transparency and accountability are the key inescapable elements in pursuing the goal of poverty eradication (§66-75).

The strengthening of the rule of law in the three dimensions is to be implemented at the international and at the national level. At the international level, three sets of actors are the institutions entitled to spread the principles of the rule of law: legally, international tribunals; economically, the international financial institutions; in general, the United Nations system as a whole, as a means for establishing responsive governance. At the national level, the building of sound

¹⁴⁰ See *infra*, section IV).

institutions concerns both the executive and the judicial branches (§92, 93) – with a particular stress on the enhancement of participation and access to justice, deemed as primary in guaranteeing human rights for everyone.

The report of the Secretary-General is an additional tool for interpreting the notion of rule of law as linked to the Agenda Post-2015. The intertwining nature of the notions of sustainable development and rule of law, although not distinctly stated in the document, emerges by itself in the crosscutting issues dealt by the United Nations system.

Finally, a brief overview in the political science literature concurs in shedding light in the global significance of the rule of law, in its relations to the concepts of access to justice, sustainable development and democratic societies (the latter being subsumed in the substantive notion of rule of law). According to political scientists, among the qualities of a democracy the first analytically worthy element in a substantive definition is the rule of law.¹⁴¹ The rule of law is defined as a procedural dimension, that nonetheless carries a substantive meaning insofar as it is the body itself in which substantive notions as freedom and equality are implanted. Among the main characteristics of the notion, prominent are the enforcement of legal norms, the supremacy of laws as public, universal, stable, non-retroactive and unambiguous. These attributes lead to several sub-dimensions of the concept, namely individual security and civil order, with a special focus on the guarantee of the right to life; the independence of the judiciary; the application *erga omnes* of the legal system; the existence of an efficient bureaucratic system that applies the laws; equal and unhindered access to justice for citizens.¹⁴²

¹⁴¹ Morlino, L., *Changes for Democracy. Actors, Structure, Processes*, Oxford, Oxford University Press, 2011. More broadly, O'Donnell, G., *Why the rule of law matters?*, in Diamond, L., Morlino, L. (eds.), *Assessing the Quality of Democracy*, The Johns Hopkins University Press, 2005, pp. 3-17; Maravall, J.A., *The rule of law as a political weapon*, in Maravall, J.A., Przeworski, A. (eds.), *Democracy and the rule of law*, Cambridge, Cambridge University Press, 2002, pp. 261-301; Sen, A., *Democracy as a universal value*, in *Journal of Democracy*, 10, 3, 1999, pp. 3-17.

¹⁴² Morlino, L., *op.cit.*, pp. 197-198.

It is this very last aspect that is relevant for the analysis of the protection of rights in the legal system, and in our analysis for environmental rights as envisioned in the framework of sustainable development. Access to justice is one of the four pillars of the rule of law, as outlined in the *World Justice Project*, with governmental accountability, protection of rights through clear and stable legislation and processes of law-making and law-enforcement that are accessible, fair and efficient.¹⁴³ The key aspects of the rule of law, and especially the universal principle of access to justice, is thus essential for the protection of fundamental environmental rights, as it is inferred from the thick conceptions developed in the consensual documents of the United Nations.

IV) Environmental rights and access to justice

a) An international perspective

As analysed thus far, in the field of international law the perspective of environmental rights can be only deduced from the suggestions made in non-binding instruments such as the declarations adopted in the occasion of world conferences and the resolutions approved by the main organs of the United Nations (often including reports drafted within the UN context). In fact, the body of documents we have been focusing on contains principles – some more consolidated, some emerging – that are addressed to the states for implementation in their legal systems, whether through positive norms or, seldom, through custom.¹⁴⁴ Notwithstanding the huge production of conventional

¹⁴³ *World Justice Project Rule of Law Index 2014*; the fourth element of the working definition is: “Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve”. See also O’Scainnlain, D.F., *The Rule of Law and the Judicial Function in the World Today*, in *Notre Dame Law Review*, Vol. 89, 3, 2014, pp. 1383-1402.

¹⁴⁴ For an interesting perspective on custom, refer to Orebech, P., (ed.), *The Role of Customary Law in Sustainable Development*, Cambridge, Cambridge University Press, 2005.

instruments¹⁴⁵ and the emergence of principles on environmental law, the relationship between the environment (and especially the notion of sustainable development) and human rights resides in the anthropocentric interpretation of the latter and in the documents drafted from the Conference on Environment and Development and the establishment of the Commission on Sustainable Development.

The 1992 Rio Declaration, as noted above, marks a clear watershed in the unfolding of environmental law in the perspective of human rights law, starting from the statement of Principle 3 on the right to development.¹⁴⁶ However, the evolution of the link between the environment and human rights – excluding the noteworthy exception of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, negotiated and signed in the framework of the United Nations Economic Commission for Europe in 1998¹⁴⁷ – has mainly relied on domestic law. In fact, in the field of international law, in spite of the early statements on environmental rights in regional documents as the African Charter on Human and People's Rights of 1981 – that dealt with the quality of the environment in Articles 16 and

¹⁴⁵ See *infra*, section I-a).

¹⁴⁶ See *infra*, section II), and refer also to Marchisio, S., *Il diritto internazionale dell'ambiente*, in Cordini, G., Foix, P., Marchisio, S., *Diritto ambientale – Profili internazionali, europei e comparati*, Torino, Giappichelli, 2008.

¹⁴⁷ The Aarhus Convention is the most ambitious treaty in the field of environmental rights, as it provides not only for general principles, but sets minimum standards for access to information, participation in public decision-making processes and access to justice in favour of citizens. For an assessment, Mason, M., *Information disclosure and environmental rights: the Aarhus Convention*, in *Global Environmental Politics*, 10, 3, 2010, pp. 10-31; Kravchenko, S., *The Aarhus Convention and innovations in compliance with multilateral environmental agreements*, in *Colorado Journal of International Environmental Law and Policy*, 18, 1, 2007; Wates, J., *The Aarhus Convention: a driving force for environmental democracy*, in *Journal for European Environmental & Planning Law*, 2, 1, 2005, pp.1-11.

24¹⁴⁸ - questions concerning detailed definitions and, all the more so, on enforcement, are left to the law of the single countries.¹⁴⁹

In addition to the reports on the rule of law that have been the object of the previous paragraph, a detailed elaboration on the manner for implementing and improving the range of environmental principles and rights in the framework of human rights comes from a review of the Commission on Human Rights of 1994, adopted by the UN Economic and Social Council, also known as the Ksentini Report.¹⁵⁰ Starting from the declared purpose of overcoming the dichotomy between human-centred and eco-centred approaches, the report fully analyses the juridical links of environmental issues and human rights, with a view to integrate them and to shed light in the relationship between environment and development.

The Ksentini Report finds the link between human rights and the environment in Principle 1 of the Stockholm Declaration, inasmuch as it states the inherent intertwining nature of the right to life to the

¹⁴⁸ Article 16 (Right to Health): “Every individual shall have the right to enjoy the best attainable state of (...) health.”; Article 24 (Right to a General Satisfactory Environment): “All peoples shall have the right to a general satisfactory environment favourable to their development.”; on the African Charter, refer to Ouguerouz, F., *The African Charter of Human and People’s Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* The Hague, Martinus Nijhoff Publishers, 2003; Ouguerouz, F., *La Charte africaine des droits de l’homme et des peuples: une approche juridique des droits de l’homme entre tradition et modernité*, Paris, Presses Universitaires de France, 1993.

¹⁴⁹ An exception to this general statement is the famous case of the Ogoniland before the African Commission on Human and People’s Rights. See Ebeku, K. S., *The right to a satisfactory environment and the African Commission: recent developments*, in *African Human Rights Law Journal*, 3, 1, 2003, p.149; Coomans, F., *The Ogoni Case Before the African Commission on Human and Peoples’ Rights*, in *International and Comparative Law Quarterly* 52, 3, 2003, pp. 749-760. It is noteworthy to recall that the decisions of the African Commission are non-binding, leaving open the concerns on enforcement.

¹⁵⁰ UN Document E/CN.4/Sub.2/1994/9. Fatma Zohra Ksentini was the Special Rapporteur on the subject.

environment, understood both in an eco-centric and in an anthropocentric way. Moreover, this link is confirmed by the theory of the indivisibility of rights as illustrated in the UN Declaration on the Right to Development (Article 6 states the indivisibility and interdependence of human rights and fundamental freedoms, with the aim of reconciling civil and political rights with economic, social and cultural rights), including the right to environment and the right to development (§47-49). These rights are conceived as democratic and participatory (§70-71), encompassing individual and collective aspects and stressing the necessity of a sound access to information as an enabling condition for sustainable development (§72) and as a manner for reinforcing all fundamental rights.

Notwithstanding the systemic approach on the mutual reinforcement of fundamental rights, the centrality of the right to life is reiterated in the report and emerges as the key element in integrating the environment in the whole picture. The relevance of environmental protection comes to the forefront when related to the right to life, as the latter is valid *erga omnes* and must thus be the object of positive actions from the part of states in order to safeguard it from detrimental environmental measures that are the main threats to it (§172-175). As a specification of the right to life, the report also mentions the right to health (§176) and the problem of food security (§188). Moreover, the other human rights to be considered in the framework of the environment-development debate are particularly interesting. Among them, the right to information, embodying public access to information and the coherent obligation of the states to disclose such information (§203), assumes a higher stance insofar as fundamental rights and human security are hindered when information on environmental threats is not provided. In addition to the right to information, the right to participation surges as an additional democratic right related to the environment (§217), as it encompasses decision-making processes (including environmental impact assessments) and judicial activity.

Finally, while asserting the universal nature of environmental rights, the report stresses the fundamental role of national legislation, and of constitutions above all legal instruments, for stating the substantive content of these rights and for effectively enforcing them, starting from the general right to a satisfactory environment (§241). In the end, the list of rights proposed includes the rights analysed so far with the

insertion of an express provision on access to justice (Article 20, “*all persons have the right to effective remedies and redress in administrative and judicial proceedings for environmental harm or the threat of such harm*”).

Notwithstanding the non-binding nature of the catalogue of environmental rights set by the Ksentini Report (depriving them of enforcement mechanisms), the categorising enterprise delivered in the report results in a major advance in the discourse on the protection and enhancement of the environment since it provides, from mere declarations on rights and principles, a substantive set of specific environmental rights that find their origin in the right to life. Moreover, the set of rights could be understood not only in a framework imbued in the logic of environmental and economic perspectives, but also in light with the concerns on public health and of the consequent right to individual health.¹⁵¹ Taken from this point of view, the dichotomy between eco-centric and anthropocentric visions could be overcome: protection of the environment and of human health are to be seen as complementary, since actions undertaken for safeguarding the environment are also beneficial to the promotion of health. In this sense, Onzivu makes a point in listing the negative effects of environmental threats – use of chemical and biological agents, air and water pollution, climate change – on human health and in underlining how positive measures to prevent these threats concur to the preservation and amelioration of ecosystems and, consequently, of human conditions. Environmental protection is thus to be achieved through the panoply of international treaties and international law principles,¹⁵² but by means of domestic instruments implementing the agreements reached at the international level.¹⁵³ Besides becoming Parties to international conventions, national measures impose

¹⁵¹ A perspective already included in Agenda 21.

¹⁵² See *infra*, sections I) and II).

¹⁵³ Onzivu, W., *International Environmental Law, the Public's Health, and Domestic Environmental Governance in Developing Countries*, in *Am. U. Int'l L. Rev.*, 21, 4, 2006, pp. 597-684. See also Shelton, D., *Human rights, health and environmental protection: linkages in law and practice*, in *Health and human rights working paper series*, WHO, 1, 2002, pp. 3-24.

themselves as the enabling tool for the actual embodiment of rights and the improvement of human and ecological conditions. In fact, international environmental agreements are mainly focused on the damages produced than on the relief for human beings and on prevention directly addressed to people, a concern dealt with in human rights treaties.¹⁵⁴ As Shelton remarks, in light with the distinction between instruments on human rights and on environmental damage and protection, at the international level advances in environmental rights occurred by means of four approaches: the incorporation of basic human rights in international environmental instruments, mostly at the regional level (it is the case of procedural rights, as in the Aarhus Convention); the inclusion of an environmental dimension in human rights treaties, also through interpretation; the elaboration of a new right to a safe environment by combining environmental law and human rights law (a perspective adopted at the constitutional level, not internationally);¹⁵⁵ finally, the articulation of legal duties upon the individuals that include environmental protection.¹⁵⁶

Thus, in order to provide a comprehensive discipline on environmental rights, attention has to be focused on national law: on the one hand, the insertion of provisions related to the environment in a country's constitution and the enactment of appropriate legislation constitutes a thorough advance in the field; on the other hand, administrative measures and judicial action are capital in implementing and protecting environmental rights.

¹⁵⁴ Osofsky, H.M., *Learning from environmental justice: A new model for international environmental rights*, in *Stanford Environmental Law Journal*, 24, 2005, pp. 1-71.

¹⁵⁵ The exceptions being the African Charter on Human and Peoples' Rights, providing an explicit guarantee of environmental quality (Art. 24) and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights that listed the right of everyone to live in a healthy environment (Art. 11).

¹⁵⁶ Shelton, D., *Human rights and the environment: What specific environmental rights have been recognized?*, in *Denv. J. Int'l L. & Pol'y*, 35, 2006, pp. 129-171.

b) The domestic dimension

In consonance with the developments in international law, the entrenchment of environmental rights in domestic legal systems started in the 1970s, following the global movement characterised by increasing concerns on the state of the environment. In parallel with the difficulties in defining the object of environmental law, the analysis on comparative constitutional law meets challenges in grasping and curtailing the fields of studies concerning the environment. The normative framework varies according to the degree of guarantees granted to environmental rights. A set of “strategies”, characterised by a considerable degree of abstraction by virtue of the encompassing aspects of the notion of environment, can be outlined: firstly, the use of general statement on the protection of the environment, seen as a duty of the state; then, the definition of a right (or of more rights) of citizens to enjoy a safe and balanced environment; finally, the recognition of this right (or those rights) in a way apt to weight up economic rights with environmental rights, posing limits to the former.¹⁵⁷ In fact, these strategies are declined into three different methods or approaches of ascertaining the protection of the environment, according to the degree of enforceability: policy directives, posing duties upon state authorities; procedural rights or duties; substantive rights.¹⁵⁸

Following the historical evolution of constitutional law in recent years, the interventions on inserting constitutional environmental rights are differentiated between countries integrating environmental provisions since the beginning (constitutions originating from the Third Wave of democratisation), countries amending their fundamental texts in order to provide rights and principles connected to the environment (protection, sustainable development or intergenerational equity)¹⁵⁹ and

¹⁵⁷ Cordini, G., *Profili di diritto ambientale comparato*, in Cordini, G., Fois, S., Marchisio, S., *op.cit.*, pp. 105-107.

¹⁵⁸ May, J., Daly, E., *Vindicating fundamental environmental rights: Judicial acceptance of constitutionally entrenched environmental rights*, in *Oregon Review of International Law*, 11, 2009, pp. 365-440.

¹⁵⁹ It is the case of India, that amended its constitution in 1972 (although the principles on the environment are also derived from the right to life, see *infra*,

those deriving environmental rights from original provisions, especially the right to life and the right to health.¹⁶⁰ The main point of providing norms on the environment in a constitution, as Brandl and Bungert observe, resides in the advantages deriving from the enshrinement of those rights (or provisions on duties) in a text hierarchically superior to statute law. Thus, being granted the highest rank in the normative system, environmental rights cannot be superseded by statutes or administrative decisions, are amendable only by means of a qualified majority and – metajuridically – also constitute a model that aims at influencing the citizens in their behaviour and identity, for the nature of a constitution as the fundamental law of the land.¹⁶¹

In order to clarify the dimensions of environmental rights, it is useful to list all the constitutionally relevant provisions that apply to environmental protection, summarising the discourse on rights held at the national and international level:

- Right to life (as the fundamental norm upon which environmental rights are based);

Chapter II), of Colombia, that inserted the notion of sustainable development in the Constitution of 1991, and of France, whose Parliament approved a Charter for the Environment (to be considered as part of the Constitution, into force from 2005), containing most of the international principles and the right to a safe environment.

¹⁶⁰ As in Italy: the right to a safe environment has been derived from an evolutionary interpretation of Articles 2, 9 and 32 of the Constitution, in order to understand the notion of environment as a fundamental value. Refer to Cecchetti, M., *La disciplina giuridica della tutela ambientale come “diritto dell’ambiente”*, in *Federalismi – Rivista di diritto italiano, comunitario e comparato*, 2006, e Caravita, B., *Diritto dell’ambiente*, Bologna, Il Mulino, 2003.

¹⁶¹ Brandl, E., Bungert, H., *Constitutional entrenchment of environmental protection: a comparative analysis of experiences abroad*, in *Harvard Environmental Law Review*, 16, 1992.

- Right to health (since norms on health are often contained in constitutions that do not explicitly provide for environmental protection);
- Right to a safe and balanced environment (or duty to guarantee a safe and balanced environment, for constitutional texts drafted from the 1970s, following the Stockholm Declaration);
- Provisions on food security (mainly based on the developments on the subject within the United Nations and connected to economic rights);¹⁶²
- Rights to information and participation on environmental issues;
- Right to remedies before courts on environmental litigation.

Notwithstanding the clarifying nature of the list, these “categories” of environmental rights shall not be considered as absolute, since they are interrelated to the existence of other socio-economic rights and to the essence of the notion of sustainable development and to the principles of international law that are applicable in domestic systems. As noted above, the gist of the argument on environmental rights is the definition of environment itself and the links to economic and social rights. From the perspective of legal theory, the ecological concerns of the man on the state of nature are a break from the Western tradition of human liberties, since environmental rights necessarily pose limits to economic rights and subsequent activities – the international law perspective on the gradual establishment of principles such as the polluter-pays principle or the precautionary principle testifies of these theoretical difficulties.

As a consequence, environmental principles and rights were often stated as an aspiration or a goal rather than as positive law, especially when they emerged. The only method to uphold environmental rights

¹⁶² The debate on the right to food as connected to economic, social and environmental issues is flourishing lately, due to the negotiations for the Agenda Post-2015.

was to connect them to the general rule of law doctrine (an approach employed not only domestically, but also in the international arena by the United Nations).¹⁶³ From the list of rights and duties, the most difficult to attain was the right to remedies in courts (or administrative bodies, according to the legal system of each country), since the formulation of environmental rights was not apt to enshrine them as positive, substantive rights that could be actionable in courts, but as general aspirations or procedural rights. Thus, internally, environmental rights could be integrated in the framework of protection guaranteed by the respect of the rule of law.¹⁶⁴ From this point, questions arose about the necessity of establishing constitutional rights on the quality of the environment, as they could be deemed redundant in systems guaranteeing the right to life and following the principles of the rule of law.¹⁶⁵

To overcome these debates, a reference to the conceptual aspects of the definition of a right to environment in international human rights law, set by Philippe Cullet, is fruitful also for our analysis of domestic law. Noticing the general necessity to link environmental concerns and human rights, for the latter to display an enhanced realisation, Cullet enucleates several “avenues” for the integration of the environment in human rights. First of all, the reinterpretation of those rights in line with the purpose of the protection of the environment. Then, the introduction of procedural, technical rights to the corpus already existing. Finally, the formal addition of a proper right to

¹⁶³ See *infra*, Section III).

¹⁶⁴ For a critical view, Tarlock, A.D., *The Future of Environmental Rule of Law Litigation*, in *Pace Environmental Law Review*, 19, 2001, pp. 575-612; Gaba, J.M., *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, in *Columbia Journal of Environmental Law*, 24, 1999, p. 249. Refer also to Mushkat, R., *Contextualizing environmental human rights: a relativist perspective*, in *Pace Environmental Law Review*, 26, 2009, pp.119-179; Hayward, T., *Constitutional Environmental Rights*, Oxford, Oxford University Press, 2004; Tarlock, A.D., *Is There a There There in Environmental Law?*, in *Journal of Land Use & Environmental Law*, 2004, pp. 213-254.

¹⁶⁵ May, J.R., Dale, E., *op.cit.*, pp. 378-380.

environment.¹⁶⁶ In line with the previous list of rights related to the environment, the inception of the theoretical structure of the integration of environmental rights is the universality of the right to life and the impossibility of guaranteeing the full enjoyment of it without considering environmental concerns. These concerns are understood as both eco-centric and anthropocentric, as consideration is put on both the intrinsic value of nature and on the damages created to individuals and societies, from the right to food and water to the right to health. Nevertheless, the encompassing nature of a right to environment does not allow for the definition of it as “synthetic”, owing to the fact that it is constituted by specific characteristics: the duty to refrain from certain activities and to promote policies enabling an improvement of environmental conditions and the essence of a right that is addressed to individuals, collective groups and future generations.

Conceptually, the right to environment has been recognised in several ways. Purely, the right to environment is linked to the quality of life and to aspects pertaining to the domain of health. In wider formulations, coming from the international discourse on environment and development, this right embraces social, cultural and economic concerns – a trend that is dominant from the elaboration of the notion of sustainable development. Nevertheless, the main aspects pertaining to the right to environment are identified in a general principle of solidarity, since the environment is a common good, and in the embodiment of the precautionary approach. These two features show the specificity of environmental rights (considering also the derivative rights to information, participation and access to justice that effectively complete the scenario of the right to environment), to be theoretically considered as distinct from socio-economic rights.

Finally, emphasis should also lay on the rights connected to environmental protection such as the right to information and participation. A right to information can be individually configured as a right to receive information and to be able to gather information, conversely connected to the requirements, placed upon the state, of

¹⁶⁶ Cullet, P., *Definition of an environmental right in a human rights context*, in *Netherlands Quarterly of Human Rights*, 13, 1995, pp. 25-40.

non-interference in activities concerning the collection of information or of spreading information on environmental projects. As for the right to participate in environmental decisions, the right is to be divided between the mere right to be part of the procedure (e.g. to be heard in a phase of a process) and the right to be incisive in decisions.¹⁶⁷ It is noteworthy that these rights, albeit procedural, are a key tool for realising the general statements characteristic of the right to environment.

Thus, notwithstanding the debate on the existence and the essence of environmental rights and on the human-centred or eco-centred approached, the specificity of environmental rights emerged for the inherent transformative nature of environmental rights, in a catalogue of third generation rights that encompassed social, economic and cultural rights, posing duties of protection and of positive actions upon states. Overcoming this debate, the emergence of them and the interpretation given at the national and at the international level show the relevance of environmental protection and the changing nature of its elements, according to the threats globally evolving. In this sense, the necessary degree of abstraction of the term environment becomes a useful tool for interpreting norms in the future and for leaving to the legislation the task of widening or narrowing the scope of the rights, from the overarching end of comprehending all human activities to the curtailment of single aspects.

By virtue of their transformative nature and of their difficult entrenchment in constitutions, the definition of environmental rights, regardless of the specific characteristics, has been left to the action of administrative and judicial powers. In spite of the inconsistency of judicial enforcement of rights that are considered as aspirational, courts have often ruled in favour of the existence of specific environmental rights (as those listed above) on the grounds of the respect of the rule of law, of the international environmental law principles and upon

¹⁶⁷ Shelton, D., *Human rights and the environment: What specific environmental rights have been recognized?*, *op.cit.*.

national norms allowing individuals to present lawsuits and internal standards for governmental and individual action.¹⁶⁸

Apart from the enactment of constitutional reform, in the framework of legislative policy the tools for ensuring the right to environment are basically two: administratively, the enactment of provisions implementing the use of the Environmental Impact Assessment; judicially, the guarantee of access to justice in tribunals.¹⁶⁹

In the domain of administrative law, the Environmental Impact Assessment is an instrument that helps reducing the impact of an activity aimed at development by evaluating *ex ante* the consequences on the environment. It is a methodology used to anticipate and minimise the effects of economic activities on the environment, understood physically, biologically and socio-culturally. The three core principles of the EIA are integrity, utility and sustainability, in order to guarantee a decisional process that is fair, credible and apt to safeguard the environment. Following the procedural rights previously analysed, an EIA foresees several phases that include public participation and access to information.¹⁷⁰ Thus, the Environmental Impact Assessment constitutes a possible embodiment of procedural rights that enables the realisation of the statements included in the substantive right to environment.

In addition to the procedural methods employed in the executive branch, the capital instrument in guaranteeing environmental rights is access to justice. As emphasised in the documents of the United Nations, access to justice is capital in ensuring the effectiveness of

¹⁶⁸ Shelton, D., *Developing substantive environmental rights*, in *Journal of Human Rights and the Environment*, 1(1), 2010, pp. 89-120.

¹⁶⁹ These introductory remarks will be the object of a deeper analysis in the following chapters, with a focus on the Indian experience.

¹⁷⁰ Biswas, A.K., & Agarwal, S.B.C. (eds.), *Environmental impact assessment for developing countries*, Elsevier, 2013; Sahasranaman, P.B., *Oxford Handbook of Environmental Law*, New Delhi, Oxford University Press, 2012, pp. 79-102; Wood, C., *Environmental impact assessment: a comparative review*, Pearson Education, 2003.

rights, especially as far as environmental rights are concerned, since the practice of national courts is often the only means for rendering effective those rights through the work of tribunals in widening or curtailing the scope of the definitions provided for in constitutions or legislation. It is evident that the respect, protection and enforceability of rights is the main objective of the judicial instrument and the only manner to provide a solid ground to the substantive right to environment. To achieve this, several procedural aspects come to the forefront. First of all, the *locus standi* before courts – the possibility for plaintiffs to present claims to a tribunal. In environmental litigation, the doctrine of standing is crucial, as the violation of environmental rights is not always characterised by a direct harm on a subject (that is the typical motive for access to justice), but could involve human beings only indirectly, and difficulties arise in the identification of defendants (the state, but also privates, thus allowing a horizontal application of constitutional and legislative norms). Here too, the essence of rights as anthropocentric and eco-centric poses concerns, overcome in national systems in different ways – some legal systems allowing a wider scope for the rules of standing through enhanced technicalities, including public interest litigation and access by non-governmental organisations with an interest in environmental matters. Moreover, an additional tool for favouring access to justice is the use of interpretive principles of environmental law (for instance, the precautionary principle and the polluter-pays principle) in the judicial process leading to a ruling. Finally, the right to effective remedies constitutes the third facet of access to justice. Because of the specificities of environmental rights, in some legal systems new kinds of remedies have been introduced, such as the writ of continuing mandamus in India (and lately in the Philippines)¹⁷¹ or the establishment of specialised courts devoted to environmental litigation.¹⁷²

¹⁷¹ See *infra*, Chapter III).

¹⁷² In addition to the bibliography already quoted, see Banda, M., *Improving Access to Justice: Recent Trends and Developments in Procedural Environmental Rights*, Discussion Paper, 3rd UNITAR-Yale Conference on Environmental Governance and Democracy, New Haven, 2014.

This last measure has been the choice of India for upholding the rule of law in environmental matters and implementing the canons of a truly environmental democracy.¹⁷³ In a context characterised, internationally, by the continuous support to national solutions eager to effectively face the calls for a higher protection of environmental rights and for the implementation of solutions congruent with the achievement of sustainable development, and internally, by a strong judicial activism and the creation of innovative measures on the part of the Supreme Court, the legislature responded to the challenges posed by an increasing resort to judicial measures with the establishment of a National Green Tribunal, entrusted with the task of dealing with a wide scope of environmental litigation.

¹⁷³ On the characteristics of an “environmental democracy”, see Siclari, D., *L’evoluzione dei pilastri della “democrazia ambientale”: “partecipazione pubblica” e “accesso alla giustizia”*, in *Dereito*, Vol. 20, n. 1, 2011, pp. 43-83.

Chapter II

Environmental law in India: constitutional and legislative framework

In spite of the absence of provisions directly related to the environment in the very detailed Constitution of India, a constitutional tradition characterised by the respect of the right to life and by a certain openness to international influence bolstered the inclusion of a right to a healthy environment and fostered the elaboration of legislative and administrative instruments that could effectively embody the spirit of the international movement born in the 1970s. In order to coherently assess the development of the Indian legal system in the field of environmental and sustainability law, it seems appropriate to refer to the constitutional debates leading to the draft of the Constitution of 1950, a text that illustrates the value of the concept of the rule of law and its adaptation to the emergence of “new” rights. Thus, a first section of this chapter will be devoted to the elaboration of the right to life in the Indian constitutional tradition, by shedding light on the peculiar nature of the foundational document as a social pact guaranteeing a broad and extensive range of rights and by studying the insertion of environmental rights in the Constitution of India (namely Articles 48A and 51A(g)). Then, the second part of the chapter will focus on the legislative texts enacted by the Parliament and on the administrative instruments designed to implement environmental protection and rights in the different fields.

I) Legal theory: right to life and the environment in the Constitution of India

a) The Indian tradition of fundamental rights

Although the rights enshrined in the Constitution of 1950 are clearly derived from the Western tradition, and especially from the experiences

of the United States of America and of Ireland,¹⁷⁴ the ground upon which the Bill of Rights was installed was characterised by a rich history and a civilisation that, legally, blended the ancient Hindu texts with the Mohammedan tradition brought by the Persian conquerors and the principles of *justice, fairness and good conscience* that governed the working of the Courts in absence of specific provisions.¹⁷⁵

Early in the debates of the Indian National Congress, the question of the organisation of independent India was put to the forefront, in light of the consciousness of the leading figures that the local tradition of custom could not be erased in the legal system. In spite of consistent indications that the draft of the Constitution would have to rely on Western elaborations – “*the Congress had never been Gandhian*”,¹⁷⁶ as referred to by Granville Austin in his account of the work of the Constituent Assembly – and that the Objectives Resolution presented by Jawaharlal Nehru at the opening of the Assembly embraced the guarantee of fundamental rights within the goals to be attained,¹⁷⁷ the reality of a social system that relied on custom and on the “Gandhian” ideals rendered inevitable the reading of those constitutionally entrenched rights with the local tradition.

Indeed, such a reading is opportune in the framework of the analysis of environmental rights, as it allows a more complete understanding of

¹⁷⁴ See *infra*, paragraph b), and on the birth of the Indian Constitution Austin, G., *The Indian Constitution: Cornerstone of a Nation*, New Delhi, Oxford University Press, pp. 50-83.

¹⁷⁵ For a brief sketch of the development of the Indian legal system before the independence, Nariman, F.S., *India's Legal System: Can it be saved?*, New Delhi, Penguin Books, 2006, pp. 1-39.

¹⁷⁶ Austin, G., *op.cit.*, p. 39.

¹⁷⁷ Parliament of India, *Constituent Assembly Debates*, Volume II, Report of the 22nd of January 1947: “*This Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent Sovereign Republic and to draw up for her future governance a Constitution (...) wherein shall be guaranteed and secured to all the people of India justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality*”.

the width of those provisions concerning the environment and of the application of the legislation enacted in the last forty years. The existence of an “Indian tradition” – although apparently to the background in the constituent period – is in fact crucial in assessing the record of India for environmental protection as well as the role of the institutions in the operationalisation of those principles. The intertwining of various legal traditions - religious and secular – made the Indian system a complex one,¹⁷⁸ whose peculiarity deserve a special mention, notwithstanding the criticisms toward this approach that postulates a certain continuity between Indian tradition (whether coming from a Hindu, Mohammedan or Buddhist background) and the modern legal system.¹⁷⁹

The basis of Hindu law is the concept of *dharma*, that carries with it the double meaning of legality and of morality.¹⁸⁰ Indeed, as a pure distinction between law and social elements cannot be made, it is to be noted that in the Hinduist conception of human behaviour there is tripartite distinction among *sastra*, or “rules”: *dharma-sastra*, dealing with moral norms; *artha-sastra*, the rules on politics and trade; *kama-*

¹⁷⁸ On the complexity of the Indian system and the interaction of different models, see Francavilla, D., *Il Diritto nell'India Contemporanea: Sistemi tradizionali, modelli occidentali e globalizzazione*, Torino, Giappichelli, 2010, pp. 13-19.

¹⁷⁹ For this thesis, that assumes a substantial difference between traditional Hindu law and contemporary legal system, see Menski, W., *Hindu Law: Beyond Tradition and Modernity*, Delhi, Oxford University Press, 2003; from the same author, acknowledging a certain influence of traditional law, Menski, W., *Hindu Law*, in *Law and Justice, Christian Law Review*, 45, 2010 (“Hindu law concepts, however, invisibly but deeply, continue to influence the entire structure of Indian civil and criminal laws, including particularly the Constitution of 1950”).

¹⁸⁰ Panikkar, R., *Is the Notion of Human Rights a Western Concept?*, in *Philosophical Foundations of Human Rights*, 1984, quotes the following: “The meaning of the word *dharma* is multivocal : besides element, data, quality and origination, it means law, norm of conduct, character of things, right, truth, ritual, morality, justice, righteousness, religion, destiny, and many other things.” See also Chatterjee, M., *The Concept of Dharma*, in *Facts and Values*. Springer Netherlands, 1986, pp. 177-187.

sastra, on corporal subjects.¹⁸¹ These notions derive from a panoply of compilation of Vedic literature that postulated the existence of an order, *rita*, that permeated Hindu law.¹⁸² In this framework, the category that is closer to legal analysis is that of *dharma*, a Sanskrit concept that could be translated by “justice” (which is itself rendered as *nyaya* in Sanskrit) or by “code of conduct”, but also as “duty”. However, notwithstanding the difficulties in apprehending the notion, the main characteristic of these proto-legal rules lies in their prominence with respect to *artha-sastra* and *kama-sastra*.

The principles prescribed by the *dharma*, from a variety of ancient texts,¹⁸³ include non-violence, truth, purity and control. Within this order, the *dharma* would have been aimed at protecting the rights of the individuals and the regulation of human conduct, as a sort of organisational rule that would have restrained individual behaviours with respect of the liberty and the interests of other people pertaining to the same society. However, it should be considered that this notion related to a period characterised by the absence of a single power that could enforce rules; thus, the classification of *dharma* as simple rules of conduct seems more appropriate, also with a view to the consideration of moral elements within the notion.¹⁸⁴ The relativisation of the concept is all the more valid if one follows Menski in rejecting to report ancient Hindu categories to modern legal practice and in analysing the *dharma* as an evolutionary criterion that varied according to custom and caste,

¹⁸¹ David, R. e Jauffret-Spinosi, C., *Les grands systèmes de droit contemporains*, Paris, Dalloz, 2002, p. 375.

¹⁸² Menski, W., *Comparative Law in a Global Context – The Legal Systems of Asia and Africa*, Cambridge, Cambridge University Press, 2nd Edition, 2006, p. 204.

¹⁸³ Including a number of *smriti*, codifications, as the *Manusmriti* (the first “code” made up of cogent rules), the *Yajnavalkyasmriti* and the *Naradasmriti*, see Jois, M. R., *Legal and Constitutional History of India – Ancient Legal, Judicial and Constitutional System*, Delhi, Universal Law Publishing Co. Pvt. Ltd., 1984.

¹⁸⁴ Menski, W., *Comparative Law in a Global Context – The Legal Systems of Asia and Africa*, *op.cit.*, p. 206.

thus being deprived of the necessary binding value that a legal norm should possess.¹⁸⁵

Notwithstanding the predominant character of duty in the meaning of *dharma*,¹⁸⁶ the wide connotation of it could expand as to include the existence of a “rule of *dharma*” in pre-British times.¹⁸⁷ Moreover, if one has to draw a parallel between the Indian tradition and the Western idea of rights, *dharma* seems to be the term that is most functionally similar to that of right,¹⁸⁸ and the one that allows an understanding of rights that is broader than the plain Western liberal tradition. Indeed, as stated by M. P. Singh, “*dharma is not only the basis of human rights in the Indian tradition but it is also a model of universality of those rights*”.¹⁸⁹

The idea of duties as connected with rights should not be construed as a hindrance to the conception of liberties in the Indian constitutional system, rather as a manner of making those rights as universal as possible, since the notion of duties represents the attempt for the formation of a social order based on harmony, not only among people, but also with respect to nature. In spite of the denial of the individual autonomy as understood in the Western tradition, the reliance on more communal grounds for the establishment of rights certainly concurs to re-evaluating the question of the environment, of nature, within the constitutional discourse. Moreover, the absence of a liberal tradition based on individualism should be nuanced, as the request for a Bill of Rights was part of the independence movement and was fulfilled by the Constituent Assembly.¹⁹⁰ Historically, the notion of rights did not develop as in the West because of the lack of antagonism between the

¹⁸⁵ Menski, W., *Comparative Law in a Global Context – The Legal Systems of Asia and Africa*, op.cit., pp. 214-215.

¹⁸⁶ Derrett, J.D.M., *Hindu Law*, in *An Introduction to Legal Systems*, London, 1968.

¹⁸⁷ The expression is from Kulshreshtha, V.D., *Landmarks in Indian Legal History and Constitutional History*, Lucknow, Eastern Book Company, 9th Edition, 2005, p. 487.

¹⁸⁸ See Panikkar, R., op.cit..

¹⁸⁹ Singh, M.P., *Human Rights in the Indian Tradition: An Alternative Model*, NUJS Law Review, 2, 2009, pp. 145-182.

¹⁹⁰ Singh, M.P., op.cit., p. 171, and *infra*, paragraph b).

individual and the state, as the latter had never assumed a pervasive position as it did in the Occidental experience. To put it in the words of M.P. Singh, *"the position of the individual vis-à-vis the state in India is just the reverse of the West; (...) the state must take positive steps to secure to him his autonomy and dignity. The realization of the human rights in India is not as much a question of individual's claim against the state as of the responsibility of the state. Whether the individual asks for his rights or not the state must secure them to him."*¹⁹¹

The idea of *dharma* and of duties, albeit restricted in the elaboration of the Constitution of 1950, is a starting point for reflections on the integration of environmental subjects within the fundamental text of India. Although the Constituent Assembly relied on the Western tradition to draft the list of rights to be constitutionally protected, and the assertion that Gandhian ideals had been rejected for lack of pragmatism – a choice that was criticised as it left to the background the Indian tradition¹⁹² – the social pattern upon which the Constitution was to be woven was imbued of those values. While initially lost in the classical statements of liberties, the concepts of duties and of harmony were to resurface in the 1970s and to be inflected also for environmental matters.

b) The Constituent Assembly and the elaboration of the right to life

In a historical and institutional context characterised by the inclination toward the draft of a document with evident links to the British tradition,¹⁹³ the Constituent Assembly was convened at the end of 1946. Thanks to its activities, that spanned for a period of three years, India endeavoured to independently regulate its own government for the first time in modern history with the approval of the Constitution of 1950. Although a consistent part of the Constitution derived from the

¹⁹¹ Singh, M.P., *op.cit.*, p. 173.

¹⁹² Kane, P.V., *History of Dharmasastra*, Poona, Bhandarkar Oriental Research Institute, 1968, Vol. V, Part II, pp. 1664-1665.

¹⁹³ Austin, G., *op.cit.*, pp. 39-49, for the rejection of a possible "Gandhian Constitution".

Government of India Act of 1935 – especially the provisions related to the form of government – the fundamental text of 1950 introduced anew a capital innovation in the legal system: a Bill of Rights characterised by a detail that reflects the challenges to be overcome by the newly empowered statesmen and by the whole country, and a system of judicial review of those rights and “directive principles” (that originally ought not to be actionable before courts, as they were deemed as objectives for substantial actions on the part of the Executive)¹⁹⁴ that endowed the citizens with the possibility of rendering those human rights concrete.

Indeed, the calls for the affirmation of fundamental rights were part of the struggle for *swaraj*, independence, since the foundation of the Indian National Congress in 1885. Although the embodiment of a coherently designed right to life was only achieved later in the history of the independence movement, the first draft *Constitution of India Bill* of 1895 provided for a nucleus of rights for Indian citizens. In this non-official text, supposedly elaborated by Lokamanya Bal Gangadhar Tilak,¹⁹⁵ the focus is driven toward the institutional regime, but a bulk of liberties can be outlined, in particular the equality of rights, *habeas corpus*, the right to property, freedom of expression and the right to education.¹⁹⁶

While the Congress devoted most of its energies in countering the British projects for the distribution of powers – epitomised by the

¹⁹⁴ See *infra* for the distinction between the two categories, that was derived from the Irish Constitution of 1937.

¹⁹⁵ Lokamanya Bal Gangadhar Tilak (1856-1920) was later the President of the Home Rule League and the author (along with Muhammad Ali Jinnah) of the Lucknow Pact, that ensured unity between Hindus and Muslims in 1916.

¹⁹⁶ Shiva Rao, B., *The Framing of India's Constitution – Select Documents*, New Delhi, The Indian Institute of Public Administration, Volume 1, “The Constitution of India Bill, 1895”, pp. 5-14. The source concerning the authorship of the text is Annie Besant, the President of the Theosophical Society and a member of the Indian National Congress.

system of dyarchy between the centre and the provinces¹⁹⁷ – the quest for a list of rights recognised by the Government found fertile ground only in 1925, through the *Commonwealth of India Bill*. This text originated by the ferment that led to the “National Demand” pronounced by Motilal Nehru (the then Head of the Opposition in the Central Legislature)¹⁹⁸ in favour of the drafting of a constitution by Indians and contained the first official declaration of rights. Deriving its essence from the classical liberal tradition, Article 4 of the *Commonwealth of India Bill* indicated as fundamental rights the liberty of person and of its property, the freedom of conscience, of religion and expression, the right to free education and the principles of equality before the law and equality of sexes.¹⁹⁹

Although pressed by the most pragmatic problems of reversing the situation created by the dyarchy system, the Congress pursued its strategy of calling for the convention of a conference for the draft of a *swaraj constitution*. These attempts crystallised in the Nehru Report, a document issued by a special committee of the Congress in order to enucleate the principles of a Constitution for India, in opposition to the British initiative of the convention of the “Simon Commission” – a body charged with the study of establishing an advanced responsible government but that excluded Indians. Also in this case, the definition of fundamental rights (the object of paragraph 4 of the Report) refer to the essential list sketched in the *Commonwealth of India Bill*, through the identification of a right to personal liberty coupled with the right to

¹⁹⁷ A system introduced by the Government of India Act of 1919 that divided subjects between the Central Government and the Provinces and that further separated subjects of local institutions between transferred competences (administered by the Provincial Governor with the concurrence of the local legislative bodies) and reserved prerogatives (exercised by the Governor without intervention from the popular body).

¹⁹⁸ Motilal Nehru (1861-1931), the father of the First Prime Minister of India, Jawaharlal, was one of the fundamental leaders of the Indian National Congress.

¹⁹⁹ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 1, “The Commonwealth of India Bill”, p. 44.

property. Nonetheless, the Nehru Report elaborates on the conditions of the exercise of a proper right to life for the first time. Indeed, paragraph 4 of the Report includes the right to a *writ of habeas corpus* and the duty upon the Parliament to legislate on health, protection of workers, welfare of children and mothers and on retired and unemployed people²⁰⁰ – a bulk of rights that anticipate the formation of the “Directive Principles of State Policy” in the Constitution of 1950 and that demonstrate the coherence of a constitutional construction that integrated the concerns leading to the elaboration of second generation rights within the legal system. Indeed, as stressed by Austin, this was the first “*close precursor of the Fundamental Rights of the Constitution*”²⁰¹ and set the scene for an advance in this field with the Karachi Resolution, approved by the Congress in 1931. This text marked the favour for a comprehensive Bill of Rights²⁰² that included positive liberties as anticipatory of the Directive Principles of the 1950 Constitution.

Notwithstanding this ferment inside the Indian National Congress, these proposals found little ground in the legislative activity within the competent institutions. The very many initiatives led between 1928 and 1935 (as the Simon Commission and the Round Table Conferences)²⁰³ generated the *Government of India Act* of 1935, a text that was certainly fundamental insofar as it established an institutional system for India that allowed popular government in Provinces, but that proved insufficient in encountering the demands of the Congress, as the British statute was considered “*wholly unsatisfactory as it has been designed to*

²⁰⁰ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 1, “The Nehru Report”, pp. 59-60.

²⁰¹ Austin, G., *The Indian Constitution: Cornerstone of a Nation*, New Delhi, Oxford University Press, p. 57.

²⁰² The title of the declaration approved in Karachi was, in fact, “*Resolution on Fundamental Rights and Economic and Social Change*”.

²⁰³ For an account of these attempts at fostering a productive dialogue on the reforms for India, see the relevant sections in Keay, R., *India: A History*, London, Macmillan.

perpetuate the subjection of the people of India".²⁰⁴ The Congress pursued its strategy of requesting the convention of a Constituent Assembly and proved successful only with the start of the Second World War, that substantially triggered the nationalist movement. Notwithstanding the existence of offers from the British side since 1940,²⁰⁵ the deadlock was solved only in 1945, with the colonial power starting a path of disengagement from the subcontinent.

Indeed, the essence of the troubles originated from the communal problem that ultimately led to the partition between India and Pakistan. Thus, in these years, the question of constitutional rights lost momentum within the nationalist movement in favour of the framing of solutions to the reallocation of States within the subcontinent. The capital document in this sense is the so called "Sapru Report", the result of the work of a committee that was made public in December 1945 and provided for a pragmatic federal response to the unrest in India, but also for a substantial constitutional scheme on liberties.²⁰⁶ In line with the focus on the communal divisions, Chapter VII of the Sapru Report referred to the problem of discrimination and equality as a cause of such tensions and proposed an outline of rights that could be included in the Constitution of India, namely:

"(a) the liberties of the individual;

(b) the freedom of Press and association;

(c) equality of rights of citizenship of all nationals irrespective of birth, religion, colour, caste or creed;

²⁰⁴ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 1, "Resolution in Provincial Assemblies regarding the Constituent Assembly, 1937", p. 93.

²⁰⁵ With the concession of the so called "August offer" by the Viceroy of India (refused by the Congress) that included the installation of a Constituent Assembly in the post-war period.

²⁰⁶ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 1, "Constitutional Proposals of the Sapru Committee, December 1945", pp. 151-156.

(d) *full religious toleration, including non-interference in religious beliefs, practices and institutions;*

(e) *protection to language and culture of all communities.*"²⁰⁷

It is this very list that constituted the first outline for the elaboration of a complete set of fundamental rights in the future Constitution. Although the absence of a proper right to life is remarkable, this latter is clearly the silent outset of the liberties declined in Chapter VII of the Report.

Finally, preparations for a Constituent Assembly that could delve into all the aspects of the draft of a fundamental text restarted only when it was clear that the communal problem was solved through the partition and the absence of the Muslim League to this project. Thus, the Constituent Assembly started its work on the 9th of December 1946 and nominated a special committee devoted to the issues of fundamental rights – an idea that was brought forward by the Constitutional Adviser of the Congress, B.N. Rau,²⁰⁸ in September 1946. Already in preliminary notes on the future Constitution, B.N. Rau and K.T. Shah²⁰⁹ analysed the most relevant Bills of Rights in modern Constitutions and endeavoured to present a draft that could be used as a guidance for the Constituent Assembly. In particular, Shah enucleated the existence of the right to life as isolated from the right to personal property (a step from the purely liberal tradition that had not been undertaken beforehand) and linked to the principle of equality: "*the most sacred of all such (fundamental) rights, the right to life – its dignity, sanctity and fullness –*

²⁰⁷ Sapru, T.B., *Constitutional Proposals of the Sapru Committee (Sapru Committee Report)*, Bombay, Padma Publication Ltd., 1945, Chapter VII, pp. 215-257.

²⁰⁸ Benegal Narsing Rau (1887-1953) was the jurist that helped drafting both the Constitutions of Burma and of India. In 1949 he was made Permanent Representative of India to the United Nations.

²⁰⁹ K.T. Shah, a member of the Constituent Assembly from Bihar, former member of the Congress Expert Committee, was the later founder of the United Trade Union Congress in 1949. He had been involved in institutional matters since the early 1930s, as he attended the Round Table Conference.

is not absolute and unconditional. For the same right of every individual imposes an equal obligation of all to respect it for all its fellows."²¹⁰

Following these suggestions, the Constituent Assembly nominated an Advisory Committee on Fundamental Rights,²¹¹ that subsequently elected five additional subcommittees, including one particularly focused on fundamental rights. This subcommittee, analysing the question of liberties through various drafts, presented its conclusions to the Advisory Committee in April 1947. The peculiar structure of the Indian Constitution, separating justiciable and non-justiciable rights, was discussed and approved in this very subcommittee. Indeed, as the matter of including a Bill of Rights in the Constitution was deemed surpassed by the obvious need of providing fundamental rules for the protection of the life of the citizens and for its enhancement, the manner through which achieving such list of fundamental rights was still a point in the agenda. Moreover, the existence of a right to life to be singled out as a cornerstone of the constitutional foundation was still not evident in the debate surrounding these issues.

Hence, several drafts were put before the subcommittee by some of its members. While the common feature of all these documents lies in the relevance of access to justice as a means of rendering valid the rights to be constitutionally enshrined, they differ in "strategic" considerations. The draft presented by K.M. Munshi,²¹² while stressing the absolute necessity of the enforceability of rights and the requisite of speedy remedies through the instrument of *writs*, bypassed the existence of a pure right to life in favour of long and detailed provisions on equality and citizenship – right to life being part of a list of "rights to freedom" (Article 5 of the draft) that encompass freedom of opinion, of assembly and the *habeas corpus*. In his draft, Munshi devoted several articles to second generation rights, but did not address the distinction between

²¹⁰ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, "Preliminary Notes on Fundamental Rights, September-December 1946", p. 48.

²¹¹ That met for the first time on the 27th of February 1947.

²¹² Kanaiyalal Maneklal Munshi (1887-1971) was an active participant in the Indian National Congress and a later Governor of Uttar Pradesh.

rights and directive principles, considering all rights within the scope of justiciability and thus apparently granting the right to constitutional remedies for all liberties.²¹³

While another draft elaborated by Harnam Singh²¹⁴ was less complete and avoided the matter of enforceability of fundamental rights,²¹⁵ the most accomplished elaboration was delivered by Bhimrao Ambedkar,²¹⁶ the father of the Indian Constitution, that presented a memorandum and a list of articles based on macro-categories. Indeed, Ambedkar managed to resolve in the first articles of the tentative Indian Constitution both the matters of human rights and territorial division, as the latter encompassed the question of minority rights. While presenting the questions of Indian States and the Union and of the representation in the State bodies as initial and final clauses, Ambedkar treated the issue of proper fundamental rights in Article II, Section I, of its draft. Here, the constitutionalist detailed a list of rights focused on equality and citizenship. Right to life was dealt with as a right to security and to protection against detention in paragraph 10 of the Section, in a row of provisions that encompassed different aspects of freedoms. To counterbalance the restricted character of the proper “Bill of Rights”, the relevant part of the project presented by Ambedkar was the section on remedies (Article II, Section II), providing for a Supreme Court endowed with the power of issuing prerogative *writs* and for a series of duties upon the State recalling socialist echoes – from the nationalisation of key industries to the organisation of agricultural

²¹³ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, Munshi's Note and Draft Articles on Fundamental Rights, March 17, 1947”, pp. 69-80.

²¹⁴ Harnam Singh was a member of the Constituent Assembly from Punjab.

²¹⁵ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, Harnam Singh's Draft on Fundamental Rights, March 18, 1947”, pp. 81-84.

²¹⁶ Bhimrao Ramji Ambedkar (1891-1956) is considered the father of the Indian Constitution. Coming from a *dalit* background, he was the first Law Minister of independent India.

activities – a proposal that, in the words of its drafter, “marks a departure from the existing constitutions”.²¹⁷

Facing this scenario, the sub-committee discussed the different proposals with the aim of focussing on the main points of a Bill of Rights with clear ideas. In fact, if there was consensus on the idea of providing a machinery for enforcing rights – through the identification of an independent and superior court empowered to uphold fundamental rights if infringements occurred – the debate on the list of justiciable rights was still open. In the course of the discussions, the question of the right to life was initially deferred, as a logical place within the draft could not be found, and then represented as clause 4 in Article V: “No person shall be deprived of his life, liberty and property without due process of law.”²¹⁸ Subsequently, the matter of the enforceability of rights was resolved in a double direction: on the one hand, Article XIII of the draft presented the right of access to the Supreme Court for the enforcement of rights through prerogative writs;²¹⁹ on the other hand, the subcommittee decided in favour of a list of “Directive Principles of Social Policy” to be included in Article XIV of the draft. This list contained guiding rules devised for legislating and governing and deprived of the possibility to be enforced by courts.²²⁰

Thus, the Sub-Committee presented the report to the Advisory Committee on the 3rd of April 1947, with a project of articles that

²¹⁷ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, Ambedkar's Memorandum and Draft Articles on the Rights of States and Minorities, March 24, 1947”, pp. 84-114.

²¹⁸ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, March 26, 1947”, p. 124.

²¹⁹ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, March 29, 1947”, pp. 132-133.

²²⁰ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, March 30, 1947”, pp. 135-136. Among those Directive Principles, the sub-committee also selected the right to health.

distinguished between justiciable and non-justiciable rights in separate chapters: the right to life was here provided for as one of the rights to freedom, in a classical liberal vision that comprehended in the same notion the protection of life and property, as adapted from Amendment V to the Constitution of the United States.²²¹ As noted by B.N. Rau, the effect of this right, coupled with the provision granting access to the Supreme Court for the protection of fundamental rights,²²² would result in an inflation of cases before the apex court, as the general clause of due process of law would entail litigation in various fields not covered by specific provisions.²²³ The Sub-Committee finally approved the text on the 16th of April 1947, outlining the derivation of the tentative Bill of Rights from the American and Irish experiences while keeping “*in view the complexity of Indian conditions and the peculiarities of the Indian situation*”.²²⁴

The report of the Sub-Committee was further discussed by the Advisory Committee on the 21st-22nd of April. Within this body, questions on the enforceability of rights and on the breadth of the right to life arose too. Clause 12 of the Draft Article, on the right to life, liberty and property, was the object of a joint scrutiny with Clause 11, on the “right to security”. The Advisory Committee decided to delete the latter, deeming Clause 12 (“*No person shall be deprived of his life, liberty and property without due process of law*”) sufficient for protecting fundamental rights. What is relevant in the debate within this body is the early acknowledgement of the potential open nature of the Article. Through an analysis of American constitutional history, the members of the Advisory Committee admitted how a plain clause on due process of law could lead to a comprehensive interpretation “*in the direction of*

²²¹ Article 12 of the Draft Articles approved on the 16th of April 1947.

²²² Article 30 of the Draft Articles approved on the 16th of April 1947.

²²³ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, Note by the Constitutional Adviser (B.N. Rau) on the effect of some of the proposed clauses”, p. 151.

²²⁴ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, “Sub-Committee on Fundamental Rights, Report of the Sub-Committee on Fundamental Rights, April 16, 1947”, p. 169.

social utility".²²⁵ Moreover, questions concerning the scope of due process and the possible intrusive behaviour of the three powers – the legislative and the executive for possible abuse of power and deprivation of liberty, the judiciary for broad interpretation of the norm – led to the separation of the property clause from the part on life and liberty.²²⁶

The Advisory Committee thus presented to the Constituent Assembly an Interim Report that contained the right to life in its Clause 9 as a justiciable fundamental right.²²⁷ On the 29th of April, the Constituent Assembly undertook the study of this draft report clause by clause: on the matter of the right to life, the text adopted the day after, without substantial debate, read:

"No person shall be deprived of his life, or liberty, without due process of law, nor shall person be denied the equal treatment of the laws within the territories of the Union.

*Provided that nothing herein contained shall detract from the powers of the Union Legislature in respect of foreigners."*²²⁸

After the approval of the interim report on fundamental rights and the termination of the work of all the Sub-Committees, the Constituent Assembly ordered the Constitutional Adviser to prepare a draft Constitution, that was eventually delivered to a Drafting Committee on the 27th of October 1947, with a reduced membership (only seven members) and the Chairmanship attributed to Ambedkar. The provision on the protection of life and liberty appeared in the newly presented draft as Article 16, with discussions focussing on the definition of liberty as "personal liberty", in order to prevent

²²⁵ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, "Advisory Committee Proceedings, April 21-22, 1947", p. 241.

²²⁶ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, "Advisory Committee Proceedings, April 21-22, 1947", pp. 245-247.

²²⁷ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 2, "Advisory Committee Report on Fundamental Rights", p. 301.

²²⁸ Parliament of India, *Constituent Assembly Debates*, Volume III, "Interim Report on Fundamental Rights - continued", Report of the 30th of April 1947.

exceedingly wide judicial constructions.²²⁹ The final Draft Constitution reported a formulation, in its Article 15, that varied from what had been proposed earlier, inasmuch as it characterised liberty as personal (in order to curtail interpretations that could encompass other freedoms) and specified due process as “*procedure established by law*”.²³⁰ The Drafting Committee further confirmed the presence of a detailed norm on constitutional remedies (Article 25, later approved by the Constituent Assembly as Article 32) and the separation between Fundamental Rights and Directive Principles of State Policy.

The Draft Constitution was presented to the Constituent Assembly on the 26th of February 1948. Within the Drafting Committee, K.M. Munshi later insisted for the modification of the wording on due process, but no change was made at this stage.²³¹ Finally, the text was introduced in the Constituent Assembly by Ambedkar on the 4th of November 1948. Through a detailed allocution, the father of the Indian Constitution acknowledged the difficulties of the task of the Drafting Committee in elaborating a Bill of Rights for the newly independent nation. Though, by drawing a parallel with the American experience, Ambedkar defended the peculiarity of the Draft Constitution – its length and detail for describing rights – and the novelty of inserting Directive Principles, provisions that do not possess binding force but are characteristic of the form of State of India, opting for a social vision that could uphold the challenges of eradicating poverty and sustaining a fair development, if read in contemporary terms.²³²

²²⁹ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 3, “Minutes of the Meetings of the Drafting Committee, October 31, 1947”, pp. 328-329.

²³⁰ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 3, “Draft Constitution prepared by the Drafting Committee”, p. 523.

²³¹ Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 4, “Comments and Suggestions on the Draft Constitution, March 23, 1948”, p. 15.

²³² Shiva Rao, B., *The Framing of India's Constitution – Select Documents, op.cit.*, Volume 4, “Introduction of Draft Constitution in the Assembly”, pp. 432-433.

The matter of the right to life was again in the agenda of the Constituent Assembly on the 6th of December 1948. The wording that was disputed in the Drafting Committee, *“No person shall be deprived of his life or liberty without due process of law”*, gained momentum again as it was considered to guarantee an enhanced protection of fundamental rights by the Courts. Notwithstanding this debate, the relevant point to be noted is the acknowledgement that Article 15 (then Article 21 of the Constitution) was *“the most fundamental of the Fundamental Rights in this Chapter, because it is the right which relates to life and personal liberty without which all other rights will be meaningless”*.²³³ The question was resumed a week later, with a speech delivered by Ambedkar himself that weighted the pros and cons of the introduction of due process in the clause, as *“the introduction of the phrase”* brought to the forefront the issue *“whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles”*.²³⁴ The proposed amendments were then negated and the text was finally adopted with the formulation: *“No person shall be deprived of his life or personal liberty except according to procedure established by law”*.

The approval of Article 21 as a key provision in the Constitution was thus met with a certain reserve on the part of the members of the Assembly. Notwithstanding the caution demonstrated by the constituent body in formulating such an important right, the role of this provision in the jurisprudence of the Supreme Court would prove that in spite of the literal expression, the right to life in the Indian legal system had to be interpreted along with the spirit of the many provisions in the fundamental text that allowed a positive intervention from the State. Indeed, if the Directive Principles were adopted but welcomed by severe criticism from those who wished to make those provisions justiciable, the Constituent Assembly accepted the

²³³ Parliament of India, *Constituent Assembly Debates*, Volume VII, Report of the 6th of December 1948, Part II.

²³⁴ Parliament of India, *Constituent Assembly Debates*, Volume VII, Report of the 13th of December 1948, Part I.

orientation proposed by the Drafting Committee but still managed to introduce new provisions in the list of Principles.

One of these provisions, related to agricultural activities, comes to the forefront for the analysis of environmental rights, as it proved to be a basis for the expansion of constitutional protection also to the environment. The provision is contained in Article 38-A, that was farther approved as Article 48 of the Constitution, on the steps to be taken for preventing cow slaughter and for organising agriculture. Upon the last discussion of this Article, that dealt with both economic and religious issues, the text approved read: *"The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle"*.²³⁵ Here, it is noteworthy the attention driven to the issue of protection, that would pave the way for the insertion of environmental rights in the Constitution – indeed, the Forty-Second Amendment would later introduce constitutionally entrenched environmental provisions as Article 48A.

The debates within the Constituent Assembly show how the issue of rights was crucial in reshaping the form of State of the new Indian democracy. For the present analysis, it should be noted how the constituent fathers focused on three aspects of the protection of human rights. First of all, the issue of access to justice was tackled consistently through the introduction of a machinery for protecting rights – sanctioned in Articles 32 and 226 of the Constitution – that allowed a person to access directly the highest Courts through the request for prerogative *writs*. Secondly, the distinction between Fundamental Rights and Directive Principles, derived from the Irish Constitution, introduced a scheme according to which the legislation enacted for concretely implementing those Fundamental Rights would have to be answerable to social directions aimed at favouring fairness – thus making Directive Principles, although legally different, substantially binding. Thirdly, the detail in drafting rights, aimed at preventing

²³⁵ Parliament of India, *Constituent Assembly Debates*, Volume XI, Report of the 14th of November 1949.

abuses from the legislative and executive branches, was overtaken in practice by the strength of the Directive Principles, that guided legislative action as well as judicial interpretation, and by the omnipotent role of the Supreme Court, thanks to the device of Article 32. The system created by the Constitution of 1950 thus made possible a vast enterprise of constitutional integration that included environmental rights and protection as primary actors.

c) The introduction of environmental rights

The prevision of Directive Principles in the Constitution, notwithstanding their Irish origin, could be welcomed as an acknowledgement of the Indian tradition and of the need of a collective dimension for a series of prerogatives that could not be exercised autonomously. The evolution of Indian jurisprudence, in parallel with the subsequent amendments to the Constitution, confirmed this possible tendency, in opposition with the provision contained in Article 37 of the Constitution, that prevented enforceability for Directive Principles for they imposed positive obligations on the state.

More precisely, the Supreme Court of India did not depart from the obligation arising from Article 37 of the Constitution, but integrated and harmonised in a way that Directive Principles could trace the “scope of action” of Fundamental Rights. This scheme of harmonisation and complementarity proved to be the door through which environmental principles could enter the Indian legal system *à part entière*. This evolution, dating from the 1970s, with the judgments *Golak Nath vs. State of Punjab*²³⁶ and *Kesavananda Bharati vs. State of Kerala*²³⁷ marked the beginning of a more activist role played by the Supreme Court.²³⁸

²³⁶ *Golak Nath vs. State of Punjab*, AIR 1967 SC 1643.

²³⁷ *Kesavananda Bharati vs. State of Kerala*, AIR 1973 SC 1461.

²³⁸ Jain, M.P., *Indian Constitutional Law*, Gurgaon, LexisNexis Butterworths Wadhwa Nagpur, 6th Edition, 2010, p. 1490-1495.

Concurrent to the evolutionary jurisprudence of the Supreme Court, the Forty-Second Amendment to the Constitution, approved in 1976 during the emergency period,²³⁹ responded to the quest for regulating environmental protection with two provisions on this issue. On the one hand, Article 48, on agricultural organisation, was followed by a new Article 48-A as a Directive Principle on the environment that read: *“Protection and improvement of environment and safeguarding of forests and wild life. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”* On the other hand, the Parliament approved a new Section of the Constitution devoted to “Fundamental Duties”, an addition that reconciled the Indian Constitution with the tradition of *dharma* that was evoked above. While the insertion of duties was deemed unusual in a text inspired by liberal constitutionalism and was considered as a feature of socialist constitutions, these provisions added value inasmuch as from 1976 the implementation of duties through legislative action could not be declared conflicting with Fundamental Rights unless the divergence between the two categories would have proven patent.²⁴⁰

Among the duties provided for by the Forty-Second Amendment,²⁴¹ Article 51A(g) reported in the Constitution the international discourse

²³⁹ The emergency period, lasting from June 1975 to March 1977, had been proclaimed by the Government of Indira Gandhi on the ground of threats to Indian security, curtailing civil and political liberties. Amendments to the Constitution were passed by the Parliament and later challenged before the Supreme Court. For an account of the judicial vicissitudes of the Amendments, see Krishnaswamy, S., *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, New Delhi, Oxford University Press, 2009.

²⁴⁰ Singh, M.P., V.N. Shukla's *Constitution of India*, Lucknow, Eastern Book Company, 11th Edition, 2008, pp. 361-362.

²⁴¹ Constitution of India, Article 51-A. Fundamental duties.

“It shall be the duty of every citizen of India

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

introduced in Stockholm by inserting the ecological dimension of environmental protection. Indeed, now a duty “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures” was placed not only as a driving principle for the state, but also for its citizens. Although in Parliament the debate on the wording of the provisions had been aimed at enriching Article 48A with details on the object of the term “environment”, as to include the conservation and development of natural resources and the express mention of environmental pollution as a result to avoid, the texts were defended by the Government by stating that the essential nature of the wording was sufficient for Directive Principles and that the draft already encompassed those aspects highlighted in the debate.²⁴²

The approval of the Forty-Second Amendment thus opened the path for a truly substantive environmental jurisprudence that relied on the combined reading of Article 21 with the clauses herewith presented. The joint reading of the classical definition of the rule of law with the provisions claiming environmental protection as a constitutional value made possible for the Supreme Court to use Article 21 as a tool for enhancing the welfare of Indian citizens.²⁴³ The apex tribunal fundamentally introduced in the Constitution three additional rights: the right to a wholesome and safe environment, the right to livelihood and a right to “environmental equality” or to ecological balance that

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- (d) to defend the country and render national service when called upon to do so;
 - (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
 - (f) to value and preserve the rich heritage of our composite culture;
 - (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
 - (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
 - (i) to safeguard public property and to abjure violence;
 - (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.”

²⁴² Divan S., Rosencranz, A., *op.cit.*, pp. 44-45.

²⁴³ Jain, M.P., *op.cit.*, pp. 1241-1245.

bears resemblances with the principle of inter- and intra-generational equity (although the latter could be contested because of the absence of direct reference to Article 21 and considered as an additional guiding principle).²⁴⁴ The separation made between these rights responds to a hermeneutical need to distinguish three different areas of “action” of environmental protection, namely the concerns on health (paralleled by the idea of safety), the more specific scope destined to the exercise of the right to life (“livelihood”) and the idea of equality and equal enjoyment of the environment that is couched in the concept of ecological balance.

Thus, the tripartite classification hereby proposed aims at assessing in broad lines the *opus* of the Supreme Court: although the categorisation of environmental rights can slightly vary,²⁴⁵ the relevant argument to be stressed is that the expansion of Article 21 as to encompass an “environmental rule of law” was made following several steps that allowed a broader interpretation of the notion of personal liberty. While in the judgment *Maneka Gandhi vs. Union of India*²⁴⁶ the Supreme Court assumed the necessity of a test of reason and justice for restricting liberties, thus upholding the principles of natural justice,²⁴⁷ the apex tribunal enlarged the scope of personal liberties by interpreting the

²⁴⁴ Divan S., Rosencranz, A., *op.cit.*, pp. 49-54.

²⁴⁵ Divan S., Rosencranz, A., *op.cit.*, distinguish between the right to a wholesome environment, the right to livelihood and the right to equality; Nomani, for instance, draws a line between the right to ecological balance, the right to a decent and qualitative environment, the right to environmental safety and the right to health and the environment. See Normani, Z.M., *The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective*, in *Asia Pacific Journal of Environmental Law*, Vol. 5, Issue 2, 2000, pp. 113-134.

²⁴⁶ *Maneka Gandhi vs. Union of India*, AIR 1978, SC 597.

²⁴⁷ In this judgment, the Court stated that “the natural law rights were meant to be converted into our constitutionally recognised fundamental rights so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our constitutional law. A divorce between natural law and our constitutional law would be disastrous.”

right to life as implying a right to environmental protection being inextricably linked to the enjoyment of a decent life.

Concerning the **right to an ecological balance**, the first assumptions on the existence of such right were delivered by the Court without reference to Article 21, but only relying on the environmental clauses inserted in 1976 as in the famous case *Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh*,²⁴⁸ also known as the *Dehradun Quarrying* case.²⁴⁹ While the Supreme Court comprehensively analysed the facts leading to the filing of Writ Petitions²⁵⁰ – the alleged illegal limestone mining activities carried out in forest areas – it eventually referred, as *obiter dicta*, to Articles 48A and 51A as the provisions guaranteeing environmental protection, as a duty for both institutions and citizens.²⁵¹ Indeed, the Court acknowledged the existence of a cultural tradition protecting the environment,²⁵² in light with the interpretation of the Indian legal system that has been previously presented, and the damages provoked to life and property by the modification of the ecological balance.²⁵³

²⁴⁸ *Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh*, AIR 1988 SC 2187.

²⁴⁹ Concerning environmental rights, the analysis in this Chapter will only rely on several landmark cases, as a more detailed study on the role of the judiciary in defining environmental protection and sustainable development will be the object of Chapter III.

²⁵⁰ Namely, W.P. (Civil) Nos. 8209 and 8821 of 1983.

²⁵¹ *Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh*: “the problem of forest preservation and protection was no more to be separated from the life style of tribals. The approach required a shift from the dependence on law and executive implementation to dependence on the conscious and voluntary participation of the masses.”

²⁵² *Ibidem*: “Our ancestors knew that trees were friends of mankind and forests were necessary for human existence and civilization to thrive. (...) That is why there is copious reference to forests in the Vedas and the ancient literature of ours. In ancient times trees were worshiped as gods and prayers for up-keep of forests were offered to the Divine.”

²⁵³ *Ibidem*: “The treeless expanse of land provides an environment least conducive to healthy living. Tree leaves recharge the atmosphere with life giving oxygen, take away

The relevance of ecological balance derived from the Forty-Second Amendment was again stressed by the Supreme Court in *Sachidananda Pandey vs. State Of West Bengal & Ors.*,²⁵⁴ or the *Calcutta Zoological Garden* case. On the possibility of granting land that was possessed by the zoological garden of the city to a private company that ought to build tourism facilities that would disturb the ecology, the Court confirmed the active value of Articles 48A and 51A: "*Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Art. 48-A of the Constitution, the Directive Principle which enjoins that 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country,' and Art. 51-A(g) which proclaims it to be the fundamental duty of every citizen of India 'to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.'*" When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority." Although the case was dismissed, as the tribunal considered that the West Bengal Government and the Taj Group (the private company that bought the land) acted *bona fide* and respecting the prescribed limits, this judgment was an occasion for confirming the necessity of an "ecological test" for economic activities that could alter the ecological balance.

The statement of concerns on the ecological balance was again delivered by the Court in 1996, with the case *State of Himachal Pradesh vs. Ganesh Wood Products & Ors.*²⁵⁵ Here, the installation of a number of small-scale katha factories was studied in light of the national and international evolution of environmental law. Indeed, the Court aptly

excess carbondioxide and transmit moisture to the atmosphere by way of transpiration. (...) In a barren, unprotected surface the rain drops hit the soil directly and the water flows torrentially (... resulting) in disastrous floods in lower areas causing damage to life and property."

²⁵⁴ *Sachidananda Pandey vs. State Of West Bengal & Ors.*, AIR 1987 SC 1109.

²⁵⁵ *State of Himachal Pradesh vs. Ganesh Wood Products & Ors.*, AIR 1996 SC 149.

delved into the kernel of the concept of ecological balance²⁵⁶ and considered that institutions and private citizens shall be bound by the imperatives of economically and ecologically sustainable activities, as Article 51A hinted,²⁵⁷ and that the imperatives of intergenerational equity must be fulfilled.²⁵⁸ Thus, the Supreme Court upheld the principle of intergenerational equity and barred the construction of additional katha factories.²⁵⁹

According to the constitutional interpretation that has been analysed so far, it could be argued that the absence of reference to Article 21 of the Constitution impinges on the definition of the right to an ecological balance as such. However, notwithstanding the critical view on the nature of the notion, it is evident how the principle entered the Indian jurisprudence and the constitutional interpretation of several rights, including the right to life as such.²⁶⁰

²⁵⁶ *Ibidem*: “The considerations of environment and ecology and preservation of forest wealth are absolutely relevant considerations which the government must keep in mind while devising its policies and programmes.”

²⁵⁷ *Ibidem*: “Suffice to refer to Article 51-A of our Constitution which makes it a duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

²⁵⁸ *Ibidem*: “This digression was necessary to put in proper perspective the obligation of the State and the significance of the concept of “sustainable development” and “inter-generational equity” vis-a-vis the legal submissions made on the basis of principles of natural justice, estoppel and so on.”

²⁵⁹ *Ibidem*: “so long as there is no commitment on the part of the Government to supply khair wood to the proposed factories, there is no harm in approving any and every proposal that comes before it. (...) It is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. Afterall, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.”

²⁶⁰ This view can also be found in the Indian jurisprudence that followed the *Dehradun Quarrying case*. In *T. Damodhar Rao And Ors. vs. The Special Officer, Municipal Corporation of Hyderabad*, see also *infra*, the High Court of Andhra Pradesh held that “In *R. L. & E. Kendra, Dehradun v. State of U. P.*, the Supreme Court in an application under Art. 32 has ordered the closure of some of these quarries

If the principle of ecological balance as a right could be contested, this is not the case of the two rights abovementioned. Indeed, the right to a wholesome and safe environment and the right to livelihood (or to a decent life) are indisputably derived by the three provisions so far analysed and constitute a specification of the right to life. Concerning the **right to a wholesome environment**, the first comprehensive reference to the relevant articles of the Constitution was made in the landmark case related to the tragedy of Bhopal, *Charan Lal Sahu Etc. vs. Union of India & Ors.*²⁶¹ While in a previous judgment, *Union Carbide Corporation vs. Union of India*²⁶² - where the appellant questioned the basis on which the Supreme Court quantified the overall settlement as a reasonable sum and the validity of the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Act that contributed to granting a speedy relief to victims²⁶³ - the apex tribunal already upheld the reasons of the victims, in *Charan Lal Sahu* the Court confirmed its views and made reference to the relevant constitutional provisions. Two main ramifications of Article 21 can be outlined: on the one hand, the procedural device of inscribing the right of representation of victims to the Central Government was deemed constitutional as an effective way for ensuring access to justice;²⁶⁴ on the other hand, the

on the ground that their operations were upsetting ecological balance. Although Art. 21 is not referred to in these judgments of the Supreme Court, those judgments can only be understood on the basis that the Supreme Court entertained those environmental complaints under Art. 32 of the Constitution as involving violation of Art. 21's right to life."

²⁶¹ *Charan Lal Sahu Etc. Vs. Union Of India & Ors.*, AIR 1990 SC 613.

²⁶² *Union Carbide Corporation vs. Union of India*, AIR 1990 SC 273.

²⁶³ In particular, Section 3 of the Act guaranteed the substitution of the Central Government to victims in their representation and actions for claims in the case.

²⁶⁴ *Charan Lal Sahu Etc. Vs. Union Of India & Ors.*: "*conceptually and from the jurisprudential point of view, especially in the background of the Preamble to the Constitution of India and the mandate of the Directive Principles, it was possible to authorise the Central Government to take over the claims of the victims to fight against the multinational Corporation in respect of the claims. Because of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. (...)*

express reference to environmental provisions *cum* the right to life as to ensure a right to a wholesome environment: “*In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51-A(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by Clauses 9 and 13 of U.N. Code of conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws.*” Thus, the right to a wholesome environment has been recognised by the Supreme Court as a complex construction that is composed of a double inspiration, international and constitutional, and of a double direction: on one side, the right itself; on the other, the specular duty of the state to uphold and protect such right.

This evolution in the jurisprudence of the Supreme Court, in the wake of such a dramatic event, was announced in previous judgments of State Courts. In particular, the High Court of Andhra Pradesh, in *T. Damodhar Rao And Ors. vs. The Special Officer, Municipal Corporation of Hyderabad*,²⁶⁵ a case dealing with urban planning that limitedly mirrors the *Calcutta Zoological Garden case*,²⁶⁶ made express reference to the “*law of ecology and environment*” as a force impacting on the common law concept of ownership and on its correlated right. Indeed, a right to life that encompass a right to a sound and balanced environment was

“The fact that the provisions of the principles of natural justice have to be complied with, is undisputed. This is well-settled by the various decisions of the Court. The Indian Constitution mandates that clearly, otherwise the Act and the actions would be violative of Article 14 of the Constitution and would also be destructive of Article 19(1)(g) and negate Article 21 of the Constitution by denying a procedure which is just, fair and reasonable.”

²⁶⁵ *T. Damodhar Rao And Ors. vs. The Special Officer, Municipal Corporation of Hyderabad*, AIR 1987 AP 171.

²⁶⁶ *T. Damodar Rao* concerns the change of legal destination of a recreational park into a residential area.

prefigured by the tribunal as a constitutional right arising from Article 21: *"environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of common law theory of individual ownership. (...) It would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Art. 21 of the Constitution."*

Moreover, a similar development was envisaged by the High Court, in a judgment on limestone quarrying that explicitly encompassed all the recent evolutions concerning the constitutional guarantee on the environment. Factually, *Kinkri Devi vs. State of Himachal Pradesh*²⁶⁷ is probably the most accomplished review of environmental rights as constitutionally binding for both authorities and citizens. By recalling the landmark judgment *Rural Litigation and Entitlement Kendra*, the High Court reconstructed the legal theory behind the Stockholm Conference, the Forty-Second Amendment and its links with the right to life, and highlighted the prescription for the state to protect the environment under Article 48A of the Constitution (*"Article 48-A which prescribes that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country"*), its *Drittwirkung* under Article 51A(g) - the value of this principles also in the relations between citizens (*"Part-IVA, which enshrines the Fundamental Duties, provides similarly in Article 51A, Clause (g), that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures"*) and the existence of a right to a sound environment derived from the right to equality and the right to life (*"if (...) the environment and the natural wealth and resources by the adoption of a long-term perspective planning is not heeded (...) there will be (...) a violation of the fundamental rights conferred by Article 14 and 21 of the Constitution"*).

²⁶⁷ *Kinkri Devi vs. State of Himachal Pradesh*, AIR 1988 HP 4.

With this background, the Supreme Court moved to consolidate the existence of proper environmental rights deduced from the catalogue of Fundamental Rights. Indeed, the reading of the constitutional protection of the environment as a human right based on Article 21 of the Constitution and actionable by means of Article 32 was further confirmed in *Chhetriya Pardushan Mukti Sangharsh Samiti vs. State of Uttar Pradesh And Ors.*,²⁶⁸ where the Supreme Court dismissed a petition on alleged environmental pollution but stated that “every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to be taken recourse of Article 32 of the Constitution.” However, deviating from the corpus of judgments of the High Courts, in these cases, the significant development in the jurisprudence is the fact that the apical judiciary only relied on Article 21 as the provision from which the right to a wholesome environment stemmed. Eventually, the derivation of this right found a coherent elaboration based on Article 21 in *Subhash Kumar vs. State of Bihar & Ors.*,²⁶⁹ on the effects of the discharge of industrial effluents in rivers. The construction presented in *Chhetriya Pardushan Mukti* was herewith maintained – while the petition was dismissed – as the Supreme Court confirmed the centrality of Articles 21 and 32 of the Constitution as the key provisions for a substantive protection of human rights, and in particular, for environmental cases, for the right of enjoyment of unpolluted air and water (thus for a sound environment). Indeed, in the words of the Court, “Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental Rights of a citizen. Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the

²⁶⁸ *Chhetriya Pardushan Mukti Sangharsh Samiti vs. State of Uttar Pradesh And Ors.*, AIR 1990 SC 2060.

²⁶⁹ *Subhash Kumar vs. State of Bihar & Ors.*, AIR 1991 SC 420.

Constitution for removing the pollution of water or air which may be detrimental to the quality of life.”

The sanction of the right to a wholesome environment as a fundamental right was accompanied – and, chronologically, preceded – by the elaboration of a third environmental liberty, the **right to livelihood**, as a complementary aspect of the right to life at the crossroad between environmental and social concerns. The right to livelihood was in fact the object of patient scrutiny on the part of the Supreme Court, without immediately referring to Article 21, in several judgments. Criptically, the first sketch of the right could be derived from the landmark *Ratlam Municipality* case,²⁷⁰ where the Supreme Court upheld the reasons for the elaboration of a right to decent life that included an environmental component, although in absence of connection with any of the rights listed in the Constitution and with reference to the action of public institutions.²⁷¹

However, the pivotal decision in establishing a precise right to livelihood was *Olga Tellis & Ors vs. Bombay Municipal Corporation*,²⁷² a case dealing with the displacement of pavement dweller from Bombay, a decision of the local Government that had been challenged in court on

²⁷⁰ For a detailed analysis, see Chapter III.

²⁷¹ *Municipal Council, Ratlam vs. Vardhichand*, AIR 1980, SC 1622, (1980) 4 SCC 162: “Human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. (...) A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.”

The imperative of decency and dignity as part of the right to life under Article 21 was established by the Supreme Court in *Francis Coralie Mullin vs. the Administrator, Union Territory of Delhi*, AIR 1981 SC 746, where – on preventive detention – it held that “the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. (...)the right to life includes the right to live with human dignity and all that goes along with it.”

²⁷² *Olga Tellis & Ors vs. Bombay Municipal Corporation*, AIR 1986 SC 180.

the ground of the violation of Articles 19 and 21 of the Constitution. The Supreme Court upheld this contention by stating that “*if the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation*” and sustained the provision of fair procedures for displacing people from their habitations, a point that would assume relevance with regard to Environmental Impact Assessment procedures.²⁷³ While these cases only dealt with the nucleus of the right to life – namely the deprivation of personal liberty proper – the extension of the right to livelihood to environmental issues found an initial root in *Charan Lal Sahu Etc. Vs. Union Of India & Ors.*, where the right was considered to be part of the constitutionally protected rights.²⁷⁴

The Indian judiciary thus elaborated a “basket” of environmental rights that could adhere to the development of international law and be part of the most central of the Fundamental Rights enshrined in the Constitution, the right to life, that matured from a classic procedural right of the liberal tradition to a full-fledged socially and environmentally consistent right. Although the categorisation among the authors may differ, the insertion of environmental rights in the fabric of the Indian Constitution testify the rapid reception of international principles and their adaptation into the national system, also in connection with the open nature of Article 21 of the Constitution. In addition to constitutional evolution, what is still more impressive in the Indian record is the legislative activity that followed the Stockholm Conference, that contributed to the creation of a truly local branch of environmental law and to remarkable body of jurisprudence on the protection of the environment.

²⁷³ See *infra*, Section II.

²⁷⁴ The submissions for the appellant in the case *Charan Lal Sahu Etc. Vs. Union Of India & Ors.* read: “*The right to life and liberty includes the right to sue for violations of the right, it was urged. The right to life guaranteed by Article 21 must be interpreted to mean all that makes life livable, life in all its fullness. According to counsel, it includes the right to livelihood.*”

II) Legislative strategies for the protection of the environment

After having appraised the constitutional interpretation that endeavoured to include environmental rights in the fundamental charter, the following section will deal with the legislative measures taken by the Parliament of India in the field of environmental protection. The most relevant pieces of legislation – on water, air, forests, wastes and the general management of the environment – will be analysed in order to provide a guidance for the study of the enforcement of the discipline through the judiciary. Although the main piece of legislation in the field is the Environmental Protection Act of 1986, this Act was chronologically preceded by two fundamental single-issue laws, the Water and the Air Act, that provided for a first set of rules and institutions preventing and moderating the adverse impact of economic and human activities on the environment. Thus, while the Constitution provided for the main orientations on environmental issues, the Parliament was now entrusted with the task of setting the rules for the creation of an administrative machinery that could uphold environmental rights and that could guarantee the implementation of a substantial “environmental rule of law”.

a) **Setting the administrative machinery: the Water (Prevention and Control of Pollution) Act of 1974 and the Air (Prevention and Control of Pollution) Act of 1981**

Even anticipating the amendments to the Constitution, the **Water (Prevention and Control of Pollution) Act of 1974**²⁷⁵ was the first of a series of pieces of legislation stemming from the conclusions of the Stockholm Conference and from the perceived urgency by the population for action against pollution.²⁷⁶ As the Constitution of India entrusts the discipline of water in the powers of the States (specifically,

²⁷⁵ Water (Prevention and Control of Pollution) Act, Act No. 6 of 1974, amended by Acts No. 44 and 53 of 1988.

²⁷⁶ Divan S., Rosencranz, A., *op.cit.*, pp. 60-61. The debate on the necessity of legislation on water was already ongoing 10 years before the enactment of the Act.

Entry 17 of List-II, which is the State List), the Water (Prevention and Control of Pollution) Act has been approved by the Parliament thanks to the provisions of Articles 249(1) and 252(1) of the Constitution, that allow the central legislature to enact laws on subjects pertaining to States if a majority of two-thirds of the *Rajya Sabha* or if State legislatures decide so.²⁷⁷ The Water Act basically introduced two innovations in the environmental discipline of India: on the one hand, the establishment of Pollution Control Boards at the State level (with the addition of a Central Board charged with the coordination of the regional boards and the regulatory powers of those latter for Union Territories); on the other hand, the existence of limitations to economic activities by setting environmental standards and by envisioning penalties for those avoiding implementation of these standards.

First of all, it is capital to define the scope of the act as far as the object is concerned. While in the Constitution the term “pollution” was not included, as the provisions of the Forty-Second Amendment contained only the express reference to environmental protection, pollution is defined in Section 2(e) of the Water Act as “*such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms*”. The range of activities concerning water pollution is thus very broad, as it encompass legitimates uses, domestic and industrial. The key element in the definition of pollution is that of “nuisance”, relying the Water Act to the concept of public nuisance as expressed in Section 268 of the Indian Penal Code. Moreover, the definition of water is specified in Section 2(j) as to include rivers, water courses, inland water, sub-terranean and sea waters (the latter if specified through notification in the Official Gazette by State Governments).

As anticipated, the main innovation of the Water Act resides in the constitution of boards for the prevention and the control of pollution

²⁷⁷ In 1974, 12 States had approved resolutions in this sense.

(here after, Pollution Control Boards or PCB), at the central and local levels. On the one hand, Section 3 empowers the Government to appoint a Central Pollution Control Board with a varied composition as to include experts in environmental protection, members representing the Government, members of the State Boards, representatives of private interests (agriculture, fishery, industry) and of State-owned companies. On the other hand, section 4 provides for the institution of State Boards, with a composition reflecting that of the Central Boards as far as expertise and interests are concerned (with State officials instead of Government officials). At the organisational level, the Boards have to meet at least every three months and, in case of urgency, when the Chairman deems opportune to convene the Board (Section 8). Moreover, the division of tasks within the Boards is characterised by a certain degree of flexibility. External persons can be associated to the work of the PCB for particular purposes on a temporary basis (Section 10) and committees within a Board can be constituted not only by members of the PCB, but also by external persons whose contribution is deemed necessary.

Concerning the functions of a Pollution Control Board, Sections 16 to 18 of the Water Act are very detailed. For the Central Board, its main purpose is the promotion of the *"cleanliness of streams and wells"* (Section 16). To achieve this goal, the CPCB has advisory, technical, coordination and residual functions. First of all, the CPCB is endowed with the function of advising the Central Government on water pollution. Then, it has the charge of providing assistance to State Boards, to promote research on matters concerning water pollution and its prevention or abatement and to collect data so as to prepare guides on treatment of waters. A third function is basically organisational, as the CPCB has to coordinate State Boards and resolve disputes among them and to devise a national plan for the prevention and the control of water pollution. Finally, the residual function of the Central Board lies in the performance of functions proper to a State Board, should the latter have defaulted in its functions and should an emergency threatening the public interest have arisen.²⁷⁸

²⁷⁸ Section 18(2) of the Water Act, as amended in 1988.

In parallel with the functions of the Central Board, State Boards also have advisory functions towards State Government in matters related to water pollution (Section 17). In contrast with the Central Board – being the closest institution to the citizen level – State Boards possess function more directly related to the actual protection of the environment. A panoply of functions are thus entrusted to these institution: the planning of programmes for the prevention and control of pollution in the State; the initiation of investigations and researches on water pollution; the power to inspect sewage and trade effluents and to review plans for the treatment of waters; the setting of standards for the quality of waters and the elaboration of methods for treatment of effluents, also in agriculture and on land. Moreover, the capital instruments of a State Board are the possibility of disposing orders for the discharge of wastes into waters and for requiring people to adopt new systems for sewage and trade effluents and to advise the State Government on the location of plants whose activities are likely to pollute waters.

Following the functions attributed by the Act, State Boards are endowed with several pervasive powers, namely of information, of inspection, of restriction and of emergency. First of all, the Boards (and, consequently, its officers) are empowered to conduct surveys of areas concerned by water pollution (actually or potentially) and to measure the flow of water, to issue directions to people in order to deliver information on waters abstracted and on the working of system of treatment of plants (Section 20). In connection with this power of survey, the officers have to follow a specific procedure set in Section 21 of the Act. The requirements to take samples (also with a view to use them as evidence in legal proceedings) are designed as follows: the officer must notify the person in charge of the plant (or an agent) and take the sample in presence of him/her;²⁷⁹ then, the sample must be divided into two parts and sent to a laboratory recognised by the State Board; finally (Section 22), the report of the laboratory should be sent to both the Board and the occupier (or his/her agent). Apart from this

²⁷⁹ Although sub-section 4 provides also for the case of absence of the occupier of or his/her agent.

power of mere information, a second prerogative concerns the entry and inspection of plants. Officers of a State Board have a right to enter any place to fulfil the functions of the Board, in order to assess the compliance to the rules set in the Water Act and examine whether offences have been or are about to be committed (Section 23).

In addition to this, a third category of powers – certainly the most pervasive – has been here defined as “powers of restriction”. In fact, the State Board has the right to prohibit the entrance of persons in areas (streams) for disposal of pollution (Section 24, with several exceptions concerning land rights and natural occurrences), to establish industries, operations, processes or treatment systems that are “*likely to discharge sewage or trade effluents into a stream*” (Section 25), to bring into use new devices for the discharge of sewage or to begin to make new discharges. In order to be allowed to establish operations or to pursue them, the occupier must make an application for consent to the State Board (Section 25(2-3)). This application is taken in charge by the PCB, that instructs an enquiry ending with the issuance of an order granting plain consent or consent bound by restrictions on the points of discharge or on the nature, composition and volume of such discharge.²⁸⁰ Finally, in order to operationalise the procedure in later time, the Water Act specifically confers to the State Boards the power of refusing or withdrawing the consent (Section 27), while it endows the occupier to appellate the order to a different authority from the PCB²⁸¹ and it also grants the State Government a power of revision of the orders issued by the Board. Furthermore, a corollary of these measures followed with the amendment of 1988, granting the PCB the power not only of restricting, but also of giving directions for closing, prohibiting or regulating industries, operations and processes and of stopping or regulating the supply of primary services such as water and electricity

²⁸⁰ For plants built before the entry into force of the Water Act, Section 26 provides for the necessity of a grant of consent, whose procedure is set by notification in the Official Gazette.

²⁸¹ A provision that has to be read together with Section 58 of the Act, barring jurisdiction to civil courts. Only criminal courts and writ courts are then empowered to deal with such matters.

(Section 33A). Finally, as a conclusive tool, emergency powers are also part of the “package” of the prevention and control of water pollution. On the one hand, State Boards are empowered to execute necessary measures that have not been undertaken by any person being granted consent for operation with imposed conditions (Section 30). On the other hand, a PCB is allowed to carry out operations apt to remove, remedy or mitigate pollution in case of emergency (Section 31) and to make application to courts for restraining pollution (Section 32).

The exhaustive nature of the Water Act deploys its effects through the sanction mechanism provided for in Sections 41 to 49. The failure to comply with the directions issued by the PCB for lesser offences (linked to the power of information) is punishable with imprisonment (up to a term of three months) or with a fine, while the penalty for offences linked to the non-compliance of an order or direction – and to the contravention of provisions on the necessity of consent – amounts to a term between eighteen months and six years (Sections 41-42 and 43-44). Moreover, when companies and Government Departments too are concerned with offences, the person being in charge of them is deemed to be guilty of the acts committed (Sections 47-48).

All things considered, the Water Act of 1974 constitutes a revolutionary tool for preserving and improving the quality of the environment. As exposed beforehand, the statute indicates a broad sphere of application as far as water and activities connected to water pollution are concerned. Moreover, it establishes the institution of specific Boards endowed with substantial powers, including the possibility to close industrial plants, and provides for a mechanism of sanctions that effectively closes the system.

Reflecting the comprehensive discipline for matters concerning water pollution, the Indian Parliament approved similar provision for air pollution seven years later. In fact, the **Air (Prevention and Control of Pollution) Act of 1981**²⁸² follows the path undertaken from the Stockholm Declaration for the “*preservation of natural resources of the*

²⁸² Air (Prevention and Control of Pollution) Act, Act No. 14 of 1981, amended by Act No. 47 of 1987.

earth which (...) include the preservation of the quality of air and control of air pollution", as stated in the Preamble of the Act. In opposition to the Water Act, the Air Act extends its effects to the entire territory of India, as it has been adopted on the basis of Article 253 of the Constitution of India (namely, the power of the Parliament to legislate for the implementation of international agreements).

The Air Act follows the same pattern of the Water Act and resembles it in most features. In principle, the law defines air pollution as *"any solid, liquid or gaseous substance (including noise) present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment"* (Section 2(a)) and emission as *"any solid or liquid or gaseous substance coming out of any chimney, duct or flue or any other outlet"* (Section 2(j)). Here too, the statute aims at encompassing several situations causing pollution, from everyday individual matters (such as automotive pollution) to emissions provoked by industrial plants. Moreover, the express mention of noise within the notion of air pollution enlarges the scope of the Act also to human emissions caused by activities different from industrial operations (including religious activities, protected by Article 25 of the Constitution – on the freedom of conscience – but subject to the Noise Pollution (Regulation and Control) Rules of 2000).²⁸³

The institution charged with the task of monitoring air pollution and of administering the rules provided for in the Act is a Pollution Control Board. As for water pollution, there is a division between a Central Pollution Control Board and several State Boards. According to Section 3, the Central Pollution Control Board is the same body in charge under the Water Act of 1974. Thus, the appointment of members follows the same rules and the functions of the Board trace those of the previous Act, but with an additional focus on air pollution (Section 16). As far as State Boards are concerned, in the States where a Water Pollution Control Board already existed, the functions and powers granted by the

²⁸³ The question of noise emission is also part of the jurisprudence of the National Green Tribunal, several cases concerning the right to profess a religion being brought before the environmental jurisdiction because of the infringement of the Rules of 2000.

Air Act are extended to that body (Section 4). Where a PCB is not constituted, the Air Act provides for the establishment of a State Board through the appointment of members comprising the same categories *ex* Section 4 of the Water Act (Section 5). For matters of organisation, the provisions of the Air Act are identical to those of the Act of 1974 as for meetings, committees and external participants.

Functions and powers too are designed with a view to homogenise the discipline of water and air pollution. The Central Board has the general task of improving the quality of air and of preventing, controlling and abating air pollution in India (Section 16(1)). The main purpose is then declined in the different schemes already set for water pollution – planning, inspecting, coordinating and setting standards for pollution. As far as State Boards are concerned, the functions enumerated in Section 17 range from the typical advisory competences (to State Governments) to the inspection of plants, of pollution control areas and to the establishment of standards for the quality of air to be enforced.

The provisions on powers are nevertheless slightly more detailed, as air pollution encompasses a series of human activities distinct from the discipline of water pollution. First of all, Section 19 empowers States to declare air pollution control areas, where only the use of approved fuels is allowed. Then, the following Section endows States with the power to give instructions for respecting standards for automotive emissions, through registration of motor vehicles by the concerned authority. Moreover, the classical power of restriction has been maintained. Some categories of industrial plants are bound to apply for consent in order to be established and operate in an air pollution control area (Section 21). Following the grant of consent, the occupier has to comply with several conditions – such as the installation of control equipment and the erection of chimneys, if necessary. Finally, the other powers of PCB under the Water Act are maintained: the power to make applications to court; the power of obtaining information, of entry and of inspection; the possibility of appeals and the power to give directions (including the closure, prohibition or regulation of plants and the stoppage of the supply of services, Sections 22A to 26 and Sections 31-31A).

Finally, the Air Act sets a system of penalties that resembles the mechanism of sanctions provided for in the Water Act. For lesser

offences – related to the power to obtain information – the punishment is set to a maximum of three months with a fine. For offences related to Sections 21, 22 and 31A – compliance with the restrictions set by the PCB, emissions in excess of the standards, non-compliance with the directions given by the Board – the punishment ranges from eighteen months to six years (Sections 37-38). Here too, the bar of jurisdiction for civil courts is established and a difference is set for companies and Government Departments as far as accountability is concerned.

As these two major pieces of legislation show, the Parliament of India endeavoured to find a balance between the reasons for economic development and the constitutional tradition of the right to life as innovated by means of the Forty-Second Amendment and by the international discourse on the right to a safe environment. What emerges is a legislation that provides for limits to economic activities and for enforcement of standards by the application of sanctions, but through a piece-meal approach. The role of these provisions has been central for environmental protection, as main litigations arose from the non-application of these measures.²⁸⁴

In addition to this, the protection of the environment also lies in the existence of traditions on the sanctity of the land and of natural resources in general.²⁸⁵ In fact, the Water and the Air Acts provide for the protection of the environment mainly as far as industrial activities are concerned. As the Constitution did not provide for a specification of the categories of resources to be protected, several areas of concern were still left unregulated. Thus, important pillars of environmental protection with relations to human activities, such as the struggle against the degradation of land and forests and the management of cities, are to be analysed in order to assess the value of single-issue legislation when meeting the challenges of urbanisation.

²⁸⁴ See *infra*, Chapters IV and V.

²⁸⁵ Refer to the *Introduction* for a brief summary of the Indian tradition on the protection of nature.

b) Specialised legislation: the management of land and economic activities

While water and air pollution were problems emerging from the industrialisation of the country and, consequently, were dealt with in periods when environmental challenges emerged at the global level, the legal discipline of lands and forests finds its origins already in the colonial period and in the years immediately following the independence. In fact, legislation on the use of lands developed as soon as the impact of human activities affected the environment, with the double purpose of preserving the nature and of managing a sound use of resources – a problem that originated from the early industrialisation carried out since the *British Raj*.²⁸⁶

The first statute dealing with the protection of natural resources is the **Forest Act of 1927**, that consolidated previous legislation dating back to 1878 (with subsequent amendments).²⁸⁷ The Act of 1927 classified forests into four categories (Section 2): reserved forest, protected forest, unclassified forest and village forest. According to Section 3, a reserved forest is a forest-land or waste-land which is the property of the Government, or over which the Government has rights of property, that is constituted by a notification stating certain limitations and over which the Government has appointed a Forest-Settlement officer with powers of enquiry on possible claims and rights by any person and of admitting and rejecting such claims (Sections 8 and 11). Protected forests (Section 29) are similar to reserved forests, but in this case the Government directly issues a notification and make rules on the regulation of certain activities – such as cutting trees, granting licences, cultivation, mining, installation of industries. The last categories pertain to residual lands that are derived from the previous two: unclassified forests are wastelands where the rules on protected or reserved forests can be extended by the Government (Section 28A); village forests are reserved forests that the Government may assign to a village community with the rights proper of the Government itself (Section 28).

²⁸⁶ Gadgil, M., Guha, R., *This Fissured Land: An Ecological History of India*, New Delhi, Oxford University Press, 1992.

²⁸⁷ Forest Act, Act XVI of 1927.

The powers of the Government are both regulatory and sanctioning: it can control the transit of timber, prohibit the felling of trees, impose duties and fines while also encouraging public-private partnerships for the development of forests (Section 81).²⁸⁸

This initial regulation was followed by another specific statute on forests, the **Forest (Conservation) Act of 1980**, approved with a view to limiting the growing degradation of natural resources due to economic development, and particularly the decline in forest lands.²⁸⁹ Opposed to the Forest Act of 1927, the statute of 1980 shifts powers from State Governments to the centre – a change derived from the 42nd Amendment Act of 1976, that shifted the competence on forests from the State List to the Concurrent List in the Indian Constitution. In fact, the Act extends its application to the entire territory of India (Section 1, excluding Jammu and Kashmir) and empowers only the Central Government to approve the issuance of orders by other authorities (starting from State Governments) concerning changes in the classification of forests, in the assignment of lands to privates or other state bodies and in the use of forests for economic purposes (e.g. cultivation, Section 2). In order to pursue this goal, the Act provides for the constitution of an Advisory Committee at the central level (Section 3), whose main competence is the grant of prior approval of orders by the State Governments. Moreover, the Act of 1980 grants the Central Government the power to make rules on matters concerning forests, that have to be approved by both Houses of Parliament (Section 4).

What is peculiar in the legislation on forests is the attempt at centralising the competences – a movement which stands in opposition to the general framework of the Water and Air Acts, that encourage decentralisation in order to keep environmental policies to a level closer to the citizens. Nevertheless, it should be observed that, factually, the discipline on forests remains circumscribed within the norms of the Act

²⁸⁸ The latter is an innovation deriving from the 2010 amendment (Forest (Amendment) Act 2010, Act XVII of 2010).

²⁸⁹ Forest (Conservation) Act, Act No. 69 of 1980, amended by Act No. 69 of 1988.

of 1927.²⁹⁰ Moreover, the choice for decentralising environmental policies is confirmed by the legislation on land pollution and on the management of cities (particularly concerning urban wastes). In particular, several industrial activities have been regulated so as to safeguard the environment and human health. The most relevant piece of legislation in this field is the **Mines and Minerals (Development and Regulation) Act of 1957**, that has been amended in 2015.²⁹¹

The Mines and Minerals Act, extending to the whole territory of India (Section 1), broadly deals with the economic activities concerning mining, whether of minerals or of oils (natural gas and petroleum). The Act places a burden upon the operators to obtain a licence or a lease in order to undertake prospecting and starting operations (Section 4). According to Section 10, prospecting licences or mining leases are granted by State Governments, but several exceptions and limitations exist. First of all, special rights are recognised for those already possessing a reconnaissance permit or a prospecting licence in order to obtain a mining lease (Section 11). Then, for minerals such as coal and lignite, the Central Government is empowered to select companies by competitive bidding (Section 11A). As in the Forest Act, there exist a division of competences between the centre and the periphery. The powers of the Central Government consist in the regulation of the grant of permits, licences and leases (Section 13) and in matters concerning the protection of the environment (Section 18), while the State Governments are competent with the rules on quarrying and mining for minor minerals (Section 15). Nevertheless, Sections 17 and 17A cast special powers in the Central Government for particular cases, that are reserved to the centre, and Section 20A empowers it to issue directions to State governments concerning the conservation of mineral resources

²⁹⁰ Diwan, S., and Rosencranz, A., *op.cit.*, p. 291.

²⁹¹ Mines and Minerals (Development and Regulation) Act, Act No. 67 of 1957, as amended, recently, in 2010 and 2015 (Acts No. 34 of 2010 and No. 10 of 2015). The most relevant innovation of 2015 is the constitution of District Mineral Foundations, bodies charged of the development of the areas surrounding mines and financed by a part of the revenues deriving from the exploitation of mines.

and the sustainable exploitation of them. In spite of these larger powers, the ambivalence between competences is maintained through Section 23C, that empowers State Governments to make rules for preventing illegal mining, transportation and storage of minerals, and Section 26, that allows delegation of powers to subordinate authorities (not only State Governments).

As one could see, concerning land pollution, the protection of the environment is embodied in the procedure to be undertaken in order to establish an economic activity and in the obligation to take precautions cast in several documents: generally, the Mineral Conservation Development Rules of 1988; for specific resources, the Coal Mines Regulations of 1957, the Metalliferous Mines Regulations of 1961, the Oil Mines Regulations of 1984 (amended in 2011), the Atomic Energy (Working of Mines, Minerals and Handling of Prescribed Substance) Rules of 1984 and the Granite Conservation and Development Rules of 1999. General regulation is set in the **Mineral Conservation Development Rules** (as amended up to 2011), that applies to all minerals except from petroleum, natural gas, coal, lignite, minor minerals and those substances dealt with in the Atomic Energy Act of 1962 (Section 2). Apart from the procedures for reconnaissance, prospecting and mining operations, a special chapter of the rules is devoted to the environment, prescribing the duty to take *“all possible precautions for the protection of environment and control of pollution”* (Section 31) upon holders of licences or leases. In detail, operators have certain specific duties, as the separate removal of top soil and its reutilisation or storage for rehabilitating the land in the mining area (Section 32), the restoration of land before the abandonment of mines (Section 34), the control of ground vibrations (Section 35), air, water and noise pollution (Sections 37 to 39) and the planning of measures for the restoration of flora (Section 41).

Concerning the other economic activities related to minerals, similar rules on the environment – for prospecting, mining, storage and pollution (whether air, water or noise) – are provided for granite (Sections 29 to 37 of the Granite Conservation and Development Rules of 1999). For oil and natural gas, apart from the more detailed procedure for granting applications (through a Board of Mining Examination, Section 13 of the Oil Mines Regulations), special norms on the control of operations are set in Sections 103 to 108 for the

prevention of fire and for the use of flammable material. It should be noted that the rules provided for in these pieces of legislation are chiefly aimed at the protection of workers and only have a secondary environmental purpose, if compared to the procedural requirements for granting permissions.

The existence of a Board of Mining Examination is confirmed in each statute previously referred to. Moreover, the same typology of “social” rules apply for coal and for metalliferous mines in general. These are rules that provide for safety for all dangers connected to the activities around and within the mine – specifically for fire, dust, gas and water. Following the Coal Mines Regulations of 1957, as amended in 2011, fire is dealt with in Section 137, that sets general precautions on the use of certain flammable materials and for arrangements on detection and extinction of fires, in case the event occurs. Moreover, these precautions are strengthened by specific provisions on surface and underground activities (Sections 138-139). As far as dust is concerned, the manager of a mine has the duty to minimise these emissions to a limit that considers human health (Section 146). Finally, the rules on gas and water are mainly focused on the security within the workplace (Sections 150 and 152-153). In the case of metalliferous mines, the same provisions apply, on the basis of the Metalliferous Mines Regulations, approved in 1961 and lastly amended in 2012. In fact, following the enactment of the Coal Mines Regulations, a second statute on Metalliferous Mines was approved with a scope of application extending to “*every mine other than a coal or an oil mine*” (Section 1). In this case also, provisions for the same dangers are set in Sections 139 to 151.

Finally, the survey of economic activities more directly affecting the environment should be completed by a reference to atomic energy. India, as known, has been focused on the development of the atomic energy industry since its independence.²⁹² In order to regulate such

²⁹² The first programme for the study of the matter had been started since the early years after the independence, as an initiative supported by Jawaharlal Nehru himself. In 1954, the Atomic Energy Commission was created, under the direct responsibility of the Prime Minister. See Guha, R., *op.cit.*, p. 216.

issue, the Parliament enacted the Atomic Energy Act in 1962 *“to provide for the development, control and use of atomic energy”*.²⁹³ In opposition to the statutes typically dealing with environmental matters, the Atomic Energy Act – considering the strategic relevance of the subject – centralises the regulation of atomic energy. The Central Government is indeed in charge of the production, development, use and disposal of such resource and of those products (radioactive substances or minerals) needed to produce atomic energy (Section 3), by itself or by means of a specialised authority. Therefore, the Government has also powers of control and of inspection (Sections 5, 7 and 8). The most environmentally relevant norms are designed in Section 17 of the Act, concerning nuclear safety. The Central Government is thus empowered to issue regulation on the prevention of injuries to the health of people and on the production, treatment, transport and storage of radioactive waste – subject to penalties ranging from imprisonment for a term which may extent to five years or to a fine or both, as specified in Section 24.

The general framework set in 1962 found a more detailed discipline in two different Acts of the 1980s: the Atomic Energy (Working of the Mines, Minerals and Handling of Prescribed Substances) Rules of 1984 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules of 1987. Concerning the working of mines, the Rules of 1984 prescribe specific procedures and requirements for the grant of licences by the Central Government – with reference to environmental issues, the key requirement concerns the long-term storage of wastes, in geological formations or in man-made systems (Section 4-xvii), whose safety should be addressed by a thorough analysis of the conditions and of the risks. In addition to this fundamental requirement, the Working Rules introduce a “Radiological Safety Officer” as the person in charge of the safety of employees and of the environment surrounding the plant (Section 8). These provisions are reinforced by the Rules of 1987 on the disposal of waste. Here too, the Government posed restrictive conditions on the people authorised to pursue this activity, on the

²⁹³ Atomic Energy Act, Act No. 33 of 1962, amended by Act No.59 of 1986 and Act No.29 of 1987.

locations and on the quantities of such waste (Section 3). Moreover, the Waste Rules as well identify a Safety Officer, designed by the competent authority, with advisory functions on the handling of substances and with duties of inspection and assessment on radiations, buildings and hazardous situations (Sections 12-13).

This survey of the legislation on economic activities and on natural resources shows how India endeavoured to draft and enact specific discipline for each branch of environmental matters. What was left – as it emerges from the analysis of all the different pieces of legislation – is a comprehensive discipline for wastes, that are approached on a piecemeal basis (whether dust from mines or radioactive wastes). In particular, a global regulation for wastes was especially needed for cities, suffering from the growing level of urbanisation India was witnessing. The response to poor sanitation and poor management of waste was the **Municipal Solid Wastes (Management and Handling) Rules of 2000** (“MSW Rules”), adopted for *“every municipal authority responsible for collection, segregation, storage, transportation, processing and disposal of municipal solid wastes”* (Section 2). In line with an attempt at decentralising the protection of the environment – which is all the more necessary in a subject such as waste management – the MSW Rules pose the responsibility on the *“collection, storage, segregation, transportation, processing and disposal of municipal solid wastes”* upon the municipalities and under the control of the State Boards established by the Water Act (Section 4). According to this Section, the municipality shall present an application to the State Board for the creation of facilities dealing with the processing and disposal of waste and then furnish an annual report on its activities. In turn, apart from the grant of authorisations, State Boards are entrusted with the monitoring of the *“compliance of the standards regarding groundwater, ambient air, leachate quality and the compost quality including incineration standards”* (Section 6). In addition to these local bodies, the control system is closed by the duty of coordination on implementation and standards assigned to the Central Pollution Control Board.

The MSW Rules were born as a tentative solution to the phenomenon of opposition towards the installation of facilities for waste treatment, by

means of a committee empowered to discuss a management plan for cities.²⁹⁴ The initiative has been certainly crowned by success, if compared to the previous era of waste mismanagement, but the review of the discipline in the 2010s was perceived also at the governmental level, following an order of the National Green Tribunal on a case concerning municipal solid waste in Himachal Pradesh.²⁹⁵ Consequently, in 2013, the Ministry of Environment and Forests notified a draft MSW Rules that should have superseded the Rules of 2000 – a project endowed with clarity and with a more stringent regulation of the matter. First of all, Section 4 of the draft clarified the authorities involved in the management of waste, from the top to the local level. For the governmental level, the Ministry of Environment is thus in charge of the periodic review of the rules, in coordination with the Ministry of Urban Development; at the State level, each Secretary for Urban Development shall ensure the implementation of the MSW Rules and the preparation of a solid waste strategy. Concerning the technical bodies, the division of tasks between Central and State Pollution Control Boards is maintained. At the local level, the duties of the municipalities are further specified: apart from the general task of the disposal of municipal solid waste, municipal authorities are entrusted with more stringent duties for obtaining authorisations, for complying with standards and for seeking environmental clearance for project facilities to the State Level Environmental Impact Assessment Authority. Moreover, Section 5 of the draft Rules explicitly opens up to the private sector, as it makes the municipality responsible for “*engaging agencies or groups working in waste management including waste pickers*” too. Finally, as far as regulation is concerned, specific standards are set in Section 8, prescribing the collection biodegradable and non-biodegradable material, user-friendly storage spaces, the prohibition of manual handling and the limitation of landfill.

The Ministry of Environment submitted this very advanced project – as for the diversion from landfills and the decentralisation of the processes

²⁹⁴ Sahasranaman, P.B., *op.cit.*, p. 252.

²⁹⁵ <http://www.downtoearth.org.in/content/municipal-solid-waste-rules-amendments-moef-asked-formulate-new-draft>. See *infra*, Chapter V.

– to comments by the public in July 2013. In spite of the innovative characteristics of the new text, the draft Rules were stayed by an order of a division bench of the Karnataka High Court in October 2013, following a public interest petition presented by the Environmental Support Group based in Bangalore. The main ground for this decision is the distance between the text proposed by the MoEF and the progressive directions issued by the Karnataka High Court in cases concerning solid waste management.²⁹⁶ The amendments to the MSW Rules are thus still pending, while progressive interpretation for the correct implementation of the rules is being delivered by courts.

As a strategy, the single-issue approach is unquestionably helpful in tackling specific problems – some necessitating a central-based solution, such as the handling of atomic energy, some more directly affecting the daily life of citizens and dealt with at the level of municipalities, as the MSW Rules. While the reaction to the Stockholm Conference has resulted in the enactment of the most urgent legislation on water and air pollution and on the approval of constitutional amendments explicitly enshrining environmental rights in the fundamental law of India, a piece of legislation entirely devoted to the environment only passed in 1986, with the Environment (Protection) Act.

c) **The general discipline: from the concept of public nuisance to the Environment (Protection) Act**

Only following the tragedy of Bhopal in 1984 did the Government of India provide for a comprehensive statute on environmental law with a broad scope, on the basis of Article 253 of the Indian Constitution, always with a view to implement the decisions taken in Stockholm in 1972.²⁹⁷ As stated by Divan and Rosencranz, the **Environment**

²⁹⁶ <http://www.downtoearth.org.in/content/court-stays-proposed-changes-municipal-solid-waste-management-rules>

²⁹⁷ As known, the Bhopal gas incident, occurred on the 3rd of December 1984, was one of the worst industrial environmental disasters. For an account, among many, D'Silva, T., *The Black Box of Bhopal: A Closer Look at the World's Deadliest*

(Protection) Act of 1986 is both an umbrella and an enabling legislation, insofar as it guarantees coordination between the different activities of the Central and State bodies dealing with environmental issues (such as the Central and State Pollution Control Boards) and it allows the elaboration of policies for environmental protection (and regulation, the Municipal Solid Wastes Rules being an example of this activity).²⁹⁸

In fact, after some years from the approval of the Water and Air Acts, the regulation of several activities in light of environmental needs was still in the agenda. Although the Water and Air Acts proved to be progressive pieces of legislation, several critical issues could be pointed out.²⁹⁹ First of all, in the working of the Pollution Control Boards, the power to revoke consent had been rarely used, and even in case of a revocation of consent, the applicant could initiate a second procedure aimed at obtaining a grant of authorisation while continuing its activities. Then, the objectivity of Boards was jeopardised by the presence of officials appointed by the Government, who often were in charge of other assignments. A further critique came from the point of view of public participation, severely lacking – a matter that has always been treated with attempts at improving the situation.³⁰⁰ Moreover, the possibility of enforcing the laws was constrained by the fact that State Boards could not impose penalties on their own, but only by initiating judicial proceedings. Finally, the set of standards was dependent on administrative discretion – a question that is constantly in the agenda of environmental protection.

The issues on the agenda were thus two-fold: on the one hand, the existence of a variety of subjects needing an umbrella legislation; on the

Industrial Disaster, Trafford, 2006, and the classical investigation account by Lapierre, D., Moro, J., *Il était minuit cinq à Bhopal*, Paris, Laffont, 2001.

²⁹⁸ Divan, S., Rosencranz, A., *op.cit.*, p. 66.

²⁹⁹ Abraham, C. M., and Rosencranz, A., *An Evaluation of Pollution Control Legislation in India*, in *Columbia Journal of Environmental Law*, 11, 1986, pp. 101-119.

³⁰⁰ See *infra*, Chapter III, on the various judgments dealing with the participation of the public to projects affecting the environment.

other hand, the question of improving the legislation on the environment. It should be noted, however, that before the enactment of the Environment (Protection) Act, the subject was already understood in the framework of general rules, under the notion of public nuisance.³⁰¹ Nevertheless, it was desirable to set an ensemble of rules in a single Act dealing with the environment. As mentioned earlier, environmental protection was intended as part of single acts dealing with the regulation of economic activities. If the Water and Air Acts symbolise a first departure from this orientation, and the Environment (Protection) Act constitutes the image of a “revolutionary” legislation ideally encompassing the whole subject, legislative sources for building a framework for environmental protection already existed. In fact, the common law notion of public nuisance already provided for a basic overview of environmental issues and it is still nowadays the root for the draft and enactment of environmental law statutes.³⁰² This concept of criminal and tort law can indeed, as Sahasranaman states, provide “a mechanism for controlling environmental pollution”.³⁰³

In general, a public nuisance can be defined as an “unreasonable interference with a general right of the public”³⁰⁴ – in our cases, with the right to a healthy environment.³⁰⁵ Prosser, in his article, that reviewed

³⁰¹ See *infra*, Chapter III, Section I.

³⁰² For an Indian perspective, see Anderson, M., *Public Nuisance and Private Purpose: Policed Environments in British India, 1860-1947* (July 1, 1992), SOAS School of Law Research Paper No. 05/2011, 2011.

³⁰³ Sahasranaman, P., *op.cit.*, p. 269.

³⁰⁴ Divan, S., Rosencranz, A., *op.cit.*, p. 112.

³⁰⁵ For a common law, and especially American, perspective, refer to the foundational article by Prosser, W.L., *Private Action for Public Nuisance*, in *Virginia Law Review*, Vol. 52, No. 6, 1966, pp. 997-1027; Bryson, J. E., Macbeth, A., *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, in *Ecology Law Quarterly*, No. 2, 1972, p. 241; Hodas, D.R., *Private actions for public nuisance: Common law citizen suits for relief from environmental harm*, in *Ecology Law Quarterly*, No. 16, 1989, p. 883. The authors distinguish between private and public nuisance, the former deriving from the interference of other private properties to one's own private property, the latter occurring in case of interferences with a right enjoyed by the public.

the notion from the 16th century and adapted it to the challenges of a nascent environmental litigation, defines it as “*always a crime*”, being potentially “*a tort, provided that the plaintiff can plead and prove that he has suffered some "special" or "particular" damage*”.³⁰⁶ In India, the notion was codified in Section 268 of the Penal Code, that reads as follows:

“A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.”

For environmental purposes, public nuisance could be configured into several offensive acts such as the pollution of the air, the discharge of effluents in waters, the production of noises that cause disturbances in the environment and for the health of those affected by them. People pursuing such conducts would thus be considered liable to prosecution for public nuisance. Moreover, Section 268 of the Indian Penal Code also considers omissions as occurrences leading to public nuisance, thus allowing prosecutions against occupiers avoiding to set the suitable standards for environmental protection.

This provision is accompanied by its correspondent procedural norm. Section 133 of the Criminal Procedure Code of 1973 empowers magistrates to pass a conditional order to remove nuisances.³⁰⁷ The

³⁰⁶ Prosser, W.L., *op.cit.*, p. 997.

³⁰⁷ Section 133. Conditional order for removal of nuisance.

(1) Whenever a District Magistrate or a Sub- divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

remedy is speedy, since the directions given by the judiciary are of immediate applicability, but only provisional, as the occupier can oppose evidence and the magistrate is then constrained to initiate judicial proceedings. The order of the judge is then made final only

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion configuration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order-

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court. Explanation- A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

after showing sufficient evidence of the nuisance.³⁰⁸ The powers of the judge are thus broad and, according to the Supreme Court (in the *Ratlam Municipality* case),³⁰⁹ the magistrate is compelled to issue such orders under Section 133, whenever the judicial authority receives information on public nuisances, supported by sufficient evidence.

In spite of the wide powers concerning the removal of public nuisance and the enactment of specific legislation dealing with water and air pollution, in 1986 the Environment (Protection) Act was approved. As in the case of Section 268 of the Indian Penal Code on public nuisance, the Environment (Protection) Act³¹⁰ indicates broad definitions for its main objects of regulation in its Section 2. First of all, the environment “includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property”. While broad, the merit of the new legislation resides in the specificity of it, as the legal system is innovated through the insertion of provisions on the environment itself, in opposition with the general concept of public nuisance. The statute further covered a legal vacuum – albeit not with a constitutional value – insomuch as the environment is clearly defined, while Articles 48-A and 51-A(g) are silent on the issue.

If compared to the Stockholm Declaration, the EPA is to be considered more eco-centric, as it does not put an emphasis on “human environment”, but rather focuses initially on the environment itself to further extend the definition to the relationships with human beings. This point of view is carried on also to the definition of pollutant and pollution. “*Environmental pollution*”, in fact, means the presence of environmental pollutants, signifying “*any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment*”. Although the statute clearly underlies the existence of threats to the environment posed by human activities, the formulation of the main definitions is general in its nature, in order to focus more on

³⁰⁸ Divan, S., Rosencranz, A., *op.cit.*, pp. 112-113.

³⁰⁹ *Municipal Council, Ratlam v. Vardhichand*, AIR 1980, SC 1622, (1980) 4 SCC 162. See *infra*, Chapter III.

³¹⁰ Environment (Protection) Act, Act No. 29 of 1986.

the result than on the cause of pollution. Notwithstanding the debate between the eco- and anthropo-centric character of the norms, the main feature of the EPA is its nature of *lex specialis*. In fact, Section 24 enables the Act (and all the rules and orders passed under its regulation) to override any other norms approved.

As an umbrella legislation, the EPA entrusts to the Central Government a wide range of instruments to combat pollution. Section 3 of the Act lists a series of measures (that are not exhaustive) apt to protect and improve the environment that include:

- The power to coordinate actions undertaken by States and other authorities;
- The power to plan and execute a nation-wide programme for preventing and fighting pollution;
- The power to indicate qualitative standards for the environment and quantitative standards for the discharge of pollutants;
- The power to approve procedures to prevent accidents (a clear reference to the Bhopal tragedy) and to handle hazardous substances;
- The power to inspect plants and processes – in order to determine possible offences under the Act or to examine equipments and material in general (Section 10);
- The power to give directions (directly or through other authorities) for the prevention, control and abatement of pollution, including the closure or regulation of industries and of water and electricity (Section 5);³¹¹
- The power to create an authority for dealing with the enforcement of the EPA – although the Government has left

³¹¹ The EPA was the first piece of legislation expressly introducing such powers, that were later extended to the Water and Air Acts with the amendments of 1987-1988.

the question of implementation to the Ministry of Environment and Forests.

As far as the enabling *volet* is concerned, Section 6 of the EPA empowers the Central Government to issues rules for regulating pollution, including the standards of water, air and land; the limits for pollutants in certain areas; the procedures and limitations for handling hazardous substances; the limitation on the location of industries and the safeguards for accidents. Moreover, Section 25 too enables the Central Government for making rules under the premises of the Act, detailing the as well the possibility to delegate competences to other authorities – as expressly provided for in Section 23 – and the different activities concerning investigations and inspections (use of samples, laboratories, notification of offences, reporting powers).

The last crucial aspect is the enforcement of the rules. As in the other Acts dealing with environmental pollution, some norms specifically tackle offences. In the EPA, Sections 15 to 17 prescribe penalties for the violation of provisions of the Act and of the rules, orders and directions adopted thereunder by singles, companies and Governmental Departments. As a general rule, the offences under the EPA are to be punished with imprisonment for a term extending to five years or with a fine, or both (Section 15) and with the possibility of extending the term to seven year in case the contravention continues. As for companies and governmental bodies, the directors, managers or heads of public bodies are considered to be liable and thus punishable accordingly. As in the Water and Air Act, civil courts are barred from having jurisdiction on violations of the EPA (Section 22).

The Environment (Protection) Act is to be read in connection with the other statutes on the environment and with a view to underlining the deployment of its full potential as an enabler for the protection of the environment. On the one hand, the Water Act, the Air Act and the EPA share many common features. Firstly, the powers conferred to the Central Government and the possibility of delegating powers – mainly by means of creating Pollution Control Board as the main agencies for enforcement at the local level. Then, the large scope of these pieces of legislation, encompassing all kinds of pollution. Finally, the apparatus of sanctions, that is parallel in the three texts. However, on the other hand, what characterises the EPA is its enabling nature, since the Act of

1986 is to be seen as a trunk from which spring the different branches of environmental legislation, by means of the combination of Sections 6 and 25 of the Act – granting the Central Government the possibility to draft norms valid nation-wide, while guaranteeing the implementation at the local level.

d) Implementing legislation: the Environment (Protection) Rules and the introduction of the Environmental Impact Assessment Procedure

As a result of this multifaceted activity aimed at providing India with a bulk of legislation that could uphold the challenges of industrialisation and urbanisation in an environmentally sound manner, the first embodiment of the EPA was the enactment of the **Environment (Protection) Rules of 1986**,³¹² whose purpose was the establishment of standards, as required by Section 7 of the EPA. The Environment Rules provide for the specific procedures for setting standards, issuing directions and posing restrictions. As for the standards, Section 3 of the Rules refers to six Schedules annexed to the text. These Schedules deal with different activities and types of pollution. The first Schedule is focused on industrial activities in general, ranging from chemical to textile and from oil to pharmaceutical industries. The third Schedule (Schedule II being omitted by the 1993 amendment) indicates the level of noise permitted in the different areas (industrial, commercial, residential and “silence” zones), in order to set standards for air quality. Schedule IV also pertains to the field of air pollution, but as far as smoke from motor vehicles is concerned. In addition to these, the following annexes are centred on the discharge of environmental pollutants: Schedule V indicates the authorities in charge of the respect of the Rules according to the different plants or objects (e.g. mines, factories, ports); Schedule VI distinguishes between effluents in water and gas wastes; finally, Schedule VII returns on air pollution with standards in the concentration of lead, carbon monoxide, sulphur dioxide, oxides of nitrogen and particulate matter. Section 3 specifies

³¹² Amended in 1987, 1988, 1991, 1993, 1994, 1996, 1997, 1998, 1999, 2001 and 2009.

the timing of compliance to the Rules and the limitation on raw materials (coal) used by thermal plants, while setting the power to decide more stringent standards upon State Boards.

As for the issue of directions, Section 5 of the Rules empowers the Central Government (or the competent authority) to prohibit or restrict the location of industries and the carrying on of operations in certain areas, on the basis of specific requirements – air, water and noise pollution; biological diversity; land use; foreseeable discharge of pollutants. According to Section 4, directions shall be written and specific as for the actions to be taken and the time of compliance. Procedurally, there should be the possibility of filing objections on the part of the occupier. In conclusion, usual norms on the procedures for information are set in the last Sections.

The Environment Rules are thus the basic norms implementing the EPA. Nevertheless, additional Rules have been provided by the Government of India so as to allow a more comprehensive protection of the environment and the prevention of pollution. As referred to beforehand, the Municipal Solid Waste Rules and the Noise Pollution (Regulation and Control) Rules supplemented the Environment Rules for specific topics. Moreover, apart from the single-issue norms, the main development following the Rules of 1986 was the attempt at setting the Environmental Impact Assessment procedure as mandatory, a copernican revolution for the operationalisation of sustainable development.

Indeed, the problem of enforcement was crucial insofar as the regulation of economic activities passed through the existence and the realisation of controls that could account for the modification of the environment not only during the activity itself, but also for the results it could produce afterwards. Thus, in 1994 the Ministry of Environment and Forests issued Notification No. S.O. 60 (E.) – then amended in 1997³¹³ – for the regulation of **Environmental Impact Assessment** in

³¹³ The amendment of 1997 introduced a first degree of decentralisation insofar as the environmental clearance for thermal power plants was shifted to the States.

several categories of projects, under Section 3 of the EPA and Rule 5 of the Environment Protection Rules. By means of this notification, procedural and substantial hurdles were placed for pursuing economic activities and projects that could jeopardise the environment. Thus, environmental clearance is to be considered mandatory for modification of activities increasing the level of pollution and for any project related to a list (Schedule I) of economic enterprises. The range of projects and activities requiring a prior assessment of environmental soundness is directly correlated to their considerable relevance and impact, and include:

- Nuclear power plants;
- Hydroelectric plants and related activities such as river valley projects;
- Thermal power plants;
- Transport infrastructure as highway projects, airports, ports and harbours;
- Chemical industries: petroleum refineries and intermediate products, pesticides, pharmaceuticals and synthetic rubber;
- Exploration of oil and gas;
- Asbestos;
- Metallurgical industries (iron, steel, aluminium, copper, etc.);
- Mining projects;
- Several industries deemed environmentally “demanding”, such as the manufacture of paint, dyes, pulps, cement and foundries).

The Notification of 1994 sets a procedure for the grant of the environmental clearance. The first step is the presentation of an application to the MoEF – specifying the location of the project, alternate sites, objectives and the impact on lands, air and waters – with a project report that includes an EIA report. Moreover, for the categories considered as highly pollutant (mining, thermal power plants, hydro-power plants, irrigation projects, ports, prospection of

major minerals), an application containing the indication of the site should be made already when carrying on investigations.

The second phase of the procedure is the evaluation of the reports by the Impact Assessment Agency, a body constituted within the MoEF that has the power of establishing, if necessary, an ad hoc Committee of Experts for a specific project. The Committee of Experts, constituted by a maximum number of 15 people having expertise in ecological sciences, pollution control and social sciences (including representatives of NGOs), is empowered to conduct inspections on site, before, during and after the commencement of operations. After a period of 90 days, the Impact Assessment Agency prepares an EIA report providing recommendations relying upon the assessment made of the documents contained in the application and on data and investigations pursued by the Committee of Experts or by the IAA itself. The procedure is completed, immediately before the publication of the EIA report, by a public hearing before the State Pollution Control Board. The public hearing procedure – set in Schedule IV of the Notification – is characterised by the notice of the publicity of the environmental hearing in the newspapers, the participation of residents and environmental groups but by the mere procedural nature of it. At the end of this procedure, the MoEF issues an environmental clearance if the projects is considered sound for the environment and the health of the residents.

The EIA Notification of 1994 provided a first tool for guaranteeing the environment in the preparation and conduction of large projects and of highly pollutant activities. Nonetheless, several shortcomings could be pointed out. Firstly, the dilution of the initial mandatory character of the public hearing (the Notification, dated 27 January, had immediately been amended on the 4th of May of 1994).³¹⁴ Then, an excessive degree of centralisation, if compared with the provisions of the Water and Air Acts. Finally, the difficulty in implementing the notification, witnessed by the Impact Assessment Agency, due to a general lack of institutional capacity - a feature that is evident if one looks at the history of

³¹⁴ Divan. S., Rosencranz, A., *op.cit.*, p. 73.

environmental litigation.³¹⁵ In order to overcome these critical aspects, several amendments were approved, eventually leading to a reformulation of the discipline through the **EIA Notification of 2006**, for a more comprehensive and decentralised model of Environmental Impact Assessment.

Firstly, the EIA Notification is clearer as for its content. Definitions of the activities to be considered within the scope of the rules. Section 2 provides for the indication of projects needing prior environmental clearance – namely all projects listed in the new Schedule, the expansion and modernisation of previous projects and the change in product in existing projects. While the categories of projects are similar to those of 1994 – infrastructure, chemical, mining, etc. – the EIA Notification of 2006 differentiates between two categories of activities: Category A for matters to be dealt with at the central level and Category B for projects to be evaluated at the local level. Within this framework, in the Central List are included:

- Oil and gas exploration projects;
- Nuclear power plants;
- Chemical projects related to oil, pesticides and fertilisers;
- Asbestos and soda ash industry,

while in the “exclusive competences” of States would fall:

- Paint industry;
- Matters of municipal interest – building projects, township development projects, solid waste management, common effluent treatment plants;
- Isolation of hazardous chemicals (until a certain threshold);
- State highways.

³¹⁵ Panigrahi, J.K., Amirapu, S., *An Assessment of EIA System in India*, in *Environmental Impact Assessment Review*, No. 35, 2012, pp. 23-36. See also *infra*, Chapter III.

The rest of the highly pollutant economic activities – metalliferous mining, hydro-electric and thermal power plants, synthetic chemicals, infrastructures (airports and ports) – is assigned either to the central or to the local levels according to the dimensions or the location of the projects (*“the spatial extent of potential impacts and potential impacts on human health and natural and man-made resources”*, section 4). These new regulations, that aim at a broader decentralisation of the processes, are combined to the creation of a new body dealing with the EIA procedure, the State Environment Impact Assessment Authority (SEIAA), to be constituted in each State according to Section 3 of the EPA. The SEIAA, composed of 3 members (a State officer and two experts), is in charge of the decisions on granting environmental clearances under the recommendations of Expert Appraisal Committees (EAC, institutions having a similar role of the Impact Assessment Agency under the Notification of 1994, constituted both at the central and at the local levels). These Committees shall be constituted by 15 members that are expert in environmental fields – divided between “professionals” and proper “experts” (possessing at least fifteen years of experience in engineering, technology, architecture or law and with work specialisations in environmental quality, risk assessment, project management, environmental economics or life sciences).

The procedure leading to the grant of environmental clearances is innovated and detailed in the text of 2006. The process includes four phases: screening (only for Category B projects), scoping, public consultation and appraisal (Section 7).³¹⁶ The first stage of the environmental clearance process is the screening of the application. As in the case of 1994, the application has to follow a particular scheme, that has been further detailed in 2006 – including the size and the expected cost of the project, requirements for land and water use as well as other natural resources, production of solid wastes, release of pollutants, an estimation of the impacts of the work and an analysis of the environmental sensitivity of the project. This screening of the

³¹⁶ Whose relevance in its relationship with the National Green Tribunal will be the object of Chapter IV, Section II.

application consists in an initial scrutiny on the part of the State Expert Appraisal Committee, in order to determine the necessity of proceeding toward the preparation of an Environmental Impact Assessment report.

The second step of the procedure, the scoping of the application, has a nature similar to the screening (in fact, for Category A, the phases are condensed into the plain scoping). During this phase, the project proponent must present an application (as described beforehand) with a pre-feasibility report and the Terms of Reference that address all relevant critical points as for the environment, in order to prepare an EIA report. According to the information provided by the applicant, the EAC sets the Terms of Reference and communicates them to the applicant (including through online publication). The EAC has the power to reject the application even in this stage, without pursuing to a comprehensive EIA report.

After having set the Terms of Reference, the third stage is the public consultation – a phase that has been ameliorated and strengthened from the previous rules of 1994. According to Section 7, the role of public consultation of local affected subjects as well as those who are “*plausible stakes*” in the impacts of the project/activity is greatly enhanced, as this phase is deemed mandatory for Category A projects and for Category B1 – projects that passed the first phase of screening. Several categories are nevertheless excluded from this obligation, such as projects for irrigation, expansion of roads and highways, building projects in townships and strategic projects. As in the text of 1994, the responsibility for carrying on the consultation lies in the Pollution Control Boards, that are asked to proceed first with a locally based public hearing, then with the analysis of answers provided by other people affected by the project, in a period not exceeding 45 days from the request of the applicant. The public hearing must be conducted by a district magistrate with the assistance of an officer of the Pollution Control Board and it must be started by a presentation of the project by a representative of the applicant. It is to be noted that this phase has a more “dialogic” character, as the applicant has the duty to modify its EIA draft, as well as its Environmental Management Plan (EMP), according to the critical points outlined by the public consultation, and then present the new drafts to the Expert Appraisal Committee (EAC).

The presentation of the new EIA and EMP drafts constitutes the fourth and last step of the procedure, the appraisal of the project undertaken by the EAC (Central or State EAC, according to the relevance of the project). The requirements set in the Notification of 2006 are the transparency of the appraisal – that should comprehend the documentation concerning all the steps of the procedure – and the final approval, by the EAC, of “*categorical recommendations*” to be delivered to the competent authority for the grant of environmental clearance or for its refusal. Then, within forty-five days, the authority shall communicate the results of the EIA to the applicant – normally, it accepts the recommendations made by the EAC.

In addition to the normal procedure for an EIA, the Notification of 2006 adds a fifth phase, concerning post-environmental clearance monitoring (Section 10). In fact, in order to guarantee a proper implementation of the project following the recommendations made by the EAC, the applicants/project managers should provide a report to the concerned authority twice a year. Moreover, in opposition to the rules of 1994 – that set the validity of the environmental clearance for 5 years, the new Notification sets different periods of validity, from 5 years for most of the projects to 10 years for river valley projects, until 30 years for mining.

The Notification of 2006 (with minor amendments in 2009, 2011 and 2012) constitutes the basic text for the procedure of Environmental Impact Assessment. While, in general, legislative provisions in the India system are fairly detailed and amended as to improve the system from previous inadequacies (including the guidelines developed by the MoEF), the critical point of the whole construction is the lack of enforcement. In spite of a strong judicial system,³¹⁷ the practice of EIA is variable as for coordination between bodies, the phases of screening and scoping (because of the absence of definition of impacts and pollutants), the quality of the EIA reports (notwithstanding the detailed forms directly provided in the Notification of 2006) and the

³¹⁷ Whose bases will be analysed in Chapter III.

ineffectiveness of public participation.³¹⁸ Moreover, as stated in studies dealing with non-legal aspects,³¹⁹ the most relevant question about the effectiveness of the protection of the environment as outlined so far lies in the lack of enforcement, notwithstanding the solidity and the creativity of the judicial system and the existence of a comprehensive panoply of legislative instruments. A repeated absence in the system, originating the poor enforcement, is the hiatus between the EIA legislation, responding to the single activities, and the existence of both broad categories of projects that should be coherently addressed and single projects. For instance, the Terms of Reference in a EIA report should be drafted as to be fitting like a glove the project and the environmental concerns it could pose. To do this, the procedure should be more broadly open to all relevant stakeholders, including NGOs,³²⁰ in order for the EIA to be fully respondent to the needs of the local actors.

Taken as a whole, on paper, the Indian legal system seems to prove undeniably consistent with the international standards set from the Stockholm Conference. The attention to environmental issues – stemming from the Indian tradition – dates from the independence and has been declined in a wide range of constitutional and legislative documents. Constitutionally, the cornerstone of the Bill of Rights, the right to life, has been rapidly associated to environmental protection and has later developed – by means of the combined interpretation of it with the principles and duties on the environment introduced in 1976 – in single constitutionally entrenched provisions as to respond to the “international wave” of the 1970s that brought environmental rights to the forefront of the constitutional agenda. As far as legislation is

³¹⁸ Panigrahi, J.K., Amirapu, S., *An Assessment of EIA System in India*, *op.cit.*, p. 31.

³¹⁹ Among many, Paliwal, R., *EIA practice in India and its evaluation using SWOT analysis*, in *Environmental impact assessment review*, 26(5), 2006, pp. 492-510; Valappil, M., Devuyst, D., Hens, L., *Evaluation of the environmental impact assessment procedure in India*, in *Impact Assessment*, 12(1), 1994, pp. 75-88.

³²⁰ Whose role in the judiciary proved beneficial in developing environmental law, see Chapter III.

concerned, India witnessed both a piecemeal approach, especially during the period immediately following the Stockholm Conference, and a more inclusive strategy with the enactment of the EPA and of the EIA Notification.

If constitutional and legislative action have been almost immediately undertaken, the lion's share in environmental affairs had to be taken by the administration, responsible for the implementation of the "basket" of rights, principles and detailed provisions for environmental protection. In this field, the Ministry of Environment and Forests, created in 1980, and the homologues at the State level, have proved to be a key player in the elaboration of legislation and guidelines for implementation. Moreover, the creation of Pollution Control Boards, progressively enlarged in competences and dimensions, has been a crucial point for the application of the rules and for the diffusion of environmental awareness in the country. However, the amount of jurisprudence on environmental matters, that will be the object of the next chapter, is an evidence of difficult implementation of environmental provisions and of a challenged life for a development that could efficiently balance economic interests with ecological imperatives. The missing points in the picture are mainly twofold: on the one hand, a still limited decentralisation that should bolster environmental legislation and its implementation, excessively reliant on the directives of the centre.³²¹ On the other hand, apart from the existence of an apparatus of norms susceptible of enforcement, participation in the processes is the key aspect for a correct implementation of environmental policies. Where the legislative and the executive powers have achieved mixed results, the judiciary would prove more creative in proposing solutions and in setting environmental concerns in the political agenda.

³²¹ Gupta, S., *Environment Ethics, Policies and Inclusive Environment Protection Mechanism in India (With Special Reference to Environmental Inquisition)*, in *Journal of Environment and Earth Sciences*, Vol. 5, No. 3, 2015, pp. 112-118.

Chapter III

The judiciary and the establishment of the National Green Tribunal

The solidity of the legislative system, coupled by weak administrative implementation, has been the key element for the judiciary to take the lion's share in matters of environmental protection. The High Courts and the Supreme Courts – aided by the mechanism of writ petitions *ex* Article 32 of the Constitution – succeeded in ensuring a minimum level of enforcement of environmental norms and used their powers creatively, as to push administrative bodies to implement the rules and to urge legislative actions that could promote a better level of health and environmental protection, including through the establishment of new institutions such as specialised tribunals. The present chapter will thus delve into the study of the path leading to the creation of the National Green Tribunal of India. The first part focuses on an overview of the main strategies and tools of the courts to ensure an enhanced access to justice and a proper understanding of environmental matters during the judicial proceedings – namely, the theory of liabilities and the recourse to tort action, the statutory remedies, the access by writ petitions, the recourse to Public Interest Litigation and the role technical committees and of *amici curiae* in the proceeding. The second part further enlarges the scope of the analysis in the single leading cases of environmental litigation in India through writ jurisdiction, in order to look into the causes and the consequences of the judicial decisions for the public and the legal innovations purported by the jurisprudence. Finally, the third paragraph will rely on a comparative analysis – both diachronic and synchronic – of the attempts at creating specialised environmental tribunals so as to explain the developments leading to the establishment of the National Green Tribunal and the specific features of it.

I) Remedies and critical points: judicial strategies for environmental litigation

a) Common law causes of actions and the theory of liability

Notwithstanding the panoply of laws enacted from the 1970s, the lack of administrative enforcement³²² leaves space for judicial action, in case the citizen decides to resort to courts. In this event – apart from the most commonly used resort to writ petitions³²³ – several roads open up, each with specific characteristics and proceedings:

- Under the law of tort, an action for private nuisance, negligence or liability against the polluter;
- Under criminal law, an action for public nuisance;³²⁴
- With limitations to cases arising from incidents in hazardous industries, an application under the Public Liability Insurance Act of 1991;³²⁵
- For environmental clearances, the resort to the National Environmental Appellate Authority;³²⁶
- The traditional resort to filing writ petitions under Articles 32 and 226 of the Constitution, in cases of violations of fundamental rights;³²⁷
- As an extension of the former point, in case of common grievances concerning the violation of basic human rights

³²² As addressed in Chapter II on Environmental Impact Assessment.

³²³ See *infra*, paragraph b) and Section II.

³²⁴ Refer to Chapter II, Section III, paragraph c).

³²⁵ See *infra*, and Section II, paragraph c).

³²⁶ See *infra*, Section II, paragraph c).

³²⁷ See *infra*, paragraph b).

caused by activities led by the Executive, a Public Interest Litigation action.³²⁸

The law of torts, entered in the Indian legal system in the 18th century, as known and as it can be derived from the definition, deals with the redress of torts, civil wrongful acts recognised by law, not arising out of contracts or statutes, that result in injuries to another person or property and that can be redressed by the award of damages to the injured person.³²⁹ As stated by the Supreme Court in *Jay Laxmi Salt Works (P) Ltd vs. State of Gujarat*,³³⁰ "Winfield³³¹ has defined tortious law arising from breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages. In general, torts consist of some act done without just cause or excuse. "The law of torts exists for the purpose of preventing men from hurting one another whether in respect of their property, their presence, their reputations or anything which is theirs." Injury and damage are two basic ingredients of tort."

As Divan and Rosencranz state, the resorts that a plaintiff can obtain are basically two; damages and injunctions. Since damages – pecuniary compensation correlated to the action undertaken by the defendant – are generally low in India,³³² the most effective remedy in tort actions lay in the injunctions that courts can grant. Injunctions consist of processes where a person, the defendant, is faced by the obligation to restrain from continuing to act in a manner prejudicial to the

³²⁸ See *infra*, paragraph c). The classification proposed in this analysis is a remodulation of the "environmental lawyer's procedural armoury" identified by Divan and Rosencranz, p. 87.

³²⁹ For reference on tort law, Hedley, S., *Tort*, Oxford, Oxford University Press, 2011; Steele, J., *Tort law: text, cases, and materials*, Oxford, Oxford University Press, 2010. For India, Lakshminath, A., Sridhar, M., *Ramaswamy Iyer's The Law Of Torts*, Nagpur, LexisNexis Butterworth, 10th Edition, 2007.

³³⁰ *Jay Laxmi Salt Works (P) Ltd vs. State of Gujarat*, 1994 SCC (4) 1, JT 1994 (3) 492.

³³¹ Winfield, P.H., *A Text-book of the Law of Tort*, Sweet & Maxwell, 1950; Winfield, P.H., *The Law of Tort*, in *Law Quarterly Review*, 51, 1935, p. 249.

³³² The fines provided for in the Water and Air Acts can give a measure of the magnitude of eventual damages in civil suits.

environment, either temporarily or permanently. The principles that govern the grant of injunctions are three: the existence of a case where the plaintiff is very likely to succeed; the probability of permanent injury; a “balance of convenience” – the damages to the plaintiff being superior to the results of the measures ordered by the court.³³³

This enlargement of tort law to environmental cases finds its basis in the concept of nuisance. Originally, the notion was applied to private cases involving the interference of a party on the enjoyment of land by another party – thus being part of tort law. This general character of the notion led to the attraction of cases dealing with environmental damages to privates into tort law. In addition to the concept of nuisance, three other causes of action in the doctrine of tort law can be analysed in the framework of environmental law: negligence, strict liability and absolute liability.³³⁴

Negligence is defined as the breach of a duty of care on a plaintiff's good by a defendant. In order to bring to court an action for negligence in environmental cases, the plaintiff must prove that the defendant owed to him/her a “duty of care” to avoid the damage caused, that there existed a breach of this duty, and that there was a causal link between the breach and the damage. As it could be imagined, the critical point in the proceeding resides in the existence of a causal link, to be proved, between the damage and the act of the defendant – assuming the absence, in the behaviour of the defendant, of a standard of care. In this sense, it should also be noted that acts of negligence can also result in nuisance or in breaches of strict liability. In the first case, the injury caused to the plaintiff also interferes with his/her right of enjoyment of land, whereas, in the framework of strict liability, the act of negligence is also characterised by the escape of anything dangerous

³³³ Divan, S., Rosencranz, A., *op.cit.*, pp. 89-90.

³³⁴ See, for instance, Maloney, F.E., *Judicial protection of the environment: a new role for common-law remedies*, in *Vand. L. Rev.*, No. 25, 1972, p. 145; Juergensmeyer, J.C., *Common Law Remedies and Protection of the Environment*, in *U. Brit. Colum. L. Rev.*, No. 6, 1971, p. 215. For a comprehensive review of civil liability, also in the field of international law, refer to Bergkamp, L. (ed.), *Liability and Environment*, Kluwer Academic Publishers, 2001.

which the defendant has brought on the land (*Rylands vs. Fletcher* case).³³⁵

In India, the most relevant case on negligence in environmental pollution is the *Mukesh Textile Mills* case. In particular, the defendant was the owner of a sugar factory that stored molasses, eventually escaping and emptying into a water channel that irrigated the plaintiffs' lands.³³⁶ The court argued that the action of the defendant was negligent – thus underlying a breach of the duty of care – and condemned the defendant to damages. A second case occurred in 1999, when the Supreme Court of India recognised as negligence the acts of the Delhi Municipality in failing to ensure safety to road users – particularly, the falling of trees on the roads, killing one person, resulted in a breach of the duty of care (*Sushila Devi* case).³³⁷

The second cause of action is **strict liability**. As it was shown in *Rylands v. Fletcher*, a person is held as strictly liable in case he/she accumulates something with the risk of causing harm, and the escape of this substance produces damage as a consequence. Nevertheless, this definition is limited by several exceptions that differentiate negligence from strict liability: an act of God (a natural disaster), an act of a third party, fault or consent by the plaintiff, the natural use of land by the defendant and statutory authority. According to the Supreme Court, in the *Jay Laxmi Salt* case, “injury or damage resulting without any intention yet due to lack of foresight etc. is strict liability” – and the rule arose as a “judicial development of the liability in keeping with growth of society and necessity to safeguard the interest of a common man against hazardous activities carried on by others”.³³⁸

³³⁵ *Rylands v. Fletcher*, House of Lords, L.R. 3 H.L. 330 (1868), on injuries caused by the escape of hazardous substances. It is the foundational case in England for the doctrine of strict liability, enlarging the scope of tort law.

³³⁶ *Mukesh Textile Mills (P) Ltd. v. H. R. Subramaniya Sastri*, AIR 1987 KANT 87.

³³⁷ *Municipal Corporation of Delhi v. Sushila Devi*, AIR 1999 SC 1929, 1933.

³³⁸ *Jay Laxmi Salt Works (P) Ltd vs. State Of Gujarat*, 1994 SCC (4) 1, JT 1994 (3) 492.

It was this very necessity of following societal developments and of safeguarding common/public interests that led to the elaboration of two additional figures: in tort law, the notion of absolute liability of the polluter; in criminal law, the concept of public nuisance. **Absolute liability** was born as a concept stricter than strict liability with the expansion of hazardous industries, especially those dealing with chemicals. In India, the doctrine was first elaborated by the Supreme Court in the *Shriram Gas Leak* case,³³⁹ one of the litigations brought forward by M.C. Mehta, a public interest attorney that successfully pleaded before the Supreme Court in several landmark environmental cases. The case involved a writ petition under Article 32 of the Constitution for compensation of victims of damages caused by a plant owned by Shriram Foods and Fertilisers. Pending the writ petition, a gas leak occurred, so applications were filed for award of compensation to the victims. The matter thus involved Articles 21 and 32 of the Constitution, as environmental accidents impinged on the right to life of the citizens – the accident of the *Shriram* case affecting the people (and, consequently, their fundamental rights) on a large scale.³⁴⁰

Considering the relevance of the case, and its possible reflections on the Bhopal gas tragedy, the Supreme Court perfected the doctrine of strict liability set in *Rylands vs. Fletcher* in order to respond to the necessity of guaranteeing principles of liability for large enterprises producing hazardous substances. In the judgment, Chief Justice Bhagwati – considering the case as exceptional and deserving a particular treatment, including the award of compensation – stressed the “old-fashioned” character of the rule of strict liability³⁴¹ and allowed the introduction of absolute liability in the Indian law of torts. According to

³³⁹ *M.C.Mehta v. Union of India*, AIR 1987 SC 1086.

³⁴⁰ *M.C. Mehta & Anr. Etc vs. Union Of India & Ors. Etc*, 1987 AIR 965, 1986 SCR (1) 312.

³⁴¹ “The rule in *Rylands v. Fletcher* was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he falls to do so, is *prima facie* liable for the damage which is the natural consequence of its escape. The liability under this rule is strict.”

the judge, “We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries. (...) An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. (...)if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. (...) Such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*.” The Supreme Court thus innovated the legal system by introducing this new notion through a petition under Article 32 of the Constitution. Notwithstanding this assumption, the resort to civil courts – as it should be procedurally pursued concerning tort law – has been maintained, since compensation can be claimed before the Supreme Court following the procedures for a writ petition, but damages are to be obtained before civil courts. As this mechanism and this theory was developed in the wake of the Bhopal incident, the notion of absolute liability has been applied by the Madhya Pradesh High Court in the *Union Carbide* case³⁴² and has also been integrated into statute law.

In fact, the Public Liability Insurance Act of 1991³⁴³, whose purpose was the grant of a speedy relief to the victims of accidents caused by the handling of hazardous substances, provides for the rule of absolute liability in its Section 3. In any claim for relief, “the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default

³⁴² *Union Carbide Corporation v Union of India*, Civil revision No. 26 of 1988, 4 April 1988.

³⁴³ The Public Liability Insurance Act, Act No. 6 of 1991.

of any person". Moreover, the Act establishes powers of control in the hands of courts, that under Section 11 are allowed to examine applications by the Government on possible contraventions to the prohibition of handling hazardous substances, with powers of issuing orders or directions for restraint. In light of the jurisprudence and of the crystallisation into pieces of legislation, absolute liability is thus to be considered a principle "entrenched" in nowadays environmental tort law.

Apart from these tort law remedies between privates, that are relevant in the Indian legal system as far as environmental protection is concerned – and reserving writ jurisdiction to a dedicated analysis – the most relevant notion in common law is that of **public nuisance**, as a derivation from private nuisance. As it was developed from a tort law concept, but codified in the Indian Penal Code, the notion can be considered as both a tort and a crime.³⁴⁴ Indeed, Schwartz and Goldberg define the behaviours encompassing public nuisance as a *"quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right"*.³⁴⁵ In the Indian jurisprudence, the *Ratlam Municipality* case has been paramount in entrenching public nuisance in environmental crimes³⁴⁶ - demonstrating the active role of the Supreme Court in enlarging the scope of broad definitions and in presenting tailor-made interpretation for environmental purposes and for upholding the rule of law. In fact, the court considered public nuisance as *"a challenge to the social justice component of the rule of law (...) because of pollutants being discharged by big factories to the detriment of the poorer sections"*.

Moreover, the Supreme Court clarified its powers and the interrelations between the notion of public nuisance and the crimes provided for in

³⁴⁴ See *supra*, Chapter II, Section II.

³⁴⁵ Schwartz, V.E., and Goldberg, P., *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, in *Washburn Law Journal*, No. 45, 2005, p. 541.

³⁴⁶ *Municipal Council, Ratlam vs. Vardhichand*, AIR 1980, SC 1622, (1980) 4 SCC 162.

the Acts adopted from the 1970s. In *Gobind Singh*,³⁴⁷ the apical tribunal delved into the powers of the magistrate and limited the scope of conditional orders under Section 133 – which are mandatory, but to be issued with reasonable terms (in this specific case, the demolition of an oven and the prohibition to pursue the economic activity of the defendant). Indian courts further developed the application of these rules: as for the relations between the power of the magistrate and that of a Pollution Control Board, the relevant cases are *Nagarjuna Paper Mills*,³⁴⁸ where the High Court of Andhra Pradesh maintained that a magistrate was empowered to regulate pollution according to the norm of public nuisance – while the plaintiff (the company) affirmed the exclusive power of Pollution Control Boards in cases of air and water pollution – and *State of Madhya Pradesh vs. Kedia Leather*,³⁴⁹ on the question of the implied repeal of Section 133 of the Code of Criminal Procedure by the Water and Air Acts. Also in this case, the Supreme Court distinguished between the two sets of norms: “the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise.”

In doing this, the Supreme Court ensured a variety of remedies for environmental litigation, since the Indian legal system provided for both general, common law norms that had been judicially adapted to the purpose of the protection of the environment and of human health and for special legislation aimed at protecting the right to life enshrined in Article 21 of the Constitution and at preventing potential harm to the citizens and the environment in general. Moreover, the array of remedies was not only limited to the division of fields between different norms, but resulted in an expansion of the methods for access to justice and participation to courts, such as the device of public interest litigation and the role of the *amici curiae* in the proceedings.

³⁴⁷ *Gobind Singh vs. Shanti Swarup*, AIR 1979 143, 1979 SCR (1) 806.

³⁴⁸ *Nagarjuna Paper Mills Ltd. vs Sub-Divisional Magistrate And Divisional Officer, Sangareddy*, 1987.

³⁴⁹ *State Of M.P. vs. Kedia Leather & Liquor Ltd. & Ors.*, 2003.

b) Writ jurisdiction

Before looking into the vast scope of Public Interest Litigation as developed by the Indian Supreme Court, it is opportune to review the main characteristic of constitutional litigation as devised by the Constitution of 1950, as PIL is part of the broad ambit of writ jurisdiction under Articles 32 and 226 of the Constitution.

As known, the Indian Constitution draws from the common law tradition the use of prerogative writs for the protection of individual rights, a feature that was present in the Indian legal system from the enactment of the Indian High Court Act of 1861, with reference to the High Courts installed in Calcutta, Madras and Bombay.³⁵⁰ In fact, the English legal system provided for several writs – *brevis*, written orders from the courts – that enabled a tribunal to require a party to perform an act or to cease to do such specific act. Among those remedial tools, the relevant categories are the writ of *habeas corpus*, the writ of *mandamus*, the writ of *certiorari*, the writ of *prohibition* and the writ of *quo warranto*.³⁵¹

During the drafting period of the Constitution, Bhimrao Ambedkar had been a firm supporter of the presence of provisions, constitutionally entrenched, that were aimed at guaranteeing access to justice for the protection of human rights. In fact, the father of the Indian Constitution defined Article 32 (Article 25 of the Draft Constitution) – that concerned the right to constitutional remedies – as the soul of the Constitution, the

³⁵⁰ Ramachandran, V.G., *Law of Writs*, Lucknow, Eastern Book Company, 5th Edition, 1993

³⁵¹ For a historical perspective, see Basu, D. D., *Introduction to the Constitution of India*, Nagpur, LexisNexis Butterworth Wadhwa, 20th Edition, 2008; Jain, M.P., *Outlines of Indian Legal and Constitutional History*, Nagpur, Wadhwa and Company, 6th Edition, 2006; Kulshreshtha, V. D., *Landmarks in Indian Legal History and Constitutional History*, Lucknow, Eastern Book Company, 8th Edition, 2005; Mattei, U., *Il modello di common law*, Torino, Giappichelli, 2004; Jenks, E., *The Prerogative Writs in English Law*, in *Yale Law Journal*, Vol. 32, No. 6, 1923, pp. 523-534.

Article “*without which this Constitution would be a nullity*”.³⁵² The right to constitutional remedies, considered as the last of the fundamental rights enshrined in the text of 1950, is indeed the cornerstone of the rule of law in India.

It is noteworthy to report the text of the first two clauses of Article 32, in order to review the interpretation of the right to constitutional remedies in the Indian legal system:

Article 32. Remedies for enforcement of rights conferred by this Part.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

The Constitution provides for the access to the Supreme Court (and also to the High Courts under Article 226) through appropriate proceedings, which means that the applicant should move to the Court basing its request on a specific purpose related to the protection of fundamental rights. The provision is to be interpreted in the sense that the tribunal is not concerned with the form of the application (the Supreme Court being open to numerous methods of filing petitions, including through letters).³⁵³

The fundamental character of this provision lies not only in the innovative practice of introducing such element in the Constitution, but in the broad scope of access and devices for upholding the protection of fundamental rights. Indeed, Article 32 empowers the Court with original jurisdiction in matters concerning human rights, with an array of remedial tools. Clause 2 lists the five principal categories of writs, but is not exclusive, as the norm suggests an enlargement of those

³⁵² Parliament of India, *Constituent Assembly Debates*, Vol. VII, p. 953. See *supra*, Chapter II, Section I.

³⁵³ *Bandhua Mukti Morcha vs. Union Of India & Others*, AIR 1984, SC 802, 1984 SCR (2) 67.

decisions of the Court – enumerating orders, directions and writs and underlying the possibility of evolution of prerogative writs “in the nature” of those listed, furthering a wider variety of writs than those devised in the English system.

As M.P. Singh reports, the Court is not only empowered to issue injunctive orders, but is also entitled to provide remedies or relief to breach of rights already committed.³⁵⁴ Moreover, the possibility to access justice lies in two different territorial jurisdictions, one pertaining to the territory of India as a whole, under Article 32, for the Supreme Court, and one for High Courts, under Article 226, related to the jurisdiction of the single States. The two Articles operate independently of each other, as the writ jurisdiction of the High Courts is parallel to that of the Supreme Court: the avoidance of overlapping of cases is realised through the principle of *res judicata*, according to which the disposal of a writ petition under Article 226 bars the recourse to another writ petition under Article 32, thus guaranteeing that the same case is not judged twice. Additionally, a difference between Article 32 and Article 226 resides in the larger scope of the latter, as it provides not only for fundamental rights, but also for “any other purpose”.³⁵⁵

In matters related to the environment, the resort to writs is generally restrained to three kinds: *certiorari*, *prohibition* and *mandamus*. The writ of *certiorari* is an order of the Court (Supreme Court or High Court) that directs an inferior tribunal or authority to transmit to the superior Court the record of the proceedings pending before it, in order to scrutinise and to eventually quash the record.³⁵⁶ In this sense, *certiorari* has the purpose of restraining public authorities from acting in a way that exceeds their mandate. The main concern in this field is the definition of which authorities are to be considered, as *certiorari* may be issued against bodies having exceeded their powers but having the duty to act judicially. This “duty to act judicially” has been widely

³⁵⁴ Singh, M.P., *V.N. Shukla's Constitution of India*, Lucknow, Eastern Book Company, 11th Edition, 2010, p. 322.

³⁵⁵ Jain, M.P., *Indian Constitutional Law*, Nagpur, LexisNexis Butterworths Wadhwa, 6th Edition, 2011, pp. 424-456.

³⁵⁶ Singh, M.P., *V.N. Shukla's Constitution of India*, *op.cit.*, p. 632.

interpreted by the Supreme Court as to include all activities having a quasi-judicial character, such as the order of making representations, of making enquiries or of considering evidence.³⁵⁷ Thus, when issuing a *writ of certiorari*, the Court must consider this functional test of the duty to act judicially by looking at the effective nature of the role performed by the authority, with a tendency to review also administrative acts and proceedings, following the concept of natural justice and the requirement of fairness.³⁵⁸

The *writ of prohibition* follows a similar logic, as it is designed to counter the excessive power of public authorities. As noted by M.P. Singh, several features are proper of the *writ of prohibition*. Firstly, it is a writ aimed at commanding another court to refrain from doing an action that it is bound to do, as asserting jurisdiction over a case for which that tribunal is not competent for. Secondly, it shares with the *writ of certiorari* the character of being directed to a judicial or quasi-judicial body, but not to executive authorities. Thirdly, *ratione temporis*, in opposition to *certiorari*, a *writ of prohibition* is issued for a proceeding that is pending before another tribunal, while a *writ of certiorari* is aimed at quashing a judicial decision that has already been taken.³⁵⁹ Lastly, the *writ of prohibition* follows the same practice of *certiorari* as far as the connotation of the authorities as judicial or quasi-judicial is concerned.³⁶⁰

The third most recurrent remedy under Articles 32 and 226, on environmental matters, is the *writ of mandamus*. As the name suggests, this writ is aimed at commanding any governmental, judicial, corporation or public authority to do or to refrain from doing an action that is considered an obligation under law.³⁶¹ As the writs analysed earlier, it is a remedy that is based on the principle of natural justice, as it ensures that defects of justice arising from a proceeding are eliminated. The requirements for the issue of a *writ of mandamus* are the

³⁵⁷ Singh, M.P., V.N. Shukla's *Constitution of India*, op.cit., pp. 632-637.

³⁵⁸ Divan, S., Rosencranz, A., op.cit., p. 127.

³⁵⁹ Singh, M.P., V.N. Shukla's *Constitution of India*, op.cit., pp. 653-655.

³⁶⁰ Divan, S., Rosencranz, A., op.cit., p. 127.

³⁶¹ Singh, M.P., V.N. Shukla's *Constitution of India*, op.cit., pp. 655.

existence of a legal right of a person, that is thus aggrieved by a denial of such right; then, the duty that the applicant seeks to enforce must be public (arising from the Constitution, statute law or common law and excluding contracts) and mandatory (not discretionary); moreover, it should be issued when there is no alternative available remedy. It derives from the character of public duty that a *writ of mandamus* cannot be issued against private persons. Finally, the previous requirement for the issue of such writ lies in the existence of a demand by a petitioner and a refusal from the concerned authority.³⁶²

What is peculiar of India is the transformation of the *writ of mandamus* – a remedy that is quick if compared to a common law suit and originally exceptional, as it is resorted in case other remedies are not available – into a tool for protecting the environment on a recurrent basis, thanks to the elaboration of the concept of “continuing mandamus”. As a character of judicial activism, the Supreme Court developed this writ in the nature of a *writ of mandamus*, whose purpose is the continued protection of the environment thanks to the issue of frequent interim directions of the same content, with a view to monitoring the situation until a final decision is taken.³⁶³ The Court started this practice in the case *Bandhua Mukti Morcha vs. Union of India & Others*, with directions that are passed on a recurrent basis.³⁶⁴ It is this very creative power of

³⁶² Singh, M.P., V.N. Shukla’s *Constitution of India*, *op.cit.*, pp. 655-659; see also Basu, D.D., *Introduction to the Constitution of India*, Nagpur, LexisNexis Butterworth Wadhwa, 20th Edition, 2011, pp. 136-137, for a list of actions possible under the *writ of mandamus*.

³⁶³ Divan, S., Rosencranz, A., *op.cit.*, pp. 146-147.

³⁶⁴ *Bandhua Mukti Morcha vs. Union Of India & Others*, AIR 1984, SC 802, 1984 SCR (2) 67. *Bandhua Mukti Morcha vs. Union of India & Others*, AIR 1992 38, SCR (3) 524 1991: “The Court did not treat the writ petition as disposed of by its judgment and the application survived for further monitoring.” See also Vineet Narain & Others *vs. Union of India & Another*, 18 December, 1997, “it is settled that the requirement of a public hearing in a court of law for a fair trial is subject to the need of proceedings being held in camera to the extent necessary in public interest and to avoid prejudice to the accused. We consider it appropriate to mention these facts in view of the nature of these proceedings wherein innovations in procedure were required to be made from time to time to sub- serve the public interest, avoid any prejudice to the accused and to

the Courts that highlighted the relevance of writ jurisdiction for the protection of environmental rights, extending not only to fashioning innovative remedies, but changing and broadening the rule of standing before the tribunals, thanks to the device of Public Interest Litigation.

c) Public Interest Litigation

As seen above, the Constitution of India provides for access to higher courts in Article 226 (for High Courts) and Article 32 (for the Supreme Court) in cases of human rights violations, by means of writ petitions.³⁶⁵ This kind of constitutional litigation – separated from the civil litigation described earlier – constitutes an additional tool for guaranteeing an enhanced access to justice to the citizens (especially those with lower possibilities) and possibly the most relevant method in environmental litigation. In this field, the Supreme Court has devised a powerful remedy for enlarging the scope of litigation and the categories of subjects that could address the higher courts for obtaining justice: Public Interest Litigation (PIL).

The opus of some of the Justices of the Supreme Court between the late 1970s and the early 1980s – chiefly Justice Krishna Iyer and Justice Bhagwati³⁶⁶ – Public Interest Litigation consists of a relaxation of the rules of *locus standi*, the judicial evaluation of the interest of a person in the controversy proposed to the attention of the court. Until the 1970s, the Supreme Court maintained the traditional doctrine of standing, that narrowed access to justice only to those with a sufficient interest in the case – “the person aggrieved”. In light of the social demands coming from the lower *strata* of the population, the court endeavoured to modify the traditional rules, particularly for cases dealing with the environment. This resulted in an expansion of standing, motivated by

advance the cause of justice. The medium of “continuing mandamus”, was a new tool forged because of the peculiar needs of this matter.”

³⁶⁵ See *supra*, Chapter II, Section II, and *infra*, Chapter III, Section I, paragraph b).

³⁶⁶ Cooper, J., *Poverty and Constitutional Justice: the Indian Experience*, in *Mercer Law Review*, No. 44, 1992, p. 611.

the need to uphold the rule of law, in order to hear and redress the wrongs caused to the rights of the underprivileged, by means of a public action – described, following the definition by Cunningham, as “representative standing”.³⁶⁷

The two Justices mentioned before are to be considered as the fathers of this evolution in constitutional procedural law. In fact, in two judgments of the Supreme Court, the new doctrine of *locus standi* is clearly evoked. In *Fertilizer Corporation Kamgar vs. Union Of India*,³⁶⁸ the Court delved into the characteristics of the *locus standi* under Article 32 of the Constitution and the question of the remedies available to the citizens – in dealing with access to justice in a case concerning the sale of public property for a lower price, causing loss of employment. The Court argued, then, that “the question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding be it under Article 226 or under Article 32 of the Constitution.” As developed (...) by Krishna Iyer, “the approach to Arts. 14 and 32, with its fascinating expansionism, is of strategic significance, viewed in the perspective of Third World jurisprudence. (...) Where does the citizen stand, in the context of the democracy of judicial remedies, absent an ombudsman? (...) The Court cannot wait and, despite allergy to minimal decisional law-making in vacant spaces, the rule of law in this virgin area cannot leave the fertile field fallow. (...) Locus standi must be liberalised to meet the challenges of the times. Ubi just ibi remedium must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice. (...) The argument is, who are you to ask about the wrong committed or illegal act of the Corporation if you have suffered no personal injury to property, body, mind or reputation? (...) Public interest litigation is part of the process of participate justice and

³⁶⁷ Cunningham, C.D., *Public interest litigation in the Supreme Court of India: A study in light of the American experience*, in *Journal of the Indian Law Institute*, No. 494, 1987.

³⁶⁸ *Fertilizer Corporation Kamgar vs. Union of India*, AIR 1981, SC 344.

'standing' in Civil litigation of that pattern must have liberal reception at the judicial doorsteps.

This liberalisation of the doctrine of standing for social reasons had been further confirmed by Justice Bhagwati in *S.P. Gupta vs. Union of India*,³⁶⁹ a case concerning the appointment of judges. The Supreme Court then challenged *"the basic postulate of the argument (...) that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the Court for the purpose of seeking redress for the person injured"* and held that *"it may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right (...) and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."*

Moreover, in the same judgment, the Court acknowledged the development of social, meta-individual rights and categorised the violations of those rights as *"public injuries"*, characterised by the fact that the *"acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons"*. To check these injuries, *"if public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation -- litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient*

³⁶⁹ *S.P. Gupta vs. President of India And Ors.*, AIR 1982, SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.

interest to give standing to a member of the public would have to be determined by the Court in each individual case."

Hence, the Court innovated procedural access by allowing cases presented by citizens having a simple "sufficient interest". As noted by Divan and Rosencranz, the Court implicitly made a distinction between representative and citizen standing. According to the former, the enlargement of locus standi responds to the need of standing for the underprivileged by means of representation by volunteers. According to the latter, as a derivation from representative standing, a person could file a writ petition not as a representative of the poor and oppressed, rather "*as a member of the citizenry*", in his/her right of redressing the abuses purported by executive authorities.³⁷⁰ The difference is, nonetheless, blurred in practice, the material point being the possibility of accessing the courts in order to enforce the rule of law. The main features of PIL are thus the vindication of public interests, the possibility of access to justice for poor and unrepresented classes, the expanded *locus standi* and the flexibility of the procedure.

The last aspect is probably the second key element in assessing the success of PIL in India. As a matter of fact, the flexibility of the procedure of filing a PIL lies in the absence of codification of the rules governing this tool – an attempt of passing a Parliamentary Bill on PIL failing to reach approval in 1996.³⁷¹ As stated also by Bhagwati in the *S.P. Gupta* case, the Court may accept writ petitions in any form, including letters and telegrams.³⁷² Moreover, in 1988, the Supreme Court issued certain guidelines to be followed for presenting petitions to be considered as PIL.³⁷³ In particular, the apex tribunal, while maintaining flexibility as to the form of petitions, limited the categories

³⁷⁰ Divan, S. Rosencranz, A., *op.cit.*, pp. 136-137.

³⁷¹ Deva, S., *Public interest litigation in India: a critical review*, in *Civil Justice Quarterly*, No. 28, 2009, p. 38.

³⁷² Deva, S., *op.cit.*, p. 24, and Sahasranaman, P.B., *op.cit.*, p. 63.

³⁷³ These Guidelines have been further modified in 1993 and in 2003.

of PIL to those that most directly affect the lower strata of the population.³⁷⁴

In this regard, procedurally, apart from the curtailment of categories, the Court has established a “PIL Cell” that is charged with the scrutiny of all writ petitions submitted as PIL, in order to accept only those that fall within one of the ten categories listed in the Guidelines and inscribe them in a bench. This measure derives from the overload of the Supreme Court in PIL cases and in the abuses in filing writ petitions that hide merely private interest.

In fact, since its inception, the history of Public Interest Litigation can be divided into three phases: a first period, in the 1980s, when PIL cases

³⁷⁴ <http://supremecourtindia.nic.in/circular/guidelines/pilguidelines.pdf>. The categories are:

- Bonded Labour matters;
- Neglected Children;
- Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases);
- Petitions from jails complaining of harassment, for (pre-mature release)* and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right;
- Petitions against police for refusing to register a case, harassment by police and death in police custody;
- Petitions against atrocities on women, in particular harassment of bride, brideburning, rape, murder, kidnapping etc.;
- Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes;
- Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance;
- Petitions from riot-victims;
- Family Pension.

properly responded to the need of the disadvantaged and the action of the judiciary resulted in the recognition of rights and remedies to redress violations; a second phase, roughly corresponding to the 1990s, characterised by an institutionalisation of the procedure by specialised actors (lawyers and NGOs), by a broadened scope of action – also against privates, and by a overarching judiciary that mandated directions pertaining to the legislative power; a third phase, started in the 2000s, witnessing a ballooning resort to PIL for almost every issue, balanced by a certain restraint by the judiciary.³⁷⁵ Because of its flexibility and of its inherent nature of judicial device, PIL has shown both positive and negative aspects – especially as far as environmental litigation (the eighth point of the Guidelines of the Supreme Court) is concerned.

As already stated, PIL was born as a result of judicial activism of the higher courts,³⁷⁶ as a way to alter the rules of the game when deemed necessary to uphold the rule of law and the protection of fundamental rights.³⁷⁷ Many are the positive contributions to the Indian legal system and to the society as a whole. Firstly, PIL has been an effective instrument for guaranteeing human rights and for enlarging the protection of the right to a wholesome environment.³⁷⁸ Then, procedurally, it has been a successful device for enhancing access to justice, since lower classes could eventually file suits to courts, regardless of material impediments. Finally, it has granted the judiciary a certain legitimacy through ordering measures eager to fulfil the environmental needs of those asking for redress of hazardous situations.

Notwithstanding these positive aspects, several critical points arose in the unfolding of the creativity of the higher courts. Judicial activism is certainly useful in upholding the rule of law, but an encompassing role

³⁷⁵ Deva, S., *op.cit.*, p. 29.

³⁷⁶ Sathe, S.P., *Judicial activism in India*, Oxford, Oxford University Press, 2002.

³⁷⁷ Cassels, J., *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, in *The American Journal of Comparative Law*, Vol. 37, No. 3, 1989, pp. 495-519.

³⁷⁸ See *infra*, Section II.

of courts in drafting orders that contain legislative or executive measures impinges in the traditional check and balance rule enshrined in the Constitution.³⁷⁹ By analysing the results of PIL using the framework of Anant and Singh – that divide judicial activism between interpretational, legislative and executive judicial activism³⁸⁰ – it is manifest that Indian Courts expanded their action in the realm of the legislative and executive powers, while the judiciary should normally restrain its competences within the interpretation of norms.

Secondly, this very feature of PIL offers scope for critiques as far as effectiveness is concerned. From a law and economic perspective, the courts, when delivering orders and directions that specify measures to be complied with by executive agencies or private persons, are not in the best position to assess the effectiveness of a measure if compared with other options.³⁸¹ Considering the informational advantage of the legislator and of administrative agencies in setting environmental standards, as the process of law- or regulation-making ought to be participative – and potentially more participative of a judicial proceeding – the courts appear to be the least suited institutions in ordering beneficial directions, or the most appropriate directions. Moreover, the main issue in granting executive directions resides in the impossibility, for the judiciary, of guaranteeing compliance to the orders issued – a neverending problem in environmental litigation.

This phenomenon of “creeping jurisdiction” has been observed particularly in cases concerning environmental litigation, as a result of the lack of measures by the legislature or the executive, or of a poor enforcement. Two leading cases before the Supreme Court, illustrative of the issues at stake when deciding cases presented through PIL, can

³⁷⁹ Sathe, S.P., *Judicial Activism: The Indian Experience*, in *Washington U.J.L. & Pol.*, No. 6, 2001, pp. 29-108.

³⁸⁰ Anant, T.C.A., Singh, J., *An Economic Analysis of Judicial Activism*, in *Economic and Political Weekly*, Vol. 37, No. 43, 2002, pp. 4433-4439.

³⁸¹ Faure, M.G., Raja, A.V., *Effectiveness of environmental public interest litigation in India: Determining the key variables*, in *Fordham Environmental Law Journal*, Vol. 21, 2010, pp. 239-294.

be briefly analysed: the *Delhi Vehicular Pollution* case³⁸² and the *Municipal Solid Waste Management* case³⁸³.

The *Delhi Vehicular Pollution* case is one of the litigations set by M.C. Mehta with regard to air pollution. Notwithstanding the enactment of the Air Pollution Act, the petitioner claimed the high levels of pollution in Delhi as threatening the health of the citizens, because of traffic conditions and the presence of hazardous industries within the territory of Delhi. M.C. Mehta thus filed two petitions asking the Supreme Court to issue directions for closing down those industries³⁸⁴ and for regulating air pollution caused by vehicles.³⁸⁵ The Court responded to these demands in a series of orders aimed at guaranteeing a certain access to information, in order to coherently issue directions, and at regulating the problems arising from the petition.

In the framework of its creative judicial activism, in 1991 the Court directed the Ministry of Environment and Forests to establish a Committee with the task of studying the alternatives adapted to the reduction of polluting vehicles. After the issue of the report of the Committee – that suggested the introduction of low- and unleaded fuel and compressed natural gas vehicles – the Supreme Court ordered a phase-out of leaded petrol for all public buses in its order of 28 July 1998, to be implemented by 31 March 2001.³⁸⁶ As indicated earlier, the fundamental issue in an order of a court containing environmental measures consists in its implementation. A three-year delay for converting public vehicles from diesel fuel to CNG was fought by executive agencies, apparently unable to cope with the situation in the time frame deemed sufficient by the Court. In this regard, the MoEF

³⁸² *M.C. Mehta vs. Union of India & Ors.*, SCR (1) 866, 1991, SCC (2) 353, 1991. This judgment deals with the closure of industries, as the writ petition concerning traffic conditions did not arrive at a final judgment.

³⁸³ *Almitra H. Patel & Anr vs. Union of India & Ors.*, 16 January, 1998. This case consists of a series of orders directed to the authorities concerned.

³⁸⁴ Writ Petition (Civil) No. 4677/1985.

³⁸⁵ Writ Petition (Civil) No. 13029/1985.

³⁸⁶ *M.C. Mehta vs. Union of India*, Writ Petition (Civil) No. 13029 of 1985, order dated 28 July 1998.

established an Environment Pollution (Prevention and Control) Authority, that has been used by the Supreme Court as a sort of “fact-finding commission” for issuing orders.³⁸⁷

In light of the poor implementation of the order of 1998, the Supreme Court issued another order in 2002,³⁸⁸ blaming the Delhi Government for the slow progress toward a complete phase out and directed the replacement of buses at a pace prescribed in the very same order.

It is apparent that this manifestation of judicial activism impinged on the prerogatives of the executive and of the legislature. In fact, the MoEF and the executive agencies of the Government of Delhi should have been the competent organs for directing the proper measures apt to redress the environmental situation. The passage to CNG has been considered by the Supreme Court as the measure that could diminish the alarming levels of pollution in Delhi, but the social and economic cost of the phase out was not foreseen by the apex tribunal. In fact, the fuel infrastructure of the city was not adequate for the change asked, since CNG stations had to be built anew. Moreover, the strong stance of the Supreme Court showed the inadequacy of Pollution Control Boards in managing hazardous situations. While the most appropriate intervention to tackle air pollution would have been an enhancement of the powers of the PCB, especially concerning enforcement, through legislative changes, the Supreme Court did not hesitate to pose as an “environmental manager”.

A similar scenario applies for the *Municipal Solid Waste Management* case, that was dealt with by the Supreme Court in the same period. The matter of the safe disposal of waste had been a longstanding environmental issue, being discussed by the apex court since 1980, in the *Ratlam Municipality* case,³⁸⁹ under the law of torts. Here, the

³⁸⁷ Rosencranz, A., Jackson, M., *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, in *Columbia Journal of Environmental Law*, Vol. 28, 2003, p. 223.

³⁸⁸ *M.C. Mehta vs. Union of India*, order dated 5 April 2002.

³⁸⁹ *Municipal Council, Ratlam v. Vardhichand*, AIR 1980, SC 1622, (1980) 4 SCC 162. See *supra*, paragraph a).

petitioner presented the critical situation in Delhi, characterised by deficient conditions of waste deposal and disposal, and sought *writ of mandamus* against the competent authorities – and most specifically the Municipal Corporation of Delhi and the Delhi Municipal Council – for taking initiatives in order to solve the question of the collection, transportation, disposal, treatment and recycling of waste.³⁹⁰ As in the *Delhi Vehicular Pollution* case, the Court directed the establishment of a Committee, composed of eight members (including the petitioner), whose task was the examination and suggestion of methods to improve the conditions according to the need for “eco-friendly sorting, collection, transportation, disposal, recycling and reuse”,³⁹¹ the review of local regulation and the formulation of standards and time-limits for implementing rules on the management of municipal solid waste. The so-called Asim Barman Committee proved effective, as it delivered its report in six months³⁹² and was at the origin of the notification of the Municipal Solid Waste (Management and Handling) Rules of 2000, issued by the MoEF.³⁹³

Several relevant points can be singled out from the *Municipal Solid Waste Management* case. First of all, the resort to the creation of a body entrusted with the task of suggesting measures to overcome the environmental problems set by the petitioner, a tool of judicial activism that is considered by the Court as effective for pushing the respondents to implement solutions. Then, the enlargement of the scope of action *ratione loci*, since the order of the Supreme Court was directed also to other municipalities than Delhi, and the very same writ petition was later concerned with the implementation of MSW Rules in Mumbai, Chennai, Calcutta and Bangalore³⁹⁴ and to all State Pollution Control

³⁹⁰ Writ Petition (Civil) No. 888/1996.

³⁹¹ *Almitra H Patel & Anr vs. Union of India & Ors.*, order dated 16 January, 1998.

³⁹² *Solid Waste Management in Class I Cities in India*, Report of the Committee constituted by the Hon. Supreme Court of India, March 1999, available at www.almitrapatel.com/docs/004.rtf.

³⁹³ See *supra*, Chapter II, Section III.

³⁹⁴ *Almitra H Patel & Anr vs. Union of India & Ors.*, order dated 24 November, 1998.

Boards for the draft of action plans on this issue.³⁹⁵ Finally, the length of the proceedings is a critical point, as the matter is still pending. The Court has certainly profited of this case for obtaining a result beneficial to the population, as the implementation of the MSW Rules is – considering that this was the outcome that the petitioner sought when filing a PIL. Nevertheless, the existence of a writ petition pending for almost two decades sheds light on the stimulating role of the Supreme Court – and of the National Green Tribunal, as the petition has been transferred to it in 2014³⁹⁶ – and on its possible abuses and deviations from a pure judicial function to the exercise of executive and quasi-legislative prerogatives.

Apart from the critical points of creeping jurisdiction and of the length of proceedings, the last issue raised by the use and abuse of PIL lies in the filing of frivolous petitions, a feature consistent with the practice of petitioners from the 2000s.³⁹⁷ Looking at this, the Supreme Court issued directions – in a case concerning the appointment of judges³⁹⁸ – on the resort to PIL and on the judicial method to handle the listing of this kind of petitions, that, if filed indiscriminately, cause “*unnecessary strain on the judicial system and consequently lead to inordinate delay in disposal of genuine and bona fide cases.*” Thus, by virtue of the constitutional obligation of the Court to protect the fundamental rights of the people, the apex tribunal indicated several rules centred on both monetary and non-monetary requirements.³⁹⁹

³⁹⁵ *Almitra H Patel & Anr vs. Union of India & Ors.*, order dated 26 July, 2004.

³⁹⁶ *Almitra H Patel & Anr vs. Union of India & Ors.*, order dated 8 September, 2014 (accessed 7 June 2015, at <http://courtnic.nic.in/supremecourt/temp/wc%2088896p.txt>).

³⁹⁷ Deva, S., *op.cit.*, p. 29.

³⁹⁸ *State of Uttaranchal vs. Balwant Singh Chaufal & Ors.*, AIR 2010, SC 2550, 2010 (3) SCC 402, 2010, AIR SCW 1029.

³⁹⁹ In particular:

- Encouragement of genuine *bona fide* petitions and discouragement of PIL filed for “*extraneous considerations*”;
- Framing of rules by High Courts on how to deal with PIL, instead of leaving the matter to each individual judge;

In light of the theory and practice, Public Interest Litigation has proved to be a fairly effective method for guaranteeing access to justice and for obtaining suitable measures to redress harm and the violation of fundamental human rights, particularly the right to a healthy environment. Notwithstanding critiques concerning the absence of consideration for all the dimensions of sustainable development – as the cases analysed earlier show how the environment is deemed a higher value for the Supreme Court if compared to the economic *volet* of sustainable development – another aspect that is missing in the experiences surveyed beforehand is the question of participation. If the Supreme Court is to be seen as a “*policy evolution forum*”,⁴⁰⁰ the participatory dimension of the judicial proceeding should thus be fostered. The role of technical instruments before the Courts thus soars to the attention as for its possible pertinence in enhancing participation and in devising more appropriate solutions.

d) Technicalities and *amici curiae*

The analysis of the procedural tools in environmental litigation would be incomplete without a glimpse at the role of technical expertise before the Supreme Court, a matter that triggered judicial reform. While the issue of *locus standi* has been thoroughly treated, another specific

-
- *Prima facie* verification of the credentials of the petitioner before the entertainment of a PIL;
 - *Prima facie* correctness of the contents of the petition;
 - Satisfaction of the involvement of a substantial public interest in the petition;
 - Insurance of priority for petitions involving larger public interest or petitions that are urgent or of highest gravity;
 - Verification of the aim of a PIL, that ought to be the “*redressal of genuine public harm or public injury*”, not involving any personal gain or private motive;
 - Imposition of exemplary costs for petitions filed by “*busybodies for extraneous and ulterior motives*”, in order to curb frivolous or extraneous petitions.

⁴⁰⁰ Rajamani, L., *op.cit.*, pp. 316-319.

feature of the actions before the highest tribunals comes to the forefront: the necessity of environmental expertise for allowing a judicial activism conscious of the results that it aims at providing. As seen for Public Interest Litigation, the expansion of the role of the judiciary has been guaranteed by the creative solutions presented by the Courts, that often included directions for the establishment of *ad hoc* committees charged with the task of studying the issue at stake in the proceeding and of presenting environmental and socio-economic solutions that the tribunals could refer to in its orders and final judgments.⁴⁰¹

Here, a distinction will be made between the creation of committees by the Supreme Court (and the High Courts) and the institutional feature of *amicus curiae*. Despite the homogenisation that Chowdhury makes between the two,⁴⁰² a differentiation has to be considered. On the one hand, *amicus curiae* could be defined as a person (individual or legal) that is not a party to the action and has an interest or a view in the subject matter of the dispute but is permitted by the tribunal to advise it because of relevant information that could be brought to the attention of the Court.⁴⁰³ On the other hand, the practice developed by the Indian Courts differs inasmuch as it creates the party that is mandated to intervene in the dispute, while generally the tribunals resort to existing organisations dealing with public issues as *amici curiae*. The creation of committees is thus to be considered as an additional instrument, specific of the Indian proceedings.

In fact, if one considers the development of the notion in international law, the submission of *amicus curiae* briefs is subject to an authorisation of the tribunal to existing legal organisations or individuals.

⁴⁰¹ As in the *Delhi Vehicular Pollution* and in the *Municipal Solid Waste* cases.

⁴⁰² Chowdhury, N., *Environmental risk regulation and the Indian Supreme Court: an exercise in de-formalization of the law?*, in *Journal of Risk Research*, No.17 (1), 2014, pp. 61-80 (*"The Supreme Court has intervened (...) by relying on individual technical experts, who assume the role of amicus curiae"*, p. 61).

⁴⁰³ The definition in Black's Law Dictionary is alike: *"A party that is not involved in litigation but gives expert testimony when the court asks. They can support public interest not being addressed in the trial."*

Notwithstanding the limited use of this tool,⁴⁰⁴ the existence of organisations (in opposition to the creation of bodies), often non-governmental organisations, authorised to participate in proceedings is not disputed. In constitutional law, Rule 37 of the Rules of the Supreme Court of the United States offers a similar understanding of the issue, as the filing of such brief is to be done according to specific norms that include the consent of the Court, the relevance of the intervention and the interest in the case, underlying the very prior existence of subjects able to present a brief.⁴⁰⁵ Apart from this feature,⁴⁰⁶ the significance of the role of *amicus curiae* lies in its possible beneficial effects to the decision of the tribunal. An *amicus curiae* should present additional information and a different perspective to the subject of the dispute, when the Court could be affected by informational asymmetries or incompleteness, as a brief submitted by such parties should be directly aimed at the particular case, with specific information different from those that the tribunal could derive from public opinion.⁴⁰⁷

Notwithstanding the issues of accountability and transparency deriving from the resort to specific actors that do not seem to be legitimate to participate in judicial proceedings by the mere fact that the Court

⁴⁰⁴ Beyerlin, U., *The Role of NGOs in International Environmental Litigation*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Heidelberg, Max Planck Institut, 2001.

⁴⁰⁵ Supreme Court of the United States, *Rules of the Supreme Court*, adopted January 12, 2010, effective February 16, 2010.

⁴⁰⁶ For a confirmation of the practice, see also, for a scrutiny of international law, Butler, L., *Effects and Outcomes of Amicus Curiae Briefs at the WTO: An Assessment of NGO Experiences*, University of Berkeley, 2006; for an American perspective, Collins, P.M., *Friends of the court: Examining the influence of amicus curiae participation in US Supreme Court litigation*, in *Law & Society Review*, 38, No. 4, 2004, pp. 807-832.

⁴⁰⁷ Epstein, L., Knight, J., *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in C. Clayton, C., Gillman, H. (eds.), *Supreme Court Decision Making: New Institutional Approaches*, Chicago, Chicago University Press, 1999; Epstein, L., Knight, J., *The Choices Justices Make*, Washington, DC, Congressional Quarterly Press, 1998, p. 146.

requires them to do so,⁴⁰⁸ the intervention of legal organisations or individual possessing a specific expertise in the subject matter of the dispute should be welcomed as a sign of an enlargement of perspectives by the Courts. The participation of subjects that are not directly related to the proceeding is indeed a way of obtaining focused information with a high degree of technical expertise, with the added quality of a certain neutral character, as the briefs submitted should be in the sole interest of a fairer decision.

In the practice of the Indian Courts, the resort to *amici curiae* has been limited by the introduction of a similar tool, the creation of specialised committees by the tribunals. While, in its broader sense, the resort to public *amici curiae* could be considered to be widely practised, with the appointment of independent expert committees,⁴⁰⁹ the resort to private parties has been seldom witnessed. Notwithstanding the fulfilment of the same function, the categorisation of such practice is thus to be analysed as different from the species of *amicus curiae* – as it is characterised by the appointment by the Court (at its own discretion) of different independent experts that are charged with producing single reports. The relevant cases studied earlier are emblematic of this practice: the Asim Barman Committee consisted of eight members, seven of whom were public officers (mainly members of municipal corporations and of Ministries, whether at the federal or at the State level);⁴¹⁰ the Bhure Lal Committee, for matters pertaining to environmental pollution, envisaged the participation of five members, four being appointed by virtue of their particular professionalism and expertise, and the fifth being the Central Pollution Control Board, *ex officio*.⁴¹¹

⁴⁰⁸ Boisson de Chazournes, L., *Transparency and Amicus Curiae Briefs*, in *The Journal of World Investment and Trade*, Vol. 5, No. 2, 2004, pp. 333-336.

⁴⁰⁹ A practice started in the late 1980s. For instance, *Rural Litigation & Entitlement Kendra vs. State of Uttar Pradesh*, AIR 1989, SC 594, 1989 SCC Supl. (1) 537; *Banwasi Sewa Ashram vs. State of Uttar Pradesh & Ors*, AIR 1987, SC 374, 1987 SCR (1) 336.

⁴¹⁰ *Almitra H. Patel & Anr vs. Union of India & Ors.*, 16 January, 1998.

⁴¹¹ *M.C. Mehta vs. Union Of India & Ors*, order dated 7 January, 1998.

A general overview of the composition of these committees has been proposed by Markandey Katju, former Supreme Court judge and Acting Chief Justice at the High Court of Allahabad – one of the High Courts that resorted to the creation of “citizen committees” as *amici curiae* endowed with a broader participatory basis. In a speech delivered in 2002 in Delhi, Katju indicated the presence of citizens (lawyers, doctors, teachers, businessmen) and bureaucrats as necessary to the formation of those committees, as well as technical experts.⁴¹² By means of this varied composition, it could be observed that such committees as more representative of the positions of the civil society while at the same time fulfilling the need for expertise.

In this regard, the most recent practice of appointing committees has been characterised by an enhanced recourse to experts than to bureaucrats. As Chowdhury shows, the most debated cases pending before the Supreme Court in the last years have seen the creation of committees of independent experts separated from the classical appointment of member of PCB or municipal corporations. Thus, the result of this trend has been a rise of expert activities in the field of judicial activism. In *Aruna Rodrigues & Ors. Vs. Union of India & Ors.*, a case on GMOs, the Technical Expert Committee created in 2012 – following recommendations from the MoEF – comprised six Professors in the field of biology, biotechnology and food safety.⁴¹³ In *T.N. Godavarman Thirumulpad vs. Union of India*,⁴¹⁴ on deforestation, the Court established a Central Empowered Committee as a sort of dependence of the Supreme Court, insomuch as it functions as a tribunal of first instance and as a body entrusted with the monitoring of enforcement of orders.⁴¹⁵

This brief outline attempts at showing the pros and cons of the procedural devices of the Supreme Court. While the enlargement of PIL has certainly contributed to an enhanced access to justice, the practice

⁴¹² Sahasranaman, P.B., *op.cit.*, p. 306.

⁴¹³ *Aruna Rodrigues & Ors. vs. Union of India & Ors.*, AIR 2012, SCW 340, order dated 10 May, 2012.

⁴¹⁴ Writ Petition (Civil) No. 202/1995, still pending.

⁴¹⁵ *T.N. Godavarman Thirumulpad vs. Union of India*, order dated 9 May, 2002.

of creating committees that disguise a choice of *amici curiae* by the Court itself raises methodological issues. The growing reliance on such bodies is to be welcomed as for the effective enforcement of environmental rights, but closes a series of roads that the administration and the legislator could pursue. The consequence of judicial activism, in order to ensure proper judgments, is the continued resort to experts, that impinge on the legislative and executive legitimacy.⁴¹⁶ Moreover, the case of *T.N. Godavarman* shows the drawbacks of procedural tools such as the *writ of continuing mandamus*, that is ongoing for 15 years.⁴¹⁷ A recourse to expertise is certainly fundamental for studying the issues at stake in the judicial proceedings dealing with environmental problems. Notwithstanding this need, the creation of quasi-permanent committees threatens the participation of the public sphere to environmental debates and on the deliberation of permanent and effective solutions. This very ambivalence – between judicial activism and expertise on one side and lack of regulation or implementation on the other – has proved to be the *fil rouge* of the debate around the role of courts in environmental policy and on the need for specialised environmental tribunals, with the Supreme Court as the leading actor in interpreting principles and in suggesting solutions.

II) The Supreme Court between legal principles and scientific expertise

a) The adaptation of international law principles: sustainable development in the Supreme Court

Judicial activism as interpreted by the Supreme Court concretised not only thanks to procedural devices, as Public Interest Litigation, but also

⁴¹⁶ Chowdhury, N., *op.cit.*, p. 19.

⁴¹⁷ For a critical view of the case, Rosencranz, A., Boenig, E., Dutta, B., *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, in *Environmental Law Reporter News and Analysis*, No. 37 (1), 2007. For the use of the *writ of continuing mandamus* in environmental litigation, see *supra*, paragraph b).

as a result of the internal reflections of the Supreme Court on the environmental discourse taking place at the international level, from the Stockholm Declaration, and on the pieces of legislation enacted nationally. In fact, the main decisions of the apex tribunal on broadening the scope of action of the judiciary were also based on the transposition and elaboration of the principles developed in international environmental law and in legal doctrine.

Apart from the instruments existing in the Indian legal system and borrowed from private law,⁴¹⁸ the Supreme Court relied on several principles of environmental law as a basis of its judgments. As a general corollary of judicial action, notwithstanding the constitutional evolution of the 1970s, the public trust doctrine arises as the essential explanation of the role of the Supreme Court in environmental protection. This theory states that natural resources, namely water, air, earth and forests, are to be considered as part of a common good, and that the State has to be the trustee of this natural legacy and has thus the duty to protect them for future generations. The public trust doctrine finds its sources in ancient law, both Roman and Indian. Originally, it was developed by Emperor Justinian, on the understanding that in a rational classification of goods, natural resources were *res communes* and *res nullius*, pertaining to nobody but being part of a whole, common good that had to be protected on behalf of the public – a concept that was transmitted to English common law.⁴¹⁹ In parallel, traditional Indian texts, such as the *Manusmriti*,

⁴¹⁸ Refer *supra*, Section I, paragraph a).

⁴¹⁹ Justinian, *Institutes*, Book 2, Part 1, 1-6. For a historical account, see Ryan, E., *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, in *Environmental Law*, 31, 2001, p. 477; Huffman, J.L., *Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, in *American Environmental Law*, Vol.19, 1988, p. 527. Sax, J.L., *Liberating the public trust doctrine from its historical shackles*, in *Uc Davis Law Review*, Vol. 14, 1980, p. 185; Sax, J.L., *The public trust doctrine in natural resource law: Effective judicial intervention*, *Michigan Law Review*, Vol. 68, No. 3, 1970, pp. 471-566. For an opposed perspective in American law, Lazarus, R.J., *Changing*

advanced the idea that rulers had to maintain common goods as natural resources are.⁴²⁰

This traditional doctrine is clearly correspondent to the concept of intergenerational equity, as both theories sustain the necessity of a healthy environment to be maintained for future generations and the role of public authorities in fulfilling this need. In Indian law, the concept of public trust has been adopted by the Supreme Court in dealing with the landmark case *M.C. Mehta vs. Kamal Nath*.⁴²¹ The question posed before the tribunal concerned the diversion of the river Beas, approved by the MoEF, by a private enterprise that had touristic purposes. Recalling the ancient origins of the public trust doctrine and the scope of the theory under English law for rivers and seashores,⁴²² the Supreme Court presented a clear definition of it: “*The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.*” The Indian tribunal noted how American courts enlarged the application of it, if compared to the English system (limiting trust to navigation and fishing), and extended the qualification of public trust to ecologically relevant resources: “*the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect*

Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, in *Iowa Law Review*, Vol. 71, 1986, pp. 631-716.

⁴²⁰ Manusmriti, VII, 14.

⁴²¹ *M.C. Mehta vs. Kamal Nath & Ors.*, AIR 1997 (1) SCC 388.

⁴²² “*Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public.*”

the natural resources. These resources meant for public use cannot be converted into private ownership." Moreover, the Court recognised that the public trust doctrine is "*part of the law of the land*", a crucial interpretive step in asserting the relevance of environmental principles and of the legitimacy for institutional action.

By doing this, the Supreme Court recalled the role of the executive in protecting the environment and gave solid arguments for the interpretation of the public trust doctrine within the principles stated in Stockholm, as intergenerational equity is to be considered the complement of this doctrine.⁴²³ This view is confirmed even in the earliest decisions on environmental issues, paving the way for enucleating the public trust doctrine. In fact, in *State of Tamil Nadu vs. Hind Stone*,⁴²⁴ on a case concerning the illegal grant of leases for quarrying black granite, the Court stated that "*rivers, forests, minerals and as such other resources constitute a nation's natural wealth. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way.*" This is a plain recognition of the principles of intergenerational equity and of the fact that the nation as a whole, and the Government as a trustee, has the obligation to preserve natural resources from exhaustion.

From this doctrine, that aims at universalising the concerns for the environment, the application of the principles of international law that were foundational for the legislative interventions of the 1970s and the 1980s is the logical progress in judicial thinking. Indeed, considering that the cases before the courts – as it is classic in environmental jurisprudence – deal with the comprehension of environmental concerns within litigation on economic and social hindrances, the elaboration of **sustainable development** as a key principle of domestic policy followed as a natural path for complementing decisions. On this, the turning point was achieved with the judgment *Vellore Citizens*

⁴²³ See *supra*, Chapter I, Section I, paragraph b) and Sahasranaman, P.B., *op.cit.*, p. 40.

⁴²⁴ *State of Tamil Nadu vs. Hind Stone*, AIR 1981 711, SCR (2) 742.

Welfare Forum vs. Union Of India & Ors,⁴²⁵ that was eventually decided by the Supreme Court in 1996. In this case, Justice Kuldeep Singh, the “green judge”, delivered an innovative explanation of the international law principles of sustainable development, polluter pays and precaution as applied to the local reality of India.

The matter concerned the pollution caused by the working of leather tanneries in Tamil Nadu, in particular for the untreated effluents deriving from the chemicals employed in the production of leather, whose discharge into waters endangered soils, thus agricultural cultures, and eventually drinking water as well as the environmental state of the river Palar. Vellore Citizens Welfare Forum, alarmed by the extent of pollution and by the situation of the people in the area, filed a writ petition that resulted in a series of orders directing the closure of the tanneries, absent the installation of pollution control devices. Pursuing such orders,⁴²⁶ the action of the Tamil Nadu Pollution Control Board in monitoring the directions showed an insufficient implementation of pollution control, as those devices were performing at a suboptimal level in some tanneries, while in other plants the directions were simply not complied with, in spite of the mandatory nature of the directions.

In presenting the final judgment, the Court recalled its five years monitoring period through the Pollution Control Board and acknowledged the relevance of the leather industry for the economy of the region, as a source of employment and foreign exchange. Notwithstanding these considerations, the Supreme Court directed a panoply of measures that included the imposition of pollution fines on the tanneries; the creation of an authority charged with the compensation for the damages produced by the tanneries, to the ecology and to the individuals; the closure of those industries not paying the compensation and, naturally, the request of installation of common effluent treatment plants. These comprehensive directions were set by a thorough review of constitutional provisions and

⁴²⁵ *Vellore Citizens Welfare Forum vs. Union Of India & Ors*, AIR 1996 (5) SCC 647.

⁴²⁶ *Vellore Citizens Welfare Forum vs. Union Of India & Ors*, orders dated 15 December 1995 and 9 April 1996.

domestic legislation in light of the international law principles governing environmental issues. It is worthwhile to quote and analyse the excerpt of the judgment:

"The traditional concept that development and ecology are opposed to each other, is no longer acceptable. "Sustainable Development is the answer. In the International sphere "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called Our Common Future. The Commission was chaired by the then Prime Minister of Norway Ms. G.H. Brundtland and as such the report is popularly known as "Brundtland Report". (...) Finally, came the Earth Summit held in June, 1992 at Rio which saw the largest gathering of world leaders ever in the history - deliberating and chalking out a blue print for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. (...) During the two decades from Stockholm to Rio "Sustainable Development" came to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. "Sustainable Development: as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient features have yet to be finalised by the International Law Jurists.

Some of the salient principles of "Sustainable Development", as culled-out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Nature Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development". The "Precautionary Principle" - in the context of the municipal law – means:

(i) Environment measures - by the State Government and the statutory Authorities must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage lack of scientific certainty should not be used as the reason for postponing, measures to prevent environmental degradation.

(iii) The "Onus of proof" is on the actor or the developer/industrial to show that his action is environmentally benign.

(...) The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. (...) Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.

Justice Kuldip interpreted sustainable development through an evolutionary perspective. Overcoming the definitional conundrums of the concept⁴²⁷ and the differentiation between the various principles of international law, the Supreme Court declared sustainable development as a principle of international law, with the possibility of becoming customary in a perspective *de jure condendo*. Although noteworthy for grounding the judgment in an international perspective and posing the bases for a strengthened protection of the environment, it should be noted that the Court relies on soft law instruments for recognising the "normative threshold" necessary for considering sustainable development as a legal principle.⁴²⁸ While the notion should have been classified by looking at the most relevant elements – intergenerational equity, sustainable use, intragenerational equity and

⁴²⁷ See *supra*, Chapter I, Section II, paragraph c).

⁴²⁸ Boisson de Chazournes, L., Maljean-Dubois, S., *Principes du droit international de l'environnement*, in *Jurisclasseur Environnement et Développement Durable*, Genève, 2011, pp. 1-20.

integration of economic, social and economic considerations⁴²⁹ - the tribunal assumes the existence of the principle of sustainable development, in spite of the absence of definition of its “*salient features*”, by looking at it as an “umbrella concept” integrally covering the principles stated in the Rio Declaration.

Indeed, the difficulties witnessed by international law scholars and judges in developing the notion (that is not considered a principle by the International Court of Justice in the *Gabčíkovo-Nagymaros judgment*, except by the separate opinion of Judge Weeramantry, that is posterior to the *Vellore Citizens Welfare Forum* case)⁴³⁰ are overcome by resorting to the other principles of international law whose status is more defined as far as normativity is concerned. Consequently, absent the definition of sustainable development, the **polluter pays principle** and the **precautionary principle** find a clear-cut meaning with certain contours as two fundamental features of sustainable development.

Concerning the **polluter pays principle**, the Supreme Court derives from it a “restorative” leg of the notion of sustainable development. The principle is considered as two-fold: on the one hand, the duty to compensate victims of pollution, on the other hand, the reversal of the effects to the environment, thus acceding to a concept that has both a human- and an eco-centric nature. Moreover, the Court characterises the principle by the inherent necessity of encompassing absolute liability of the polluter. In doing this, the tribunal implicitly relates the international principle to domestic jurisprudence on the theory of liability, starting from the *Shriram* case.⁴³¹ Nevertheless, the Supreme Court appears to be enlarging the scope of liability in the polluter pays principle by blurring the two concepts. In a previous, landmark case, *Indian Council For Enviro-Legal Action vs. Union Of India* (also known as *Bichhri* case),⁴³² the Supreme Court ruled against the respondents – public authorities, but also the industrial entrepreneurs that led the

⁴²⁹ Sands, P., *Principles of International Environmental Law*, op.cit., p. 253.

⁴³⁰ See *supra*, Chapter I, Section II, paragraph c).

⁴³¹ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

⁴³² *Indian Council For Enviro-Legal Action vs. Union Of India & Ors.*, AIR 1996 1446, SCC 1996 (3) 212.

chemical plants causing water and land pollution in the area – on the basis of the *Shriram* case, of the Constitution (Articles 48A and 51A), of the domestic statutes dealing with this issue (Water and Air Acts, EPA and hazardous substances regulation), but relied on the polluter pays principle as a natural conclusion of domestic law. Indeed, the Supreme Court referred to it by quoting a definition of the principle (“*The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action*”) and stating that “once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on” since the principle “has gained almost universal recognition, apart from the fact that it is stated in absolute terms in *Oleum Gas Leak Case* (the *Shriram* case). The law declared in the said decision is the law governing this case.”

Notwithstanding the apparent coherence of the judgments, several observations can be presented. Firstly, the Court traces the jurisprudential origin of the principle already in the 1980s. Then, a substantial difference between absolute liability and polluter pays seems to be reduced: while in the *Bichhri* case the polluter pays principle is applied for hazardous industries, in *Vellore Citizens Welfare Forum* the application *ratione materiae* of the principle is widened by including traditional industries such as tanneries. This view is confirmed in the judgments chronologically following the decision in *Vellore Citizens Welfare Forum*, such as *M.C. Mehta vs. Union of India*⁴³³ (*Calcutta tanneries case*, as an evolution of *M.C. Mehta vs. Union of India* of 1988,⁴³⁴ also known as the *Ganga river pollution case*). Finally, with an international law perspective, the Supreme Court focuses more on the matter of restoration (a necessity, since tribunals, notwithstanding the

⁴³³ *M.C. Mehta v. Union of India*, AIR 1997 (2) SCC 411.

⁴³⁴ *M.C. Mehta v. Union of India*, AIR 1988 SC 1037.

judicial activism that characterises the Supreme Court, can issue directions *ex post*) than on preventive measures.

In this regard, the role of the **precautionary principle** arises. The Supreme Court recognises three elements in domestic law that concur to its definition and operationalisation: the role of domestic authorities in preventing harm to the environment, the overcoming of the lack of scientific certainty for designing and implementing measures and the reversal of the burden of proof upon the polluter. The definition of the precautionary principle is possibly the least contentious: the Supreme Court adopts a meaning that is consistent with the practice it aims at establishing for the protection of the environment, in light with the Indian legal system. Moreover, in a judgment on mining operations, the *Badkhal* case,⁴³⁵ the Court extends the definition delivered in *Vellore Citizens Welfare Forum* by dwelling upon the domestic norms guaranteeing the existence of a precautionary approach for the protection of the environment. In fact, “*the Precautionary Principle has been accepted as a part of the law of the land. Articles 21, 47, 48A and 51A(g) of the Constitution of India give a clear mandate to the State to protect and improve the environment and to safeguard the forests and wild life of the country.*” The principle “*makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation.*”

Notwithstanding the solid roots acknowledged in these judgments, the Court delves into the analysis of the principle in order to clarify its defining elements, such as the matter of the uncertainty of scientific knowledge and the dimensions of risk, dealt with in *Andhra Pradesh Pollution Control Board vs. Prof. M.V. Nayudu*,⁴³⁶ where the Court infers that the precautionary principle assumes its highest relevance insofar as it concurs in preventing accidents by prohibiting certain activities or by directing appropriate safeguards.

The peculiarity of the Indian judicial decisions lies in the theorisation of these principles as a *unicum*, or as a sort of **triptych** composed by the

⁴³⁵ *M.C. Mehta v. Union of India*, AIR 1997 (3) SCC 715.

⁴³⁶ *Andhra Pradesh Pollution Control Board vs. Prof. M.V. Nayudu*, AIR 1999 SC 812.

concept of sustainable development, at the centre, as an opaque picture that is imbued of the two principles at its side, the polluter pays principle and the precautionary principle. In this sense, in most of the judgments of the Supreme Court dealing with sustainable development the occurrence of the notion is related to the need for a precautionary approach and the grounding of compensation in the broader scope of polluter pays. The *Narmada Bachao Andolan* case⁴³⁷ is emblematic of the orientation of the Supreme Court towards these international principles. In this case that attracted international media attention – as the Court was dealing with a petition concerning the construction of a dam in the fifth longest river of India⁴³⁸ – the apex tribunal relied on its earlier judgments to draw an application of sustainable development in environmental projects. The Supreme Court saw sustainable development and the precautionary principle as specular, the former being applied when the effect of a project is known,⁴³⁹ in order to soften the results on the environment, the latter coming into play before the implementation of the project,⁴⁴⁰ when lack of scientific data poses the onus of proof on the possible extent of pollution on the proponent.

⁴³⁷ *Narmada Bachao Andolan vs. Union of India*, order dated 18 October, 2000.

⁴³⁸ See Rajagopal, B., *Limits of law in counter-hegemonic globalization: the Indian Supreme Court and the Narmada Valley Struggle*, in de Souza, B., Rodriguez-Garavito, C.A. (eds.), *Law and Globalization from Below*, Cambridge, Cambridge University Press, 2005, pp. 183-217.

⁴³⁹ “It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.”

⁴⁴⁰ “It appears to us that the precautionary principle and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is not known. When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution.”

Notwithstanding this classification *ratione temporis*, the Supreme Court relied on the existence of sustainable development as “one of the principles underlying environmental law,” requiring “such development to take place which is ecologically sustainable. The two essential features of sustainable development are (a) the precautionary principle and (b) the polluter pays principle” in the *Delhi Vehicular Pollution* case,⁴⁴¹ confirming the tripartite nature of the notion as seen according to the apex tribunal. In this framework, a clearer statement of the concept is contained in *N.D. Jayal and Anr. vs. Union of India*,⁴⁴² where the Court acknowledged the multifaceted notion of sustainable development as a merger of the right to environment and the right to development, with the principle of sustainable development being a part of the right to life enshrined in Article 21 of the Constitution, supported and in its turn supporting the notion of intergenerational equity, the precautionary principle and the public trust doctrine.⁴⁴³ This definition of sustainable development, settled in a considerable number of judgments, is thus at the origin of the application of the principle in connection with the legislation on the protection of the environment, as a strengthening factor for domestic statute law, as the linkage set in the rhetoric of human rights opened the way for the adjudication of landmark cases affecting both natural environment and human situations.

⁴⁴¹ *M.C. Mehta vs. Union of India*, order dated 5 April 2002.

⁴⁴² *N.D. Jayal and Anr. vs. Union of India*, AIR 2003 Supp(3) SCR 152.

⁴⁴³ “Therefore, the adherence of sustainable development principle is a *sine qua non* for the maintenance of the symbiotic balance between the rights to environment and development. Right to environment is a fundamental right. On the other hand right to development is also one. Here the right to ‘sustainable development’ cannot be singled out. Therefore, the concept of ‘sustainable development’ is to be treated an integral part of ‘life’ under Article 21. The weighty concepts like inter-generational equity (*State of Himachal Pradesh v. Ganesh Wood Products*, [1995] 6 SCC 363), public trust doctrine (*M C Mehta v. Kamal Nath*, [1997] 1 SCC 388) and precautionary principle (*Vellore Citizens*), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.”

b) The operationalisation of sustainable development: the test of proportionality

The peculiar construction of the Supreme Court, characterised by a tripartite notion of sustainable development and based on the transposition of international law principles through constitutional norms, starting from Article 21, has been put into practice in several judgments from the early 2000s onwards, dealing not only with human activities, but also with eco-centric purposes.

Forest and wildlife protection has been the first field outside mainly human development purposes that the Supreme Court considered in the realm of sustainable development. In 2004, the Court decided the case *Essar Oil Ltd. vs. Halar Utkarsh Samiti & Ors.*,⁴⁴⁴ arising from a series of civil petitions, on the grounds of the relevant articles of the Wildlife Protection Act, the Forest Conservation Act and the Environment Protection Act and on an enlarged conception of sustainable development. Indeed, the Court opened to a more eco-centric vision of the principle while looking at the protection of sanctuaries in national parks. This judgement is a landmark of the international law oriented interpretive action of the Court, as it analysed Section 29 of the Wildlife Protection Act – on the restriction of entry in sanctuaries – taking into account Principles 2, 4, 8 and 11 of the Stockholm Declaration and integrating the prohibitions of Section 29 on wildlife and habitat, paving the way for an enhanced ecological vision of sustainable development.

Starting from this renewed interpretation, the Court continued this emphasis on the blend of international and statute law with ecological concerns also in cases dealing with more classic issues of human development. In fact, the apex tribunal endorsed the principles of international law in a case dealing with urban development,

⁴⁴⁴ *Essar Oil Ltd. vs. Halar Utkarsh Samiti & Ors.*, Appeal (Civil) 352-353 of 2004, arising out of S.L.P. (Civil) Nos. 9454-9455 of 2001, with Civil Appeal Nos. 354-357, 362-364 arising out of S.L.P. (Civil) Nos.10008-10011, 17691-17693, 17694-17696, 22137 of 2001, S.L.P. (Civil) No.5083, S.L.P. (Civil) Nos.10008-10011, 17691-17694, 17695-17696 and S.L.P. (Civil) No.5083 of 2001.

Intellectuals Forum, Tirupathi vs. State of Andhra Pradesh & Ors.,⁴⁴⁵ where the Court reconfirmed the public trust doctrine, enshrined it in international law as state responsibility⁴⁴⁶ and linked it to the principle of sustainable development.⁴⁴⁷ This reliance on international law as part of the law of the land is confirmed in *Karnataka Industrial Areas Development Board vs. Sri C. Kenchappa & Ors.*,⁴⁴⁸ that witnessed the aim of the Court of striking “a golden balance between the industrial development and ecological preservation, (...) in consonance with the principle of ‘Sustainable Development’.” Here, the Court accomplished a thorough review of the development of environmental protection and of the interrelated nature of the right to a healthy environment and the right to development from the Stockholm Conference to the World Summit in Johannesburg, while at the same time recalling legal literature (namely, sustainable development as defined by Philippe Sands). The Court aptly considered its earlier judgments on the matter in light with the declarations at the international level (including the UN Declaration on the Right to Development) insofar as it could indicate that “in order to protect sustainable development, it is necessary to implement and enforce some of its main components and ingredients such as Precautionary Principle, Polluter Pays and Public Trust Doctrine. We can trace foundation of these ingredients in number of judgments delivered by this Court and the High Courts after the Rio Conference, 1992.”

⁴⁴⁵ *Intellectuals Forum, Tirupathi vs. State Of Andhra Pradesh & Ors.*, arising out of S.L.P. (Civil) Nos. 7196-7197/ 2001.

⁴⁴⁶ “The responsibility of the state to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of “state responsibility” for pollution emanating within one’s own territories [Corfu Channel Case, ICJ Reports (1949) 4]. This responsibility is clearly enunciated in the United Nations Conference on the Human Environment, Stockholm 1972 (Stockholm Convention), to which India was a party.”

⁴⁴⁷ “What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege.”

⁴⁴⁸ *Karnataka Industrial Areas Development Board vs. Sri C. Kenchappa & Ors.*, AIR 2006 SC 2038, 2006 AIR SCW 2547.

This “judicial pilgrimage”, as the Supreme Court defines it, is fundamental in understanding the impact of the international law discourse in the judicial activism of the Supreme Court. Indeed, the Court confers a high relevance to the principle of sustainable development (garnished by the two pillars of precaution and polluter pays), considering its transposition into domestic law through Articles 21, 47, 48A and 51A of the Constitution. As a consequence, in the *Karnataka Industrial Areas* case the apex tribunal endeavoured to consider the balance between developmental needs and ecological balance in the directions on the acquisition of lands.

The concept of balance is a recurring theme, as the Supreme Court resorts to it when explaining the content of sustainable development, especially when industrial activities are concerned. In *Susetha vs. State of Tamil Nadu and Ors.*,⁴⁴⁹ on the preservation of water bodies from the construction of a shopping complex, it was recalled how the public trust doctrine implies a judicial scrutiny of governmental activities concerning alienation of properties comprising natural resources, and how this is an embodiment of the principle of sustainable development. Moreover, the pragmatic application of the concept is related to the definition of sustainable development with a view to integrate intergenerational equity and the balancing of developmental needs.⁴⁵⁰

The operationalisation of sustainable development is further enhanced in *Research Foundation for Science vs. Union of India and Ors.*,⁴⁵¹ on the working activities of a shipbreaking yard in Gujarat. Here, the Court operationalises the notion of sustainable development as for its

⁴⁴⁹ *Susetha vs. State of Tamil Nadu and Ors.*, Appeal (Civil) No. 3418 of 2006.

⁴⁵⁰ “The development of the doctrine of sustainable development indeed is a welcome feature but while emphasizing the need of ecological impact, a delicate balance between it and the necessity for development must be struck. Whereas it is not possible to ignore inter-generational interest, it is also not possible to ignore the dire need which the society urgently requires.” Here the Supreme Court relies on the judgment *Bombay Dyeing & Mfg. Co. Ltd. (3) vs. Bombay Environmental Action Group and Ors.*, AIR 2006 3 SCC 434.

⁴⁵¹ *Research Foundation for Science vs. Union of India and Ors.*, order dated 11 September, 2007, Writ Petition (Civil) No. 657 of 1995.

tripartite nature and the existence of a “condition of balance”. On the one hand, the interpretation of the Court on the derivation of sustainable development from international law and on the grounding of the notion in the Constitution is confirmed. The apex tribunal opens to the nature of the principle as customary, integrating also the precautionary principle and polluter pays principle, and states that those principles are implied in all environmental laws starting from the Environment (Protection) Act – by means of an evolutionary reading of the statutes, as sustainable development arises as a separated notion only in the Brundtland Report of 1987.⁴⁵² On the other hand, the Supreme Court relies on an earlier judgment, *T.N. Godavaram Thirumalpad vs. Union of India and Ors.*,⁴⁵³ in order to link the principle of proportionality to sustainable development, as a guarantee of the need for a balance between ecological protection and human development. Moreover, from this very same case, *T.N. Godavaram Thirumalpad vs. Union of India and Ors.*, in 2007,⁴⁵⁴ the Supreme Court raised the stance of **sustainable development as a constitutional requirement**. The pragmatic approach of the tribunal is seen inasmuch as the Courts are to be guided by the principle of sustainable development in order to decide on the single cases concerning bodies or societies undertaking industrial activities potentially harmful to the environment, with an evaluation that aims at balancing the different interests at stake: “*we may state that adherence to the principle of Sustainable Development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. While applying the principle of Sustainable Development one must bear in mind that development*

⁴⁵² “The precautionary principle and polluter-pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes including the Environment (Protection) Act, 1986, these concepts are already implied. (...) These principles are accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of our domestic law.”

⁴⁵³ *T.N. Godavaram Thirumalpad vs. Union of India & Ors.*, AIR 2002 10 SCC 606.

⁴⁵⁴ *T.N. Godavaram Thirumalpad vs. Union of India & Ors.*, judgment of 23 November 2007, arising from Writ Petition (Civil) No. 252/1995.

which meets the needs of the present without compromising the ability of the future generations to meet their own needs is Sustainable Development. Therefore, courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and co-ordinated programme to meet its obligation of Sustainable Development based on inter-generational equity. (...) Mining is an important revenue generating industry. However, we cannot allow our national assets to be placed into the hands of companies without proper mechanism in place and without ascertaining the credibility of the User Agency."

Hence, the Supreme Court grounded sustainable development to a case-by-case analysis to be delivered by tribunals. This evolutionary approach has been applied in cases still pending, such as *M.C. Mehta vs. Union of India* of 2009 (the case on mining leases arising from Writ Petition No. 4677/1985).⁴⁵⁵ In light of the earlier judgments and orders delivered in other cases, the Supreme Court read the situation of the mining leases and activities carried out in the Aravalli hills (on the border between Haryana and Rajasthan) through a comprehensive account of the international principles applying to the case, of the constitutional provisions and of Indian legislation enacted since the 1970s.⁴⁵⁶ Following the continuous violation of the orders prohibiting mining activities, the Supreme Court explicitly interpreted the Mining

⁴⁵⁵ *M.C. Mehta vs. Union of India & Ors.*, Interim Application No. 1967 in Interim Application No. 1785 dated 8 May, 2009, arising from Writ Petition (Civil) No. 4677 of 1985.

⁴⁵⁶ "Mining sector is regulated by a large number of environment and forest statutes. The Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981 and Environment (Protection) Act, 1986 were enacted to implement the decisions taken in United Nations Conference on Human Environment in 1972 at Stockholm. These environment and forests statutes interact with mining regulations under Mines and Minerals (Development and Regulation) Act, 1957; Mineral Concession Rules, 1960; Mineral Conservation and Development Rules, 1988. On account of depletion of the forest cover, we have the Forest (Conservation) Act, 1980, which was enacted to regulate the diversion of forest area for non-forest purposes. Similarly, under the Environment (Protection) Act, 1986 we have several notifications, including Environment Impact Assessment Notification 1994."

Act of 1957 in connection with sustainable development: “*mining within the Principle of Sustainable Development comes within the concept of "balancing" whereas mining beyond the Principle of Sustainable Development comes within the concept of "banning"*. (...) *Balancing of the mining activity with environment protection and banning such activity are two sides of the same principle of sustainable development. They are parts of Precautionary Principle.*”

The characterisation of sustainable development with the objective of balancing needs through a test of proportionality has been the object of recent decisions of the Supreme Court, especially in the field of mining.⁴⁵⁷ In *Maharashtra Land Development vs. State of Maharashtra & Anr.*,⁴⁵⁸ on mining and quarrying activities in forest lands, the Court reread the provisions of the Acts relevant in the judgment with the necessity of proportionality and with a teleological interpretation that looked at the intent of the legislator. Although dealing with a classical matter of administrative law – whether a State could consider the disputed forest land as owned by the Government – the tribunal relied on the *Wednesbury* principle of unreasonableness to derive the principle of proportionality that allowed the public authority to protect that particular private forest land, “*in the general interests of the public in tune with principles of environmental protection and sustainable development*”.

A similar approach has been taken in *Deepak Kumar Etc vs. State Of Haryana & Ors.*,⁴⁵⁹ on the question of sand mining and of its environmental dimension. Here too, the purpose of the Court has been to look at the environmental aspects of mining of minor minerals for ensuring sustainable mining and a balanced approach of environmental issues. Most recently, the Supreme Court has confirmed its orientation

⁴⁵⁷ A stream of repetitive cases that will also be the object of several cases adjudicated by the National Green Tribunal. See *infra*, Chapters IV and V.

⁴⁵⁸ *Maharashtra Land Development vs. State of Maharashtra & Anr.*, Civil Appeal No. 2147-2148/2004, judgment delivered on 11 November, 2010.

⁴⁵⁹ *Deepak Kumar Etc vs. State of Haryana & Ors.*, Interim Applications No. 12-13/2011 in S.L.P. (Civil) No. 19628-19629/2009.

in *Samaj Parivartana Samudaya & Ors vs. State of Karnataka & Ors.*,⁴⁶⁰ where it stated, in a matter concerning illegal mining of iron ores, that “environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India.”

The body of jurisprudence of the Supreme Court, especially from the 2000s, shows an orientation at integrating sustainable development in the law of the land, in spite of its nature of notion, or principle according to Weeramantry, in international law. Sustainable development has been consistently read as a customary norm and has been elevated to the rank of constitutionally guaranteed principle, thanks to the elaboration of the precautionary and polluter pays principles within it. While it is acknowledged that the concept has a vague definition, apart from the tripartite integration and the occasional reference to intergenerational equity and the public trust doctrine, the Supreme Court endeavoured to operationalise the principle through the so called “test of proportionality”, aimed at finding a case-based definition by looking at the balance between ecological and developmental elements, an approach that stems from the original statement of the Brundtland Report. Notwithstanding these advances, this evaluation of balance and proportionality points out an essential question: the need for expertise within the Courts in order to properly assess the scientific data that are analysed in order to reach a decision. Although the Supreme Court has constantly been resorting to the mechanism of special committees as a preliminary step of judicial proceedings, the tribunal itself noted how the participation of experts in Courts could be beneficial in enhancing the quality of decisions. This very request for expertise, coming from the judiciary itself, brought to the creation of the National Green Tribunal.

⁴⁶⁰ *Samaj Parivartana Samudaya & Ors vs. State of Karnataka & Ors.*, judgment dated 18 April 2013, arising from Writ Petition No. 562/2009.

c) The need for expertise and specialisation

As known, the question of specialising the tribunals, or some of their benches, on environmental matters, is considered as a possible solution to the incremental necessity of dealing with cases requiring professional, scientific skills that are not to be found in the general judiciary.⁴⁶¹ Apart from the procedural devices and the substantive elaborations developed while judging on environmental issues, the Supreme Court advised on tentative reforms of the judiciary as to integrate scientific knowledge already by the mid-1980s. In the landmark *Shriram* case, which involved the creation of an *ad hoc* body charged with the listing and examination of the conditions necessary for satisfying the requirements set by the Court (the Nilay Choudhary Committee), the Supreme Court explicitly noted how its prerogatives could not be adequate to the increasing challenges brought forward by technological advances. While the apex tribunal recommended policy measures dealing with the control of industries involved with the production of chemicals (such as the creation of a High Powered Authority entrusted with the regulation of hazardous industries), it also presented the increasing amount of PIL cases on environmental pollution as an occasion for considering an amelioration of the “toolkit” of the judge.

Indeed, the Court acknowledged how it has dealt with these cases through the creation of special committees composed of experts,⁴⁶² but how it faced difficulties in order to guarantee a high level of scientific competence as well as the indispensable neutrality these experts ought to possess. Two innovations were thus put forward: on the one hand, the establishment of “*an Ecological Sciences Research Group consisting of independent, professionally competent experts in different branches of science and technology*” that could provide the Court with the required scientific information in environmental cases; on the other hand, the creation of a system of environmental adjudication characterised by regional based “*Environment Courts (...) with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the*

⁴⁶¹ See *infra*, Introduction and Chapter III, Section I, paragraphs c) and d).

⁴⁶² See *infra*, Section I, paragraph d).

case and the expertise required for its adjudication", ⁴⁶³ with appeal jurisdiction resting with the Supreme Court.

The suggestions presented in the *Shriram* case – urging the Government to envision a proposed structure for environmental jurisdictions that could blend scientific and legal expertise while guaranteeing access to justice at a level proximate to the citizens – were reiterated in several landmark cases before the Supreme Court. In addition to comprehensively elaborate international environmental notions as interwoven in the fabric of Indian legislation, in *Vellore Citizens* the Court drew the consequences of the violations of the relevant statutes and of the directions ordered to prevent further infringements in two ways. *In primis*, the appointment of an authority under Section 3 of the Environment (Protection) Act that could follow the matter of the tanneries in Tamil Nadu, whose mixed composition (a retired judge of the High Court and several environmental experts) should ensure the necessary expertise for compensating damages and suggesting measures for reversing the results of pollution. *In secundis*, the constitution of a “special Green Bench” in the High Court of Madras, as it had been done in West Bengal and Madhya Pradesh.⁴⁶⁴

This care for providing both doctrinal argumentation and pragmatic devices is further shown in a contemporary judgment, *Indian Council For Enviro-Legal Action vs. Union of India* of 1996. In this decision, the final directions of the so called *Bichhri* case, the evident links with the *Shriram* case ⁴⁶⁵ – in the definition of principles as well as in the longstanding absence of abidance to the orders of the competent authorities – brought to the suggestion of setting appropriate environmental courts to judge over those matters involving an enhanced professionalism from the part of judicial institutions. In the *Bichhri* case, the starting point of the direction of the Supreme Court is not only the lack of scientific expertise, but also the consequences of it, namely the immediate resort to courts by the industries and the length

⁴⁶³ *M.C. Mehta v. Union of India*, AIR 1987(2) SCC 176.

⁴⁶⁴ *Vellore Citizens Welfare Forum vs. Union of India & Ors*, AIR 1996 (5) SCC 647. See *infra*, Section II, paragraph a).

⁴⁶⁵ Both cases dealt with chemical industries and hazardous substances.

of proceedings.⁴⁶⁶ Thus, the apex tribunal recommended again the creation of specialised tribunals. While in the *Shriram* case the focus was on the specific actions of these tribunals and on their composition, here the Supreme Court addressed not only those matters, but delved into details concerning the proposed jurisdiction – “*all matters, civil and criminal, related to the environment*” – and the relation with the lack of enforcement, through the idea of an “*environmental audit*” for industries and for the officers themselves, in order to make them accountable.⁴⁶⁷

These judgments are a testimony of the integrated vision that the Court wished to bring forward, as a positive spill-over of its judicial activism. In fact, the Supreme Court took into account not only the legal progress achieved from the late 1970s, re-elaborating the concepts and providing them a solid grounding in India, but endeavoured to suggest and sustain reforms in the ecological field, considering the unsatisfactory enforcement of laws and the problems of the administrative machinery, with “*the ultimate idea (...) to integrate and balance the concern for environment with the need for industrialisation and technological progress*”.⁴⁶⁸

Again in the late 1990s, the Court repeated its call for the establishment of environmental tribunals in *Andhra Pradesh Pollution Control Board vs. Prof. M.V. Nayudu*, with reference to the *Shriram* and *Bichhri* cases and to the solutions found in the years for responding to the call for upholding the concept of good governance that mirrors environmental principles. While examining “*the deficiencies in the judicial and technical inputs in the appellate system under some of our existing environmental*

⁴⁶⁶ *Indian Council For Enviro-Legal Action vs. Union of India & Ors.*, AIR 1996 1446, SCC 1996 (3) 212: “*the prosecutions launched in ordinary criminal courts (...) never reach their conclusion either because of the work-load in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders (...) are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion.*”

⁴⁶⁷ Again, *Indian Council For Enviro-Legal Action vs. Union of India & Ors.*, AIR 1996 1446, SCC 1996 (3) 212.

⁴⁶⁸ *Indian Council For Enviro-Legal Action vs. Union of India & Ors.*, AIR 1996 1446, SCC 1996 (3) 212.

laws”,⁴⁶⁹ the Supreme Court bluntly noted that “things are not quite satisfactory and there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also technical personnel well versed in environmental laws” and proposed the Australian Land and Environment Court of New South Wales as an ideal-type of environmental tribunal to be implemented in India.⁴⁷⁰ In pointing out the absence of environmental courts, nevertheless, the Supreme Court acknowledged the results achieved in rendering directions aimed at creating authorities characterised by the double expertise – legal and technical – such as in the *Vellore Citizens case*⁴⁷¹ and in *S. Jagannath vs. Union of India*,⁴⁷² that are not judicial institutions but whose intent is the blend of juridical and scientific knowledge.

The most relevant remark, however, copes with the specific legislative measures undertaken in the mid-1990s: the National Environment Tribunal Act of 1995 and the National Environmental Appellate Authority of 1997, the latter directly responding to the suggestions of the Supreme Court as far as appellate jurisdiction is concerned. Indeed, the call for specific pieces of legislation that could complement the Acts approved until the 1980s (and more focused on the actions of the executive) with the judicial side of environmental protection had been answered by the Parliament through the approval of those texts.

⁴⁶⁹ *Andhra Pradesh Pollution Control Board vs. Prof. M.V. Nayudu*, AIR 1999 SC 812.

⁴⁷⁰ See *infra*, Section III, paragraph c).

⁴⁷¹ *Andhra Pradesh Pollution Control Board vs. Prof. M.V. Nayudu*, AIR 1999 SC 812: “in the notification So.671(E) dated 30.9.1996 issued by the Government of India for the State of Tamil Nadu under section 3(3) of the 1986 Act, appointing a ‘Loss of Ecology (Prevention and Payment of Compensation) authority, it is stated that it shall be manned by a retired High Court Judge and other technical members who would frame a scheme.”

⁴⁷² *S. Jagannath vs. Union of India*, AIR 1997 SC 811, a case concerning aquaculture in which the Supreme Court directed the creation of a High Powered Authority constituted “by a retired Judge of the High Court and members having expertise in the field of aquaculture, pollution control and environment protection”.

In pursuance to the enactment of the Public Liability Insurance Act of 1991, that introduced the notion of absolute liability in matters concerning hazardous substances and guaranteed the grant of a speedy relief to victims of accidents, the National Environment Tribunal Act was devised as to “*giving relief and compensation for damages to persons, property and the environment*”⁴⁷³ through the establishment of such court. The National Environment Tribunal was nevertheless restricted in scope, as it was designed with a competence regarding the mere compensation for damages to properties and the environment and for death or injuries (Section 3). As far as the composition is concerned, the idea of appointing judicial and technical members was surely the main innovation in the Act: under Sections 9 and 10, the Tribunal was to be composed of judicial members (former Judges of High Courts or people having relevant experience in the Indian Legal Service) and of experts (not only scientific, but also those having knowledge in the administrative and technical fields related to the environment), to be chosen by a Selection Committee.

Procedurally, the court was endowed with a fairly wide degree of easiness – as the National Environment Tribunal ought not to be bound by the Code of Civil Procedure, but to the principles of natural justice (Section 5),⁴⁷⁴ and it was characterised by the peculiarity of sitting in benches composed of at least a judicial and a technical member (Section 9). Moreover, the court was to possess all the powers of a civil court as far as execution of orders is concerned. Finally, the appeals to awards or orders should have lain before the Supreme Court (Section 24).

In spite of the insufficiencies of the design, because of the limited jurisdiction, the National Environment Tribunal could have constituted a first step toward a specialised judicial institution blending the competences of law officers with the technical expertise of scientists and administrators. This legislative support, however, went unimplemented, as this court was never put into being.⁴⁷⁵ The second

⁴⁷³ National Environment Tribunal Act, Act No. 27 of 1995.

⁴⁷⁴ An idea that was eventually incorporated in the NGT Act.

⁴⁷⁵ Divan and Rosencranz, *op.cit.*, pp. 62-63; Nain Gill, G., *A Green Tribunal for India*, in *Journal of Environmental Law*, Oxford, 2010.

legislative intervention then took place in 1997, with the enactment of the National Environment Appellate Authority Act (NEEA).⁴⁷⁶

As a consequence of the poor enforcement of the Environment (Protection) Act of 1986 and of the judicial decisions on the impact of chemical industries and of plants dealing with the production and storage of hazardous substances and following the directions on the establishment of environmental courts, the NEEA was entrusted with the task of hearing “*appeals with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986*”. The jurisdiction of the tribunal, under Section 11, concerned the appeals against orders on environmental clearance affecting people, associations or public institutions (both the Central Government and local authorities), with a view to defuse the workload of ordinary courts in these matters. As to ensure rapidity in the decisions, the NEAA was not to be bound by the Code of Civil Procedure, but should follow the principles of natural justice or its own procedural rules, as it was the case of the unimplemented NET (Section 12). Concerning the composition, the Authority should be made up of a Chairperson, a Vice-Chairperson and a maximum of three additional members possessing “*professional knowledge or practical experience in the areas pertaining to conservation, environmental management, law or planning and development*” (Section 5).

In this case too, the experience proved unfortunate. Apart from the narrow jurisdiction for appeals in cases of environmental clearance, the NEAA had a short life, as since 2000 no members have been appointed.⁴⁷⁷ Indeed, in light of the poor implementation of the two statutes, the Supreme Court intervened again regarding this state of facts. In *Andhra Pradesh Pollution Control Board II vs. Prof. M.V. Nayudu (Retd.) & Ors*, the apex tribunal expressly referred to its previous judgment and to an academic study conducted by the University of Cambridge in 2000 to highlight once more the successful experiences of environmental courts in Australia and New Zealand and the proposal

⁴⁷⁶ National Environment Appellate Authority Act, Act No. 22 of 1997.

⁴⁷⁷ Divan and Rosencranz, *op.cit.*, pp. 85-86; Nain Gill, G., *op.cit.*.

for a “two-tier Environmental Court” that “would have jurisdiction and powers including judicial review and civil procedure powers while dealing with environmental matters”.⁴⁷⁸ Moreover, the Supreme Court invited the Law Commission of the Parliament to consider the “review of the environmental laws and the need for constitution of Environmental Courts with experts in environmental law, in addition to judicial members, in the light of experience in other countries”.⁴⁷⁹

Thus far, the copious jurisprudence of the Supreme Court testifies of the increasing judicial awareness of the relevance of environmental law and of the challenges facing a proper enforcement. While the Supreme Court has been dealing with international law principles and domestic statutes in a way as to accommodate them in a harmonised *ensemble*, it has also proposed effective policy measures directed at diminishing the work load of the judiciary and at enhancing the application of the panoply of laws guaranteeing environmental protection. The invitation and expectation of the Supreme Court, indeed, was not left unsatisfied, as the path leading to the establishment of specialised environmental jurisdiction proceeded through a careful comparative study of the options on the ground.

III) The creation of the National Green Tribunal

a) Domestic elaboration: thinking, drafting and approving the National Green Tribunal Act

In light of the repeated observations of the Supreme Court and of the explicit invitation set in *Andhra Pradesh Pollution Control Board II*, the Law Commission of India, chaired by Justice Jagannadha Rao, proposed a scheme for constituting environmental courts in the country. In September 2003, the 186th Report on proposal to constitute environmental courts was published. Acknowledging the necessity for such an institutional development, underlined by the apex tribunal in

⁴⁷⁸ *Andhra Pradesh Pollution Control Board II vs. Prof. M.V. Nayudu (Retd.) & Ors* on 1 December, 2000, AIR 2001 (2) SCC 62.

⁴⁷⁹ *Ibidem*.

the abovementioned cases,⁴⁸⁰ the Commission undertook a study that relied on the case law of the Supreme Court, on the experience of India concerning the attempts at instituting environmental tribunals and on a comparison of these legal systems already endowed with such bodies.

After a thorough review of the current system of India, characterised by civil and criminal jurisdiction on certain matters concerning environmental nuisance or offences, on the basis of the Codes and of the specific Acts enacted that followed the Stockholm Conference,⁴⁸¹ the Commission noticed the absence of appellate bodies with a sufficient knowledge of environmental matters, or even with a judicial nature, the NET and the NEEA being non-functional and with limited jurisdiction. Thus, grounding the proposal in Articles 252, 253 and 247 of the Constitution – the scope of the latter entailing the implementation of international decision, in particular Principle 10 of the Rio Declaration on access to judicial remedies, and the creation of additional Courts – the Commission designed several characteristics for the tentatively newborn courts.

First of all, the focus was on the principles to be followed. On this, the Commission relied on the discourse taking place at the international level as well as on the developments of the Indian jurisprudence. The first principle coming into analysis is the polluter pays principle, as adopted by the OECD, the EU and the case law of the Supreme Court, notably the *Bichhri* and *Vellore Citizens* cases. Then, a mainly domestic ambit is taken by the notion of absolute liability, as elaborated from the *Shriram* case. At the international level, the Commission recognised the precautionary principle – from the *Vorsorgenprinzip* to Principle 15 of the Rio Declaration and the jurisprudence of the Supreme Court, recalling how the *Vellore Citizens* case embodied precautionary and polluter pays principles as part of the law of the land – and, from international jurisprudence, the principle of prevention (the *Train Smelter* and the *Gabčíkovo-Nagymaros* cases).

⁴⁸⁰ See *supra*, Section II, paragraph b).

⁴⁸¹ See Chapter II, Section II, and *supra*, Section I, paragraph a).

In addition to these, the Commission made a substantive reference to sustainable development, read with the Rio Declaration in connection with the *Gabčíkovo-Nagymaros* judgment, as well as with Indian case law and the example of the Constitution of South Africa (Articles 24-B and 30-D). Moreover, the Rio Declaration was the origin of the principle of intergenerational equity, that the Court read in the definition by the Philippines' Constitution (Article 11) and the case *Minors Oposa*.⁴⁸²

Having shed light on the principles to be applied and acknowledged the judicial interpretations purported by the Supreme Court – witnessing how the international sources permeated the reflections on institutional innovation in India – the Commission delved into the actual proposal for the implementation of environmental courts. The proposal foresaw the creation of specialised courts at the State level, in opposition with the previous NETA and NEAA, that suggested the installation of courts at the central level.

As far as original jurisdiction is concerned, these tribunals would have been vested with the powers of a civil court for environmental matters, with the possibility of granting reliefs under the Code of Civil Procedure and with express provisions on jurisdiction over the enforcement of legal and constitutional rights on the environment, issues of pollution (water, air, noise) and cases dealing with sustainable development. These environmental courts, significantly wider in scope than their predecessors, would not have eliminated the competence of civil courts on matters concerning the environment, for reasons of proximity to the citizen, as the former would be present only in the capital or in the main cities of a State.

With regard to appellate jurisdiction, the newly formed tribunals would have taken on board the competences provided for in the Water, Air and Environment (Protection) Acts. The jurisdiction on appeals would also have attracted the provisions of the National Environmental Tribunal Act and of the National Environmental Appellate Authority, that would have thus been repealed, as the new tribunals would have

⁴⁸² Law Commission of India, *186th Report on Proposal to Constitute Environment Courts*, 2003, pp. 121-140.

been responsible for cases of compensation for hazardous substances or under the EPA.

The innovation of these institutions would have been the membership of both judicial (retired High Courts judges, members of the Bar entitled to stand before High Courts) and environmental experts, on a basis of parity. The scientific experts (so called “Commissioners”) would have been drained from the fields of engineering and environmental sciences, with an experience requirement on EIA and protection of environment, thus guaranteeing an enhanced professionalism if compared with the more succinct provisions of the NETA and of the NEEA.

Moreover, the procedures would have also shown an attempt at devising institutions that would respond to the requirements witnessed in the *corpus* of jurisprudence of the Supreme Court. Indeed, the *locus standi* before these courts would have been kept in line with the practice before High Courts and the Supreme Court in *writ jurisdiction*, thus maintaining the role of Public Interest Litigation. In addition to this, specific provisions on the role of *amicus curiae* would have been inserted. As for the powers, the specialised courts would have been endowed with competences similar to those expressed by the Supreme Court in its judicial activism, since the power of designing and monitoring environmental schemes (for instance, directions to close an industry or to implement a plan for environmental protection) would have been part of the reform package. The courts would have also had the powers concerning the execution of judgments, as civil courts, and the power to deliberate an appropriate relief, typical of writ jurisdiction. The proposal would nevertheless have excluded criminal and judicial review jurisdiction. Finally, on the special topic of judicial review, the Commission relied on the fact that High Courts would not entertain writ petitions on matters already before environmental courts, considering that appeal to a decision of these tribunals would be possible before the Supreme Court.⁴⁸³

⁴⁸³ Law Commission of India, 186th Report on Proposal to Constitute Environment Courts, 2003, pp. 141-163.

The 2003 study marked a watershed in the tentative design of environmental courts in India. As known, out of the three models of adjudication of environmental cases – general jurisdiction, the creation of green benches within tribunals and the creation of specialised environmental courts⁴⁸⁴ – the Law Commission explicitly endorsed the third option, as the Supreme Court suggested. Although India already experienced a functioning second system, as green benches were introduced by the Supreme Court and by several High Courts (such as the High Court of Calcutta) since 1995, the increasing amount of cases and the indications of the judiciary inclined also policymakers to delve into the study of the third model.

Environmental institutional policies were thus at a crossroad in the early 2000s, but it took six more years to crystallise into a proper National Green Tribunal Bill, introduced in the Lok Sabha by the United Progressive Alliance Government on the 29th of July 2009. In the meanwhile, the Supreme Court continued to adjudicate upon several relevant cases in environmental and sustainable development matters,⁴⁸⁵ while the Ministry of Environment and Forests approved the National Environment Policy of 2006, a fundamental document aimed at filling the gaps in previous strategies adopted by the executive at the central and local levels. While the policy paper acknowledged the challenges faced by the country in the environmental field – environmental degradation, loss of environmental resource base, global concerns – it also pointed out the institutional failures witnessed in the previous periods. In spite of the lack of mentions on the judiciary, the National Environment Policy indeed confirmed the need for capacity building, with an indication to “*review the present institutional capacities at the Central and State levels, in respect of enforcement of*

⁴⁸⁴ See Introduction and Amirante, D., *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, in *Pace Environmental Law Review*, 29, 2012, pp. 441-469.

⁴⁸⁵ See *infra*, Section II, paragraph b).

*environmental laws and regulations” and to “prepare and implement suitable programs for enhancement of the capacities”.*⁴⁸⁶

In light of these favourable conditions for the presentation of innovative institutions, the Minister of Environment and Forests presented the National Green Tribunal Bill,⁴⁸⁷ in a form that integrated the suggestions of the 186th Report of the Law Commission, but that proved amendable for several articles in a substantial way. As it could be foreseen from the debate in previous years, the tribunal was to be established with a broad scope of action. Indeed, in recalling the relevant international acts, the constitutional provisions and the requirement of a multidisciplinary approach, the preamble of the Bill indicated the role of the new court as an institution designed to speed up the disposal of environmental cases in an effective manner, considering protection and conservation of natural resources as well as enforcement of rights and compensation for damages. The Minister of Environment and Forests, Jairam Ramesh, presented the Bill before the Lok Sabha as a *“a major historic step forward in our country”*.⁴⁸⁸ Indeed, Ramesh linked the institution of a specialised environmental court as a means to fulfil the Directive Principle on the protection of the environment set out in Article 48A of the Constitution and as a direct consequence of the calls of the Supreme Court on implementing such tribunals. Moreover, Ramesh drew the attention to the existing backlog of cases in ordinary courts (5,600 environmental cases) and on the aim of granting *“ordinary citizens of India (...) access to quick justice when it comes to environment and forests”*.⁴⁸⁹

The Bill drew on previous statutes for definitions while enlarging the extent of action of the tribunal. Section 2 of the NGT Bill included the definitions of environment and handling of substances of the Environment (Protection) Act as well as the concept of accident derived

⁴⁸⁶ National Environment Policy, Ministry of Environment and Forests, 2006, p. 50 (<http://www.moef.gov.in/sites/default/files/introduction-nep2006e.pdf>).

⁴⁸⁷ Lok Sabha, The National Green Tribunal Bill, Bill No. 63 of 2009.

⁴⁸⁸ Lok Sabha Debates, *Discussion on the motion for consideration of the Green Tribunal Bill*, 2009, moved by Shri Jairam Ramesh, 15th of March, 2010.

⁴⁸⁹ *Ibidem*.

from the Public Liability Insurance Act, applied to the damages to the environment. The same article provided for a broad definition of person, conceived as individuals, companies, associations, trustees, local authorities or generally any other juridical person (Section 2-j). In addition to this, the most relevant notion in the Bill is the “*substantial question relating to the environment*” – the cornerstone of the institutional design of the court, as it directly affects its activation. Section 2-m of the NGT Bill defines the notion with the fulfilment of two main requirements: on the one hand, the “*direct violation*” of an environmental obligation specifically provided for in statutes, that affect or could affect a community, whose damage to the environment is “*substantial*” or whose damage to public health is “*measurable*”; on the other hand, the instance should encompass “*environmental consequences*” in relation to identified activities or sources of pollution.

As suggested in the 186th Report, the jurisdiction of the tribunal over these “substantial questions” was set as inclusive as possible, granting to the National Green Tribunal the powers of a civil court as far as matters related to the environment are concerned (Section 14), with a time limit of six months from the date of the arousal of the cause of action. Following the provisions of the Public Liability Insurance Act, relief and restoration is dealt with in Section 15, comprehending both compensation of victims and restitution of property and of the environment, subject to a limit of five years from the cause of action in order to file an application for relief/compensation. Concerning appeal jurisdiction, Section 16 listed the cases where an application to the NGT is authorised from an order or a decision rendered by State Governments or appellate authorities under the Water Act, the Air Act, the Forest (Conservation) Act or from orders granting environmental clearances under the Environment (Protection) Act.

As for *locus standi*, the NGT Bill opened not only to the typical subjects enabled to file an application (person directly affected by the injury, owner of a property, agents authorised), but also to organisations dealing with environmental matters and governmental authorities (Central and State Governments, Pollution Control Boards). Moreover, the Bill left space for procedural innovations, as the court was designed as a special tribunal governed by the principles of natural justice instead of following the provisions of the Code of Civil Procedure of 1908 (Section 19), despite its withholding the powers of a civil court. In

addition to this, specifically drafted Rules of Procedure should be approved by the Central Government following the enactment of the NGT Bill, as stated in Section 34. As a conclusive feature, Section 28 commanded the bar of jurisdiction to ordinary civil courts on disputes adjudicated by the NGT, for original and appellate jurisdiction, and Section 37 ordered the repeal of the NETA and of the NEAAA, with the consequent dissolution of the National Environment Appellate Authority.

To this initial draft, several criticisms were raised. The most accomplished study on the National Green Tribunal Bill has been delivered by the NGO “The Access Initiative”,⁴⁹⁰ putting together the contributions of three experts and submitting the study to Indian partners of the NGO at the local level. The long article issued in 2009⁴⁹¹ raised concerns about “*the narrow and limited scope of jurisdiction*” and “*the narrow scope of remedial orders*”, while recalling the absence of action from the Ministry of Environment and Forests as for the operationalisation of the NET and of the NEAA. Besides the obvious scepticism drawn from previous administrative experiences, the Access Initiative pointed out several possibilities of amendments that could improve the newly devised institution.

Concerning the scope of action of the court, the main criticism is oriented toward the definition of a “*substantial question relating to environment*”, as this leaves the judge with a broad interpretive competence on matters to be heard, based on subjectivity. As for the access to the tribunal, the Bill generally comprehends the “*community at*

⁴⁹⁰ www.accessinitiative.org. As reported in the website, The Access Initiative, born in 1999, is “*the world's largest network of civil society organizations dedicated to ensuring that local communities have the rights and abilities to gain access to information and to participate in decisions that affect their lives and their environment.*”

⁴⁹¹ The Access Initiative-India, *How Green Will Be the Green Tribunal? Comments and Suggestions on the National Green Tribunal Bill*, 2009, Delhi, 2009 (accessed from http://www.law.pace.edu/sites/default/files/IJIEA/How_Green_will_be_the_Green_Tribunal.pdf).

large”, without specifying whether individuals or groups of individuals could find their *locus standi* before the court. Moreover, the timeframe set for presenting a case is deemed questionable, for the short periods⁴⁹² granted in the Bill are considered insufficient with a view to protect the environment.⁴⁹³

Concerning the principles governing the work of the National Green Tribunal, the study advanced the idea of inserting a provision that rendered mandatory the application of the principles of sustainable development, polluter pays and the precautionary principle when deciding an order or a decision (Section 19A). Finally, regarding the institution itself, the work of the Access Initiative manifested the worries about the choice of the “technical members” of the National Green Tribunal, fearing the appointment of retired bureaucrats. The study thus proposed the addition of ecologists, environmentalists and NGO activists in the list of professionals that are eligible for being nominated experts and advanced the need for transparency in the procedures of the Selecting Committee.

Following parliamentary debates and the recognition of the need for substantial amendments, the text was adopted on the 18th of June 2010 as the National Tribunal Act of 2010.⁴⁹⁴ In spite of the pertinent observations raised on the definition of a “*substantial question related to environment*”, the Parliament retained the same wording provided for in the NGT Bill in Section 2. In this sense, the debate held at the Lok Sabha on the 30th of April 2010 sheds light on the approach and on the support of the legislature to the Bill.

A comprehensive review of the relevance of the Bill, while acknowledging its shortcomings, was given by Supriya Sule, a member

⁴⁹² 6 months for disputes on substantial questions related to environment; 30 days for appeals; 5 years for compensation and relief.

⁴⁹³ *A contrario*, see Chapter IV for an analysis of the interpretation of these timeframes in the jurisprudence of the NGT. Nevertheless, the Access Initiative paper, at page 26, correctly envisions the possibility of the court taking a liberal approach at this issue.

⁴⁹⁴ Lok Sabha, The National Green Tribunal Act, Act No. 19 of 2010.

of Parliament from Maharashtra and a scientist herself, specialised in water pollution. In her allocution, Sule maintained how the NGT Bill would be a landmark step in upholding the reasons for the right to life and environmental protection, but identified several flaws in the features and powers of the future Tribunal with respect to the situation of environmental litigation before the Supreme Court. First of all, access to the NGT would be hindered by factors such as the creation of only four regional benches (while a Tribunal in each State would have been a more opportune solution for enhancing access to justice to the common citizen) and by the removal of competence of civil courts from environmental cases, which would dilute accessibility for rural citizens, forced to address their grievances only to the NGT. Then, procedurally, shortcomings could arise from the absence of provisions concerning the powers of monitoring and follow up that the Supreme Court possesses for “*framing schemes*” for environmental solutions, and also from the provisions on *amicus curiae*, a role that could have been more extensively treated in the Bill, in light of the relevance of the researches of NGOs in specific cases. Finally, jurisprudential points could also present as far as the definition of a “*substantial question related to environment*” is concerned (since ecology, wet lands and lakes are not covered, according to Sule) and insofar as the NGT Bill seems to address only short-term projects, while leaving aside questions of relief, strict liability and, more generally, “*the doctrine of public trust and inter-generational equity*”.⁴⁹⁵

This thoughtful review, apprehending both the advances and the possible weaknesses of the new jurisdiction, was followed by a variety of critiques on the environmental policy of the last years, considering the unsuccessful experiences of the NETA and of the NEEA due to governmental inaction, on the need to envision general preventive measures - not only policies *ex post* such as the constitution of a Tribunal,⁴⁹⁶ on the lack of anticipatory powers of the NGT and on the

⁴⁹⁵ Lok Sabha Debates, *Further discussion on the motion for consideration of the National Green Tribunal Bill, 2009 moved by Shri Jairam Ramesh on the 15th March, 2010*, 30th of April 2010.

⁴⁹⁶ *Ibidem*, intervention by C. Sivasamy of AIADMK (Tamil Nadu).

insertion of the right to a clean environment in the Bill,⁴⁹⁷ and on the paucity of provisions for access to justice in favour of disadvantaged people (such as tribal people).⁴⁹⁸ Among many interventions, Maneka Gandhi of the BJP mainly pointed out the insufficient guarantees on the appointment of expert members, whose nomination could again be a haven for “*senior retired bureaucrats*”, without “*provision in this Bill for ecologists, environmentalists, hydrologists and anybody from civil society or NGOs*”, and on the risks of *pantouflage* at the end of the term. Thus, she called for a “*transparent process of appointment of members and Chairman*”, while also focusing on the need for amendments on the accessibility to the Tribunal for individuals and social organisations and on the question of prospective activities on environmental damage (not only on “*retrospective jurisdiction*”),⁴⁹⁹ in order to ensure substantive improvements in environmental litigation - enhancements that are not purportedly seen in this Bill, because of the absence of provisions on the independence of expert members, on the possibility to quash environmental clearances and on criminal liability.

To these critiques, the Minister for Environment and Forests, Jairam Ramesh of the Indian National Congress, replied by enucleating the environmental policy attempted by the Government, built on two pillars: on the one hand, a National Environmental Protection Authority endowed with the capacities of “*ensuring proper implementation of the laws relating to environment and forest*”; on the other hand, a judicial pillar, embodied by the National Green Tribunal. To the second aspect, the Minister responded by proposing ten amendments to the Bill, aimed at correcting the shortcomings pointed out by the Members of Parliament who took the floor. Among the amendments, the most relevant concern:

- the expansion of the notion of “person aggrieved” to any individual, in Clause 18 (2) (e);

⁴⁹⁷ *Ibidem*, intervention by Prasanta Kumar Majumdar of the Revolutionary Socialist Party (West Bengal).

⁴⁹⁸ *Ibidem*, intervention by Bibhu Prasad Tarai of the Communist Party of India (Orissa).

⁴⁹⁹ *Ibidem*.

- the insertion of foundational principles in the Bill, as Section 19 (namely sustainable development, precautionary principle, polluter pays principle and intergenerational equity);⁵⁰⁰
- the possibility to appeal the decisions of the NGT before the Supreme Court;
- the number of members (between 10 and 20 judicial and expert members, for each category).⁵⁰¹

Eventually, the Bill was approved with the promised amendments, that testify the vivid debate in the Parliament and the responsiveness to the potential drawbacks in the text. Concerning the composition of the Tribunal, Section 4 specifies the number of members of the court: a Chairperson, 10 to 20 judicial members, and an equal number of expert members, with the possibility of inviting persons having specialised competences in particular cases. Qualifications for becoming a judicial or an expert member have nevertheless been maintained as they stood in the NGT Bill, with the requirement of past administrative experience, assuming that the wide variety of professions listed in Section 5, paragraph 2, was sufficiently comprehensive (namely, “*pollution control, hazardous substance management, environment impact assessment, climate change management, biological diversity management and forest conservation*”). In order to guarantee independence and to refrain from the phenomenon of *pantouflage*, the term for accepting an employment related to previous activities as member of the NGT has been raised from one to two years.

As far as jurisdiction is concerned, the NGT Act provides for the same norms set in the Bill of 2009, namely:

- Section 14 for civil cases dealing with a substantial question relating to environment and arising from the implementation

⁵⁰⁰ Eventually, the latter is not mentioned in the Act.

⁵⁰¹ Lok Sabha Debates, *Further discussion on the motion for consideration of the National Green Tribunal Bill, 2009 moved by Shri Jairam Ramesh on the 15th March, 2010*, 30th of April 2010, intervention by Jairam Ramesh, Minister of Environment and Forests.

of the Water (Prevention and Control of Pollution) Act, 1974; the Water (Prevention and Control of Pollution) Cess Act, 1977; the Forest (Conservation) Act, 1980; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; the Public Liability Insurance Act, 1991; the Biological Diversity Act, 2002;

- Section 15 for relief and compensation to victims of pollution and other damages arising from activities under the cited Acts, for restitution of property and for restitution of the environment;
- Section 16 for appeals against orders or decisions rendered by the authorities or under the procedures set forth in the abovementioned Acts.

It should be noted that, in spite of the criticisms arisen with regard to the time frames, these latter have been maintained as in the NGT Bill.

Procedurally, the NGT Act provides for the possibility of making rules on the *locus standi* and on the sitting of the court in circuit procedure (Section 4, paragraphs 3 and 4 – an amendment that allowed a broader access to the NGT). In Section 18, paragraph 2, the list of the applicants to the court has been *grosso modo* maintained, with the exception of the access of representative environmental bodies. With the new formulation, the people being granted access to the NGT are those having sustained the injury, owners of damaged properties, representatives of deceased persons (if death occurred), their agents, governmental authorities and *“any aggrieved person, including any representative body or organisation”*.

As in the Bill, the NGT enjoys a vast jurisdiction on all civil cases, with the powers granted to an ordinary civil court, and has the duty to apply *“the principle of sustainable development, the precautionary principle and the polluter pays principle”* (Section 20), a reference to international principles that was asked for by the civil society and that fully places the new institution within the path traced from Stockholm. Notwithstanding the criticism purported by environmental experts during the parliamentary proceedings, the NGT Act constitutes a stepping stone in the design and in the application of environmental justice. Although several provisions justify a certain scepticism in light

of past institutional experiences – such as the role of the Government in implementing the Act (in particular, the establishment of the court and the appointment of its members) and the matter of defining a “*substantial question*” relating to the environment⁵⁰² - the amendments to the Bill enhanced the value of the tribunal as far as access (from individuals to representative bodies) and compliance with international principles are concerned.

Contrary to the worries on implementation, the Government of India established the tribunal in a very short timeframe and issued its regulation on the 4th of April 2011. With the National Green Tribunal (Practice and Procedure) Rules of 2011,⁵⁰³ the Ministry of Environment and Forests published the procedural norms governing the functioning of the new court. In particular, the Rules grant the key roles to the Chairperson and to the Registrar. The Chairperson is entrusted with a wide organisational power, as he/she is competent for distributing the cases among the benches of the NGT and for directing the sittings of the court (also in other places from the ordinary seat) and the decisions on the adoption of the circuit procedure (Section 3). According to the same Section, the Chairperson is empowered of the constitution of the benches (consisting of at least one Judicial and one Expert Member).

Following the traditional division of tasks in tribunals, the Registrar holds the reins of the circulation of documents. According to Section 7, he/she is entrusted with the tasks of receiving applications and appeals, of requiring amendments when necessary, of fixing the dates of hearings, of disposing of questions related to the service of process and of calling for information.

As for access, the Rules provide for two different types of forms, to be filled in according to the cases – whether involving a question related to the environment or an application for relief and compensation (Section 8). While an application should set forth the grounds for its filing, two provisions come to the forefront for simplifying access: on the one

⁵⁰² See the points made by Nain Gill, G., *op.cit.*, pp. 8-11.

⁵⁰³ Ministry of Environment and Forests Notification, National Green Tribunal (Practice and Procedure) Rules, 2011.

hand, for matters relating to common causes or reliefs, the NGT allows to join the cases and file a single application (or appeal); on the other hand, the fees prescribed for filing an application are not due by people whose income is below the poverty line (Section 12). Moreover, under Section 18, the NGT shall possibly hear and decide finally upon a case within six months from the date of the application – a measure aimed at reducing costs and at granting justice in a reasonable period of time. The only restrictive feature of the NGT is the language, as the Rules provide for the use of English and permit the use of Hindi, without specification of other languages (Section 33) – a measure that could hinder access to justice to people whose mother tongue is a local language.

Finally, the Rules set forth the procedures for liquidation of relief, compensation, restitution of property and restitution of environment, through the establishment of an Environment Relief Fund and the individuation of District Collectors and “Nodal Agencies” (in the case of restitution of environment) responsible for the follow up of the judgments (Sections 36-37).

Hence, following the enactment of the Rules, the NGT was established with five places of sittings: New Delhi works as the principal seat, while Bhopal, Pune, Kolkata and Chennai stand as the other four place of sitting of the tribunal. After two decades of debates concerning the creation of an environmental tribunal, the vision indicated by the Supreme Court and studied by the Law Commission of India was embodied in an institution rooted in the international environmental principles as well as in the local reality of the country, with a ramification into five different seats and a circuit procedure that would allow a broader access to environmental justice, reflecting a fair approach in the organisation and in the composition of the court, made by judicial and technical experts. This degree of innovation and of openness is still more appreciated to the full if the National Green Tribunal is compared to the experiences outside the Indian system.

b) Comparative profiles of environmental courts

As known, the idea of an environmental tribunal dedicated only to cases dealing with issues arising from a number of laws on environmental protection and on prevention of pollution springs from

the experiences of the legal systems of Australia and New Zealand. Between the three paths identified on the adjudication of environmental disputes – the maintenance of general jurisdictions dealing with all cases, including those related to the environment; the internal specialisation of the courts, through the creation of “green benches” with judges trained in the domain of environmental sciences; the creation of environmental courts, with a partial composition of scientific experts, characterised by the speed of the proceedings, the efficiency and the competence of the organisation – the Indian Parliament chose the third solution, the birth of a specialised tribunal, allowing experts to classify this trend with the existence of an “Australasian” model, more eager to develop a pragmatic institutional way for environmental protection.⁵⁰⁴

Indeed, Australia, New Zealand and India are nowadays the three peculiar and most developed examples of environmental courts. Nevertheless, an analysis of the differences between the three experiences is worthwhile, in order to appraise the salient features of the National Green Tribunal with respect to the two Oceanian predecessors. The first environmental court to be established is the Land and Environment Court of New South Wales, that started its activities in 1980. According to the statute instituting and governing the tribunal,⁵⁰⁵ the Land and Environment Court is an appeals tribunal specialised in several classes of disputes dealing with the environment.

As far as its **composition** is concerned, the New South Wales Environment Court is the epitome of a tribunal comprehending judicial and technical expertise. While judges are appointed following special requirements (people having been judges in inferior courts or advocates with an experience of at least 7 years, as prescribed in Section 8), the peculiarity of the NSW tribunal is the introduction of “commissioners”, members of the court possessing relevant experience and knowledge in a wide spectrum of fields that include local government, town and environmental planning, environment sciences, architecture, engineering and management of natural resources (Section

⁵⁰⁴ Amirante, D., *op.cit.*, pp. 446-448.

⁵⁰⁵ New South Wales Land and Environment Court Act, Act No. 204 of 1979.

12). Commissioners are appointed for a period of 7 years, with the possibility of renewing the term.

Concerning the **jurisdiction**, the NSW Court has a competence that encompass a series of Acts on the protection of environment that are classified in eight categories: environmental planning; local government; land tenure; civil enforcement of environmental planning and protection; summary enforcement of environmental planning and protection; appeals from convictions related to environmental offences; other appeals and mining matters (Sections 17-21C). Although the Act provides for an enlargement of the scope of action of the tribunal, since Section 16 broadens the jurisdiction to “ancillary matters” related to cases falling within the competence of the Court, the classes of cases clearly curtail the action of this tribunal with respect to the NGT. Moreover, the jurisdiction differs not only for the subjects, but also for the legal fields and for the place of the court in the judicial system.

Indeed, the NSW Land and Environment Court possesses both civil and criminal jurisdiction and it is an appeals tribunal, while the Indian National Green Tribunal enjoys only civil jurisdiction and is a court with original and appeal competence. In the pyramid of judicial institutions, the NSW tribunal acts as an appeals court that adjudicates civil matters concerning the first four classes of cases – generally arising from determinations of consent authorities (as in the case of environmental clearances in the Indian system) and as judicial review of environmental administrative decisions – and criminal matters concerning environmental offences from the Local Court of New South Wales. In this respect, the NSW Land and Environment Court stands between tribunals endowed with original jurisdiction and the Courts of Appeals of the State, that consequently have in the High Court of Australia their apex tribunal.

Procedurally, the NSW Court is organised with a structure that bears certain resemblances to the system devised by the Indian Parliament. Indeed, benches for civil cases are composed of both judicial and

technical members (Section 33)⁵⁰⁶ and are characterised by the informality of the procedure.⁵⁰⁷ Section 38 of the Act also permits the participation of experts in the proceedings (as in the case of the NGT, Section 4). Moreover, space is left for conciliation and arbitration, through the convention of conciliation conferences presided over by the commissioners, to be mandatory for certain cases (development applications and consents), as provided for in Section 34 – a possibility that is precluded in the Indian system devised by the NGT Act.

While the National Green Tribunal and the Land and Environment Court of New South Wales differ in certain aspects, they certainly have common features, apart from the most evident mixed composition of lawyers and technical experts. As noted by Preston, the existence of such tribunals and the informality of their procedure contributed to the enhancement of public participation and of access to justice, especially thanks to the role of Public Interest Litigation (that proved fundamental also in the Australian case). Substantially, environmental tribunals as the NSW Court were also a stepping stone in building a truly elaborated jurisprudence on sustainable development and other environmental principles⁵⁰⁸ – a contribution that the Indian counterpart will certainly bring along in the years.

In addition to the Australian case, the inspiration for the establishment of the National Green Tribunal was given by the New Zealand Environment Court. This most recent institution was created following

⁵⁰⁶ While this is not the case for criminal matters, that are adjudicated by judicial members only.

⁵⁰⁷ Section 38: *“little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit”*.

⁵⁰⁸ Preston, B., *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, in *Pace Environmental Law Review*, 29, 2012, p. 396; Preston, B., *Operating an environment court: The experience of the Land and Environment Court of New South Wales*, in *Environmental and Planning Law Journal*, 25, 2008, pp. 385-409.

the enactment of the Resource Management Amendment Act of 1996.⁵⁰⁹ This tribunal came as an innovation in the judicial system of New Zealand and as an enhancement of the environmental protection devices of the country. Indeed, the cornerstone of the system is the Resource Management Act of 1991 (RMA), a statute that aimed at creating a coherent legislative ground for a comprehensive environmental protection of land, water and air in the exploitation of natural resources.⁵¹⁰ The Act was based on the principle of devolution to the local level and has been frequently amended:⁵¹¹ indeed, the RMA originally provided for the creation of a Planning Tribunal, that evolved as a proper Court with the 1996 amendment.

Under the consolidated version of the Act,⁵¹² the RMA provides for an Environment Court as a court of record that blends the competences of judges with the expertise of technical members. Indeed, as far as the **composition** of the tribunal is concerned, Section 248 of the RMA dictates the presence of Environment Judges and Environment Commissioners. Under Section 250, the former are nominated by the Governor-General (on recommendation of the Attorney General and consultation with the Ministers for the Environment and for Maori Affairs) among District Court Judges, while the latter are chosen with the same procedure among a variety of categories that span from local government experts to environment specialists.⁵¹³ The differences

⁵⁰⁹ Parliament of New Zealand, Resource Management Amendment Act, Act No. 160 of 1996.

⁵¹⁰ Under Section 5 of the RMA, clearly inspired to the principle of sustainable development, the purpose of the whole Act is the “*sustainable management of natural and physical resources*”, intended as to enable “*people and communities to provide for their social, economic, and cultural well-being and for their health and safety*”.

⁵¹¹ 17 Amendment Acts can be counted from 1993 to 2013.

⁵¹² Parliament of New Zealand, Resource Management Act, Act No. 69 of 1991 (reprint as at 23 September 2015, <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>).

⁵¹³ According to Section 253, the list is the following:

between the two figures regard the duration of the office (congruent to the length of office as a District Judge for the judicial members; 5-year terms for expert members) and in the prominence of judicial members for the leading role in the Court – since as in the Indian and Australian cases, the RMA prescribes the presence of a judge with the functions of President of the Court (a “Principal Environment Judge”). Moreover, the Act allows the presence of special advisors for assistance to the Court when required – a provision that was drawn in the Indian system too.

As far as **jurisdiction** is concerned, the Environment Court adjudicates on matters coming under the Resource Management Act and under several statutes dealing with environmental subjects,⁵¹⁴ with the powers of a District Court (Section 278). In the judicial system of New Zealand, the Environment Court thus stands between District Courts and the High Court: its decisions are final (Section 295), but cases can be referred to the High Court from the Environment Court *suo motu* – for opinions and questions of law (Section 287) – or by the parties, proposing appeal if the matter deals with questions of law (Section 299). In fact, the competences of the Court are mainly those of an appeals tribunal on decisions adopted by local authorities such as regional and district plans or projects on public works concerning land, air and water, with the power to grant orders and directions to amend

(a) economic, commercial, and business affairs, local government, and community affairs:

(b) planning, resource management, and heritage protection:

(c) environmental science, including the physical and social sciences:

(d) architecture, engineering, surveying, minerals technology, and building construction:

(da) alternative dispute resolution processes:

(e) matters relating to the Treaty of Waitangi and kaupapa Maori.

⁵¹⁴ Namely, the Forests Act of 1949; the Local Government Act of 1974; the Public Works Act of 1981; the Transit New Zealand Act of 1989; the Crown Minerals Act of 1991; the Electricity Act of 1992; the Historic Places Act of 1993; the Biosecurity Act of 1993; the Maori Commercial Aquaculture Claim Settlement Act of 2004 and the Public Transport Management Act of 2008.

those plans and policies (Sections 292-293). The Court also deals with the environmental effects of certain activities (for instance, mining) and with the enforcement of proceedings. As it is apparent from this list, the Environment Court generally settles matters of an administrative nature and works as an institution based on reviewing decisions of local policy.⁵¹⁵

In spite of this apparent reduced jurisdiction, the most interesting provisions of the RMA concern the **procedure**. As in the New South Wales Court, benches are mainly composed of two members, a Judge and a Commissioner, with the former presiding the sitting and having the casting vote in case of absence of majority (Section 265).⁵¹⁶ Apart from this resemblances, the relevant feature of this tribunal lies in the favour for mediation and alternative dispute resolution. Several procedural instrument are devised to this purpose in the Act: first of all, the possibility of convening conferences (Section 267) entrusted to Judges and to parties in the dispute; then, the role of Alternative Dispute Resolution itself (Section 268), when agreed by the parties⁵¹⁷ - positive tools for deflating the workload of the Court that are shared by the Oceanian tribunals but that are not provided for in the NGT Act. In the same way, the New Zealand Court is bound by the purpose of promoting “*timely and cost-effective*” resolution of proceedings (Section 269) and can hold hearings where it deems appropriate, including in localities close to the facts of the dispute (Section 271). Although the proceedings may differ, it is evident how the common goal of speeding up the disposal of cases dealing with environmental rights found

⁵¹⁵ See also the institutional presentation of the activities of the Environment Court (<http://www.justice.govt.nz/courts/environment-court/about-the-environment-court>, accessed on 16 October 2015).

⁵¹⁶ Different procedures are set in Section 279 (Environment Judge sitting alone) and Section 280 (Environment Commissioner sitting alone).

⁵¹⁷ Under Section 268, “*for the purpose of encouraging settlement, the Environment Court, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution*”.

similar solutions in the three experiences, especially for the composition of the courts.

Thus, the New Zealand example too concurred to the elaboration of the idea of the National Green Tribunal in India. From the comparative analysis of the institutions – as far as their design is concerned – several conclusions can be drawn. First of all, they all share the coexistence of mixed knowledge, with lawyers, scientists and technical experts as members of the tribunals. Then, in the three cases the choice for a specialised jurisdiction is bound to the need for a quick and efficient resolution of disputes. Finally, the birth of these courts is linked to the movement for an enhanced access to justice, that has materialised in India with a tribunal that is less bound on procedural obstacles and that, in spite of its central organisation, is composed of benches present not only in Delhi, but also on a regional basis (with hearings to be held also in Bhopal, Chennai, Kolkata and Pune).

Nonetheless, these common features should not hide the peculiarity of the Indian construction. Indeed, the creation of the National Green Tribunal shows a number of differences from the Oceanian counterparts. While the New South Wales and the New Zealand Courts are apparently more focused on administrative affairs – as they were conceived as tribunals dealing with cases on plans and policy decisions – the NGT is endowed with the broadest possible civil jurisdiction on environmental matters. Moreover, the Indian Court is in fact bound by law to base its decisions on international principles and will be consistently adjudicating on environmental rights, because of the jurisprudential heritage of the Supreme Court, that linked international principles with the right to life enshrined in Article 21 of the Indian Constitution and with the environmental rights constitutionally protected, and because of the broad provision that allows the NGT to scrutinise every “*substantial question related to the environment*”. In a different context – if compared with the affluent reality of two leading industrialised countries such as Australia and New Zealand – the challenges to be faced by the National Green Tribunal are manifold, ranging from the procedural ways of granting a fair access to justice to the effective necessity of enhancing environmental protection while keeping in mind the requirements of economic development and social welfare of a rising power.

Chapter IV

Access to justice: technical and procedural features of the National Green Tribunal

As witnessed in the debates within the Parliament and among civil society,⁵¹⁸ one of the main concerns on the institution of the National Green Tribunal was the dimension of access to justice. Here, this crucial aspect of the environmental rule of law will be analysed by looking at two different components: first of all, its purest characteristic - namely the matters of jurisdiction and *locus standi* - focusing on the cases that have devised the competence of the Tribunal according to the subject (jurisdiction *ratione materiae*), the subjects allowed to file an application (*ratione personae*) and the time limits for filing a case (*ratione temporis*); then, its innovative feature, derived from the Australian and New Zealand predecessors, the role of expertise in improving the quality of the decisions. Since the inclusion of environmental experts was considered as a fundamental innovation in environmental litigation procedures, the aspect of technical expertise will be studied as a method for redefining the parts of the major administrative instrument for environmental law, the EIA procedure,⁵¹⁹ and as a structural and institutional device for delivering judgments more connected to scientific expertise.

I) Jurisdiction and *locus standi*: a liberal Tribunal

a) Dividing competences: the Tribunal on its own jurisdiction

The first question on the scope of the jurisdiction of the National Green Tribunal regards the relation with the other domestic courts, insofar as the NGT Act reserved all civil cases relating to the environment to this newly established Tribunal. Considering the complex and hierarchical

⁵¹⁸ See *supra*, Chapter III, Section III, paragraph a).

⁵¹⁹ See *supra*, Chapter II, Section II, paragraph d).

system of Courts in India, the constitution of a specialised jurisdiction would generate a rebalance of competences among ordinary civil courts, High Courts, the Supreme Court and the NGT, especially on the interpretation of the “*substantial question related to environment*” and on the time limits for filing applications. The issues at stake pertaining to this field thus include:

- the competence *ratione materiae*, on the “*substantial question related to environment*”;
- the competence *ratione temporis*, on the possible transfer of petitions to the NGT and on the limits for approachability of the Tribunal;
- the competence *ratione personae*, concerning both the legitimacy for applying by certain subjects and the role of experts (such as *amici curiae*) within the procedures of the NGT.⁵²⁰

However, before analysing the operation of the Tribunal according to this traditional tripartite classification of jurisdiction, it is noteworthy to review the competences of the NGT as interpreted by the Supreme Court and by the environmental court itself.

On this matter, the Supreme Court expressed its views in the case *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors. vs. Union of India & Ors.*, in the order dated 9th of August 2012.⁵²¹ In this landmark case, on the relief for the victims of the tragedy of Bhopal (and especially on the rights available under Article 21 of the Constitution to include free and proper medical assistance), the apex tribunal considered the pendency of certain questions and the possibility of a transfer of the case to another more appropriate tribunal for recurring directions. Thus, the Tribunal transferred the petition to the High Court of Madhya Pradesh, but referred to the role of the NGT in the *obiter dicta*. The Supreme Court operated a distinction between cases: not only those arising from the statutes listed in Schedule I of the NGT Act after the enactment of

⁵²⁰ The question of expertise will be approached in Section III of the present Chapter.

⁵²¹ *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors. vs. Union of India & Ors.*, Writ Petition (Civil) No. 50 of 1998, order dated 9th of August 2012.

the Act stand to that Tribunal, but also those pending prior to its establishment can be transferred at the discretion of the courts, “as it will be in the fitness of administration of justice”.

Moreover, the High Court of Rajasthan further elaborated in this sense by issuing an order on the 1st of October 2013 in the case *M/S. Laxmi Suiting vs. State of Rajasthan & Ors.*⁵²² – arising from Writ Petition No. 8074/2010 (and other 57 petitions) – for transferring those cases related to the environment to the NGT. While the respondents supported the view that the transfer of cases is not mandatory, according to Articles 322A and 323B of the Constitution of India, the High Court recalled the genesis of the NGT Act – with the purpose of redressing the situation before the High Courts and the Supreme Court on the quantity of environmental cases and the necessity of a specialised jurisdiction for multidisciplinary issues – and the provisions of Section 29 of that Act, on the bar of jurisdiction for civil courts, and of the inclusiveness of the notion of “substantial question related to environment”, as “a purposive interpretation has to be essentially provided to the relevant provisions of the Act so as to facilitate the wholesome implementation of its enjoinders lest the same is rendered otiose.” With a view to this reflections, the High Court confirmed the provisions on the transfer of cases also with respect to writ petitions *ex* Article 226 of the Constitution.

Following these judgments, the National Green Tribunal itself reflected on this issue and stated in the *Goa Foundation* case⁵²³ that the competence of the environmental tribunal does not expand to issuing directions for enacting laws. In making explicit reference to the prerogatives of the Supreme and of the High Courts under Articles 32 and 226 of the Constitution, the environmental judge curtailed its competences and powers: “the Tribunal doesn’t have extraordinary jurisdiction. It has a limited jurisdiction, restricted by the implementation of the Acts stated in Schedule I to the NGT Act in relation to civil cases and/or the appellate jurisdiction (cases) provided under law. The Tribunal is a creation of a statute and is bound by the provisions of the statute i.e. the NGT

⁵²² *M/S. Laxmi Suiting vs. State of Rajasthan & Ors.*, Writ Petition No. 8074/2010 and others, order dated 1st of October 2013.

⁵²³ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

Act, 2010.”⁵²⁴ This is an established view that has been confirmed in the *Wilfred* case, where the Tribunal sustained the interpretation given to the NGT Act on the overriding effect of the founding legislation.⁵²⁵ However, the judges have also extended the category of powers of the Tribunal to judicial review, namely the power of examination of statutes or administrative acts in order to determine their validity according to a written constitution, as a supplement to the work of the Supreme Court and of the High Courts. The Tribunal hence affirmed that “the framers of the law intended to give a very wide and unrestricted jurisdiction to the Tribunal in the matters of environment. Be it original, appellate or special jurisdiction, the dimensions and areas of exercise of jurisdiction of the Tribunal are very wide. (...) There is no indication in the entire NGT Act that the legislature intended to divest the Tribunal of the power of judicial review”.⁵²⁶ What arises from the interpretation of the Tribunal is the assertion of a special jurisdiction related to environmental case, but also of implied powers that can extend by virtue of its role of administrator of justice and owing to the provisions contained in Section 19 of the NGT Act, affirming the prerogatives of the Tribunal to regulate its own procedure and to be guided by the principle of natural justice.⁵²⁷

The speciality of the Tribunal was indeed the *ratio* followed by the legislature, after fifteen years of considerations on the different options for fostering a more efficient and fast environmental litigation system. This feature has also been highlighted by the NGT itself: in *Braj Foundation vs. Union of India*,⁵²⁸ on a case concerning the validity of a

⁵²⁴ *Ibidem*, paragraph 40.

⁵²⁵ M.A. No. 182 of 2014 and M.A. No. 239 of 2014 in Appeal No. 14 of 2014 and M.A. No. 277 of 2014 in O.A. No. 74 of 2014 and O.A. No. 74 of 2014, dated 17th of July 2014, paragraph 30: “another very important provision is Section 33 which gives over-riding effect to the provisions of the NGT Act. The provisions of the NGT Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the NGT Act.”

⁵²⁶ *Ibidem*, paragraph 32.

⁵²⁷ *Ibidem*, paragraph 44.

⁵²⁸ O.A. No. 278 of 2013 and M.A. No. 110 of 2014, dated 5th of August 2014.

Memorandum of Understanding for forest management, the Tribunal has confirmed its particular nature, as it has been founded as an implementing domestic institution with regard to the international principles related to the environment (starting from the UN Conference of 1972), *ex* Article 253 of the Constitution.⁵²⁹ In the words of the judges, the NGT *“is a constitutional creature with a specific purpose on the basis of certain principles like sustainable development, precautionary principle, and polluter pay principle. The NGT which proceeds to adjudicate the disputes which involve substantial questions relating to environment, consists of Expert Members from various fields connected with environment apart from Judicial Members selected by a committee constituted as per the Act (...). Therefore there is no iota of doubt in our mind that this Tribunal has inherent power of not only enforcing its orders but also treating with any person who either disobeys or violates its orders,”*⁵³⁰ on the basis of Section 26 of the Act. By asserting its speciality for its origin, competences and powers, the judges have thus claimed their own *niche* in the judicial system and have guaranteed that the spirit of the NGT Act - in contrast with previous attempts at setting environmental judicial institutions - would not be embodied by a court deprived of prerogatives.

Moreover, this principle of speciality has been grounded also for granting effective remedies in longstanding issues. Concerning the principle of *res judicata*, that should bar proceedings before the National Green Tribunal if a matter had been previously adjudicated by another court, the environmental judges advanced the application of the “constructive rule of *res judicata*”, considering that the nature of environmental litigation is not only adversarial, but also and chiefly inquisitive, thus allowing a review of a situation in cases where public interests are affected by continuous or recurrent environmental

⁵²⁹ Article 253 of the Constitution of India, *Legislation for giving effect to international agreements: “Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”*

⁵³⁰ O.A. No. 278 of 2013 and M.A. No. 110 of 2014, paragraph 24.

problems. This was the case of *Janardan Pharande vs. MoEF*,⁵³¹ on water pollution in the river Nira in Maharashtra: in spite of Writ Petitions already disposed, the Tribunal applied the constructive rule of *res judicata* (following the jurisprudence of the Supreme Court)⁵³² and allowed the application due to the existence of recurring problems of air and water pollution.⁵³³

In this framework, the provisions of the NGT Act are naturally helpful in constructing the modalities of access to justice in environmental matters. As known, Chapter III of the Act, on the question of jurisdiction, presents several options for approaching the Tribunal: direct access for matters related to the environment under Section 14, appeals against decisions taken by administrative bodies under the Acts governing the management of water, air, forests and the environment under Section 16, and then the possible recourse to the Supreme Court for appealing the decisions of the NGT.⁵³⁴ The relevant point in defining the jurisdiction of the Tribunal is the distinction between original jurisdiction and appeals, as difficulties arise in posing

⁵³¹ O.A. No. 7(THC) of 2014 (WZ), dated 16th of May 2014.

⁵³² *Ibidem*, paragraph 29: “in “V. Purushotham Rao Vrs. Union of India and Ors.” (2001) 10 S.C.C. 305 the issue of constructive “res judicata” came up for consideration. (...) The Court further noted that even in the self same proceedings, the earlier order though final, was treated not to create a bar, inasmuch as the controversy before the Court was of grave public interest. After so saying this is what the Court observed. “In our considered opinion, therefore, the principle of constructive “res-judicata” cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override.”

⁵³³ *Ibidem*, paragraph 32: “the subsequent unabated problem of Water Pollution or Air Pollution cannot be brushed aside on the ground that the earlier proceedings have been terminated by the Court on the basis of certain statement made by the Industry or that certain compliances which were found to be in order. (...) the cause of action may be continuing or may be recurring in such a case. Considering these aspects, we deem it proper to hold that the present Application is maintainable. There is no bar of “res-judicata” in dealing with the Application on merits.”

⁵³⁴ See *supra*, Chapter III.

clear lines of division: a question related to the environment could concern an appeal under Section 16 and an appeal proposed under Section 16, *viceversa*, could entail broader environmental matters than a simple need of revising a decision of an administrative body. Thus, there are critical points concerning the distinction of modalities for access to environmental justice: on the one hand, Section 14 is broader in scope, as it sets basic requirements *ratione materiae* (the “*substantial question related to environment*”) and leaves open as far as the entitlements *ratione personae* are concerned; on the other hand, Section 16 is focused on the competence *ratione personae*, through the concept of “*aggrieved person*”, while setting strict legislative limits on the mechanism for appeals, arising only from decisions of administrative bodies.

The pertinence of this reading of potential conundrum is demonstrated by a case adjudicated by the National Green Tribunal in its early stages: in *Mayur Karsanbhai Parmar vs. Union of India & Ors.*,⁵³⁵ the Tribunal was confronted to an application, filed under Section 14 read with Section 18 of the NGT Act, whose cause of action was the potential damage to the environment created by the construction of a port and a thermal power plant in Gujarat, pending the grant of the environmental clearance by the competent authority. Considering the relevant facts presented before the bench of judges and the statutory provisions governing jurisdiction, the Tribunal dismissed the application on several grounds. First of all, the case could not have been filed as an appeal, since, under Section 16 of the NGT Act, appellants can present a case only when authorities (here, the MoEF) have already issued an order granting environmental clearance for a project. Then, under Section 14 read with Section 2(m), the jurisdiction of the Tribunal can be invoked only if “*the matter in controversy is not under consideration of any Competent Authority and/or by afflux of time a project is likely to cause harm to the environment.*”⁵³⁶ Thus, the environmental court made a distinction between the two modalities of access and ensured the possibility of resorting to the NGT only when damages to the environment are

⁵³⁵ O.A. No. 28 of 2011 and O.A. No. 9 of 2012, dated 20th of April 2012.

⁵³⁶ *Ibidem*, paragraph 23.

present and proved before the grant of an environmental clearance. In *Mayur Karsanbhai Parmar*, as the applicants contested only part of the procedure (the conduct of public hearings), without showing actual harm to the environment, the Tribunal rejected their claims for the projects were still under consideration, pending the grant of the environmental clearance.

The case *Mayur Karsanbhai Parmar* thus shows how the issues to be analysed are partly interrelated: since the Tribunal, as for its mandate, should be able to assert jurisdiction on civil environmental questions, but should also constitute an effective remedy against administrative decisions detrimental to the environment, a study of the competence according to the cases treated should comprehensively account for both classes of disputes. However, in order to guarantee a comprehensive reading of the working of the Tribunal, a traditional separation between competences has been made, while considering original applications and appeals through the paragraphs of this study. As the main issue arising from the Act - and the cornerstone of the entire construction of the NGT - is the definition of the “*substantial question related to environment*”, the jurisdiction *ratione materiae* will be the starting point for delving into the elaboration of the Tribunal on its own competences. The matter aforementioned is indeed crucial for understanding the maintainability of applications before the National Green Tribunal. Several decisions, since the early working of the Tribunal, incline in favour of the widest possible interpretation of the NGT Act, in order to assert a specialised jurisdiction that could effectively and rapidly dispose of civil cases related to environmental issues.

The cases adjudicated by the Tribunal in its first years of activity show a concern for a systemic view of its jurisdiction. Indeed, the jurisprudence of the National Green Tribunal attests not only an investigative approach, due to the presence of expert members,⁵³⁷ but also a systemic view on how the legal instruments available to the applicant for the safeguard of the environment can be read in the whole framework, thanks to the awareness of the judicial members toward the

⁵³⁷ See *infra*, Section II, paragraph b).

existence of other judicial institutions, starting from the Supreme Court. In the *National Green Tribunal Bar Association* case,⁵³⁸ on mining activities of minerals and sand in rivers, the Tribunal seized the opportunity of a miscellaneous application filed by the State of Madhya Pradesh to read the directions and the principles enshrined by the Supreme Court in *Deepak Kumar & Others vs. State of Haryana*⁵³⁹ with the legislation enacted to protect the environment in mineral quarrying activities. Upon the contention that “large scale illegal and impermissible mining activity (...) on the bank of Yamuna, Ganga, Chambal, Gaumti and Revati” was taking place, the State of Madhya Pradesh created its own institution for dealing with those issues, but this action was questioned. On this topic, the NGT enlarged its view to the whole construction beneath the environmental provisions in force in India: as the Environment (Protection) Act of 1986 “enabled co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances”⁵⁴⁰ along with the implementation of controls and prevention of environmental pollution sanctioned in the Notification of 2006, the law of 1957 on minor minerals left space for activities with less restraint, provided that this activity was carried on in separate small areas. However, the Supreme Court having forbidden this enterprise for it rendered void the *ratio* of environmental protection behind the Environment (Protection) Act, the matter of implementation of the direction of the apex tribunal remained to be solved.

Concerning the legal system related to the environment, while the State of Madhya Pradesh reacted by instituting its own implementing body, the NGT endeavoured to come across a solution within the constitutional ambit. As the Supreme Court had already adjudicated the same case, the NGT followed the path traced by the apex tribunal

⁵³⁸ M.A. Nos. 685 and 708 of 2013 in O.A. No. 171 of 2013, dated 28th of November 2013.

⁵³⁹ *Deepak Kumar & Others vs. State of Haryana*, (2012) 4 SCC 629, dated 27th of February 2012.

⁵⁴⁰ M.A. Nos. 685 and 708 of 2013 in O.A. No. 171 of 2013, paragraph 10.

and shielded the panoply of laws enacted at the federal level from possible intrusion by State Governments. Indeed, considering that the Acts of 1957 and of 1986 had been approved by the central level, and that only a strict edge is left to the States in matters concerning the environment and mining activities, the Tribunal rejected the approach of Madhya Pradesh that sustained the possibility of granting environmental clearances by local bodies such as a District Level Committee⁵⁴¹, provided that such regulation would “*wipe out the impact, effect and procedure prescribed under the Central law*”.

Hence, the Tribunal entered into the definition of administrative proceedings in a pervasive manner, directing central and local bodies to refer to and implement the legislation in force also with regard to their relationships. This pervasiveness of the judges is finally corroborated by the recent tendency of the Tribunal to start proceedings *proprio motu*, on its own motion. Although the Tribunal had initially refrained from exercising such powers,⁵⁴² the judges have enlarged their scope of action to adjudicate cases dealt with by the media in absence of the presentation of an application or of an appeal. The first case to be decided through this procedural device has been the matter of the vehicular traffic at Rohtang Pass, the “Crown Jewel” of Himachal Pradesh.⁵⁴³ Concerned about the devastating impact of mass tourism in the area, the Tribunal declared its jurisdiction from this “*indisputable*” fact⁵⁴⁴ and issued comprehensive directions on pollution and

⁵⁴¹ *Ibidem*, paragraph 24: “the State Government would not be competent to alter or completely give a go-by to the said statutory procedure and methodology and assume to itself any authority appointed by it to grant environmental clearance. The environmental clearance has to be granted by the authority specified under the Central law.”

⁵⁴² Appeal No. 18 of 2011, dated 20th of January 2012, paragraph 9: “it is mentionable that we are not conferred with suo moto powers to proceed with the case.”

⁵⁴³ O.A. No. 237 (THC) of 2013 (CWPIl No.15 of 2010), dated 6th of February 2014.

⁵⁴⁴ *Ibidem*, paragraph 20: “it is indisputable that the glacier of Rohtang Pass is facing serious pollution issues and with the passage of time, is being degraded environmentally, ecologically and aesthetically. The time has come when not only the

afforestation, with regard to the constitutional provisions related to the environment and to the Environment (Protection) Act.⁵⁴⁵

This proactive and intrusive approach - deprived of explanation on the legal methodology for attracting jurisdiction - was further repeated in several instances. In the case of the dolomite mining in Kanha National Park, threatening the tiger reserve located in the natural park,⁵⁴⁶ the Tribunal took again *suo motu* cognisance of an environmental issue from a news published in the 'Times of India' dated 10th of April 2013. The judges asserted jurisdiction in spite of the fact that the Wildlife (Protection) Act is not listed under Schedule I of the NGT Act - as the competence of the Tribunal was attracted by the Environment (Protection) Act of 1986 because of the comprehensive notion of environment, that includes wildlife. ⁵⁴⁷ Without analysing the appropriateness of the attraction of jurisdiction *proprio motu*, the environmental court directed the convention of a meeting among the concerned authorities with a view to settle issues of environmental clearance for mining activities undertaken in the proximity of the forest corridors for tigers and of streamline of administrative proceedings on the operation of mines.⁵⁴⁸

State Government, the authorities concerned but even the citizens must realize their responsibility towards restoring the degraded environment of one of the most beautiful zones of the country as well as preventing further damage."

⁵⁴⁵ Ibidem, paragraph 38: "This Tribunal must issue directions which would be in consonance with the Constitutional mandate contained under Articles 21, 48-A and 51-A(g) and are the very essence of the Act of 1986. The State Government has neither formulated nor issued any specific guidelines - statutory or otherwise - on prevention and control of environmental degradation and damage in relation to the glacier of Rohtang Pass valley. "

⁵⁴⁶ O.A. No. 16 of 2013, dated 4th of April 2014.

⁵⁴⁷ Ibidem, paragraph 22: "we are of the opinion that occurrence of Wildlife in a particular ecosystem having relation with the environment has to be considered as a part of environment and therefore the matters related to wildlife are liable for adjudication."

⁵⁴⁸ Ibidem, paragraph 34.

The usage of this expansionist, self-established prerogative was again activated in the issue of the contamination of groundwater in Delhi, finally disposed on the 10th of December 2015.⁵⁴⁹ Seising the occasion of a detailed article published in the “Hindustan Times” on the lack of supply of proper potable drinking water in several areas in Delhi, the NGT issued notice to the competent authorities for filing reports on the matter. Again, regardless of preliminary remarks on the jurisdiction, the Tribunal ordered, in its short judgment, to constitute a committee (composed of the representatives of the competent authorities, at the national and local level) empowered to submit a report on groundwater contamination, to direct the closure of water pumps extracting contaminated liquids and to provide information on the quality and quantity of water.⁵⁵⁰

The development concerning *proprio motu* jurisdiction, although relevant for the protection of the environment, raises questions on the width of the powers of the NGT. If, initially, the environmental court restricted its ambits within the statutory competences, the three judgments aforementioned constitute an innovation deprived of solid legislative ground. From the start, the Tribunal has been conscious of its limits with regard to the other courts, as it considered that High Courts and the Supreme Court are endowed with the power of adjudicating matters related to fundamental rights *ex* Articles 32 and 226 of the Constitution.

However, the most recent interventions by means of *suo motu* applications have challenged such judicial equilibrium, through an activism that is not justified in the provisions of the NGT Act. With a view to these issues, the definition of “*substantial question related to environment*”, limited by the statutory restraint of the list of Acts contained in Schedule I, comes to the forefront in the present analysis for assessing the construction of the competence of the Tribunal *ratione materiae*.

⁵⁴⁹ O.A. No. 253 of 2015, dated 10th of December 2015.

⁵⁵⁰ *Ibidem*, paragraph 8.

b) The jurisdiction *ratione materiae*: how to define environmental questions

Notwithstanding the recent and controversial evolutions in the affirmation of an expanded jurisdiction, it is necessary to resort to the chronological unfolding of the court's arguments in appraising its own competence with regard to the notion of environment.

The very first cases adjudicated by the National Green Tribunal show how the newly created institution attempted to resort to the basic doctrine underlying the foundational Act, namely the protection of the environment through specific Acts and through international environmental legal principles, while keeping separated questions of possible concurrent to the jurisdiction of the Supreme Court and instances pertaining to private law that could have been incidentally considered within the jurisdiction of the Tribunal. For the first case, in Application No. 26 of 2011,⁵⁵¹ on the *Ganga River pollution* case, the longstanding issue of the pollution of the historical river was also dealt by the NGT by virtue of his powers on environmental litigation. Here, the applicants sought directions for a new environmental study (to follow the report of the Indian Institute of Technology) that would include activists, religious leaders and people in the hills affected by the construction of the hydropower dam. Indeed, after the order of the Supreme Court in the *T.N. Godavarnam* case,⁵⁵² the Union of India requested IIT to conduct a study on the cumulative impact of the dam. Consequently, the applicants alleged that the study was flawed by mistakes and conducted individually, while the respondents (Ministry of Environment and Forests and IIT) showed that the study was based on scientific parameters and written by a group of experts. Finally, the NGT dismissed the application, acknowledging the contentions of the respondents, also because a similar grievance had been presented before the Supreme Court, that rejected the claim.

⁵⁵¹ Application No. 26 of 2011, dated 17th of July 2012.

⁵⁵² *T.N. Godavarnam, Thirumulpad vs. Union of India & Ors.*, in Writ Petition (Civil) No. 202/1995, order dated 27th April 2007.

Moreover, the Tribunal considered possible parallelisms with actions brought before ordinary civil courts. In this regard, the Tribunal dealt with, and dismissed, Application No. 24 of 2012.⁵⁵³ The NGT maintained its jurisdictional limits with regard to both civil action on damages and compensation and environmental clearance for a construction project in Karnal, Haryana. Indeed, in a matter concerning action on compensation regarding land acquisition, the Tribunal acknowledged the existence of a civil suit pending in Haryana, with an order dated 30th of May 2012, arising from the Land Acquisition Act (and not from one of the Acts listed in Schedule I of the NGT Act). As for environmental clearance, the NGT reconstructed the proceedings and the case: in fact, the applicant sought a relief under the Environment (Protection) Act, while it should have worked out legal remedies concerning the transfer of lands.

From the two cases that testify the initial working of the Tribunal, it can be considered that a series of questions arose with regard to the competences on the subjects to be considered within the spectrum of environmental activities, especially if one looks at the broad construction of Section 14(1) of the Act.

In this sense, the already cited *Goa Foundation vs. Union of India & Ors.*⁵⁵⁴ was a landmark case in assessing the notion of “*substantial question related to environment*”. The Tribunal, faced to an application filed by a non-governmental organisation dealing with environmental protection and biodiversity, had to decide whether to have competence over a general question concerning the possibility of the competent institutions of granting environmental clearances in the area of the Western Ghats, one of the main biodiversity hotspots in India, and on the inaction on part of public institution concerning the safeguard of the region. If the respondents (MoEF, local Pollution Control Boards) affirmed that the application as such constituted an abuse of the process of the Tribunal, since it did not involve any dispute under the Acts listed in Schedule I of the NGT Act, the bench of judges addressed

⁵⁵³ Application No. 24 of 2012, dated 13th of July 2012.

⁵⁵⁴ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

the matter through a complete reading of the whole NGT Act in a purposive manner.

Indeed, the Tribunal started by considering the Preamble of the Act - and not only the relevant provisions on jurisdiction, namely Sections 14 to 18 - with a view to appreciate the width of jurisdiction conceived by the legislator. Since the Preamble posed the issues related to environmental protection and conservation as a pillar of the specialised court and further enlarged this provision as to include "*matters connected therewith or incidental thereto*", Sections 14 to 18 are to be interpreted keeping in mind the objectives expressed in the Preamble: the two conditions set in Section 14, the existence of a civil case and the requirement of a case being substantially related to the environment are to be read liberally. Thus, on the first feature, the jurisdiction of the Tribunal on civil cases should be understood in an extensive way, so as to collect all civil cases, in opposition to criminal cases, that are not under the provisions of the NGT Act.⁵⁵⁵ On the second point, the relation to the environment, the judges referred to Section 2(m) of the NGT Act by acknowledging its non-exhaustive character and by enucleating the essence of the competence *ratione materiae* of the Tribunal.

The classification under Section 2(m) is conceived as to set several categories of substantial causes of attraction of the jurisdiction of the Tribunal:

- a direct violation of a specific statutory environmental obligation producing serious environmental consequences;
- a substantial damage to environment and property;
- a measurable damage to health;

⁵⁵⁵ *Ibidem*, paragraph 20: "*the expression 'civil cases' used under Section 14(1) of the NGT Act has to be understood in contradistinction to 'criminal cases'. This expression has to be construed liberally as a variety of cases of civil nature could arise which would be raising a substantial question of environment and thus would be triable by the Tribunal.*"

- environmental consequences arising from specific activities or sources of pollution.

These categories are thus connected with the specific doctrine of the cause of action under the NGT Act and under Rule 14 of the National Green Tribunal (Practices and Procedure) Rules of 2011. According to the Rules, only one single cause of action is necessary for the attraction of the competence of the Tribunal, while the reliefs sought in the application/appeal can be one or more, provided that the plurality of reliefs are consequential. On this specific issue, the NGT relied on the precedents of the Supreme Court (especially *Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr.* of 2004)⁵⁵⁶ and guaranteed the maintainability of applications provided that the “*claim discloses some cause of action or raises some question to be decided by a judge*”, regardless of the weakness of the case or of its likelihood to succeed.

Thus, logically, the Tribunal aptly associated the question related to environment, considered to be substantial according to the four categories aforementioned, to the existence of a dispute, as the respondents in the case denied the existence of contentions with Goa Foundation. In fact, the correlation between Section 14(1) and 14(2) is evident insofar as the court could not rule over a question, but on a dispute arising over such environmental issue. On this, the Tribunal departed from the traditional view of adversarial litigation and asserted its speciality as a socio-centric jurisdiction: since the competence is related to cases concerning a wide scope of issues described in the Preamble of the NGT Act, that do not necessarily involve confrontational litigation, the Tribunal set the machinery for a competence *ratione materiae* that include single situations, and not only pure enforcement of personal rights.

⁵⁵⁶ *Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr.*, (2004) 9 SCC 512, paragraph 140: “*a cause of action is a bundle of acts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence.*”

As a conclusion, the National Green Tribunal asserted its jurisdiction on substantial questions related to the environment, following the reasoning exposed above, to be described as *ex post* facts, but it recalled its prerogatives in light of the principles of sustainable development, precaution and polluter pays, under Section 20, to include a fifth cause of action, *“an anticipated or likely injury to environment”*, in the list of causes attracting the jurisdiction of the Tribunal.⁵⁵⁷

With this authoritative precedent settled, the Tribunal pursued its in-depth examination of this issue, with a view to enlarge its jurisdiction in a liberal manner while, in parallel, keeping in mind the different possibilities for access to other courts (chiefly, the Supreme Court). In *Kehar Singh vs. State of Haryana*,⁵⁵⁸ the applicant filed a petition under Sections 14, 15(b) and (c) read with Sections 18(1) and (2) of the NGT Act for challenging the validity of an environmental clearance for a sewage treatment plant. On this, referring to the *Goa Foundation* case,⁵⁵⁹ the Tribunal plainly considered that the construction of a sewage treatment plant entailed its jurisdiction, as it resulted *“in pollution of underground water besides causing emission of obnoxious gases and creating public nuisance”* near residential and religious places.

Moreover, the Tribunal again displayed the notion of *“substantial question”* with reference to the *“cause of action”* - namely, *“the factual situation, the existence of which entitles one person to obtain from the court remedy”* - leading to the application. Indeed, according to the NGT, the cause of action *“must have a nexus to such dispute which relates to the issue of environment/substantial question relating to environment”*. In the

⁵⁵⁷ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013, paragraph 42: *“the applicability of precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of substantial questions relating to environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act.”*

⁵⁵⁸ Application No. 124 of 2013, dated 12th of September 2013.

⁵⁵⁹ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

distinction between a stricter interpretation of the cause of action as “*circumstances forming the infraction of the right or the immediate occasion for the action*” and a wider understanding as the mere conditions for establishing the maintainability of an application, the Tribunal identified three elements required for a case to fall within its jurisdiction: the “*relevancy to the dispute sought to be raised, right to raise such dispute and the jurisdiction of the forum before which such dispute is sought to be raised*”. In proper terms, the dispute should be related to a civil case, regarding the “substantial question” on the environment, arising from the Acts listed in Schedule I of the NGT Act.

On the matter of definition of access to the NGT according to the statutes listed in Schedule I, as well as on the legitimacy of the presentation of cases by non-governmental organisations,⁵⁶⁰ one of the leading decisions is “*Kalpavrishta*” & Ors. vs. Union of India. As the Tribunal itself recognised, *Kalpavrishta* is a “*reputed environmental non profit organisation working since 1979*”, with a record on advice for environmental governance, as the other two applicants, “Goa Foundation” and the individual Manoj Mishra, a civil society leader in organising rallies for environmental protection (i.e. on the protection of the river Yamuna).⁵⁶¹

Provided that an applicant should approach the NGT according to the ambits set in the NGT Act, the question of the maintainability of the application is here manifest, as the applicants request the Tribunal to adjudicate upon statutory and secondary legislation, an activity that the NGT may pursue only as judicial review, not under Section 14 of the NGT Act, since there is no evidence of a substantial question related to environment.

Considering the power of judicial review, the Tribunal held in this case (as well as in Application No. 74 of 2014)⁵⁶² that the NGT has a limited power of judicial review, as it shall not supplant higher courts in this

⁵⁶⁰ See also *infra*, paragraph c).

⁵⁶¹ Application No. 116 (THC) of 2013, dated 17th of July 2014. See *infra*, Section II, for a detailed analysis of the case.

⁵⁶² Application No. 74 of 2014, dated 17th of July 2014.

task. Thus, the NGT possesses this power - concerning validity, vires, legality and reasonableness - only for rules made in relation to the Acts listed in Schedule I of the NGT Act.

Having settled the preliminary matter of maintainability, on the substantial question related to environment arising from the Notification of 2006, the Tribunal rephrased the question of Appendix VI in light with some amendments made in 2007, and enucleated the matter of the appointment of public administrators in EACs. For this issue, the Tribunal noted the necessity of the appointment of people with relevant experience, congruent to this specialised job, *“rather than persons with experience of general administration or management, whose contribution to such process would be negligible”*, and stated that the MoEF shall nominate people with experience related to environmental affairs, as this is the spirit of the legislation.

Taking into account the existence of an environmental question, the Tribunal referred to the *Goa Foundation* case to explain the scope of Section 14 of the NGT Act, *“construed in a liberal manner”*. Thus, the construction of the jurisdiction of the Tribunal is to be linked to the existence of fundamental rights arising from Article 21 of the Constitution, starting from the right to a clean environment, that can be claimed by anybody: *“once a case has nexus with the environment or the laws relatable thereto, the jurisdiction of the Tribunal can be invoked”*. It is a jurisdiction, thus, established according to three ingredients: civil cases; questions related to the environment, or to the enforcement of an environmental right; implementation of the Acts in Schedule I.

In interpreting these ingredients, set in the *Kehar Singh* judgment, in the *Kalpavirishka* case the NGT puts to the forefront the third, namely the implementation of the Acts listed in Schedule I of the instituting statute. Indeed, the will of the legislature was to classify civil cases according to certain categories, reserving certain disputes to the jurisdiction of the Tribunal as far as implementation is concerned. Drawing this interpretation from the enunciation of Original Application No. 12 of 2014,⁵⁶³ the NGT confirmed the view that its jurisdiction is confined to

⁵⁶³ O.A. No. 12 of 2014, dated 17th of July 2014.

those disputes arising from the implementation of “the various provisions, rules, regulations and the notifications issued in exercise of subordinate or delegated legislation with regard to any or all of the Acts stated in Schedule I of the NGT Act”, even with an indirect nexus.

As a conclusion, the question of the appointment of experts in committees was considered to fall within the jurisdiction of the Tribunal, albeit with an indirect nexus, as it is linked with environmental clearances, “the ethos of environmental jurisprudence particularly with reference to the Scheduled Acts”. Further to this interpretation, the question is to be considered - for its impact on the environment and the legal rights underlying the project and the interest of the public - within the scope of Section 14 of the NGT Act, as it arises from delegate legislation in implementation of the Environment (Protection) Act.

However, the Tribunal reached a different conclusion the very same day with reference to O.A. No 12 of 2014, *M.C. Mehta vs. Union of India*,⁵⁶⁴ in the litigation arising from the order of the Supreme Court of 1991 concerning compulsory environmental education and dissemination of environmental information and awareness through mass media. While the NGT refrained from adjudicating the matter - as it maintained that orders of the Supreme Court should be challenged before the apex court - it repeated that under Section 14, the jurisdiction of the Tribunal is activated on civil cases posing questions related to a substantial question related to environment arising from the implementation of the Acts scheduled in the NGT Act. Considering the three requirements, the bench of judges affirmed that “the expression ‘implementation’ understood in its correct perspective cannot be extended, so as to empower the Tribunal to issue directions in relation to service matters involving environmental sciences”. The Tribunal differentiated between the terms “implementation”, related to the application of provisions included in the Acts of Schedule I, and “execution”. Thus, it stated that the matter of environmental education did not fall within its jurisdiction, as it pertains to the domain of the Supreme Court and it is not a substantial question under Section 14.

⁵⁶⁴ *Ibidem*.

If oblique questions such as environmental education do not fall within the jurisdiction of the Tribunal, the judges have, however, demonstrated a liberal construction of the scope of action of the Tribunal with regard to the environmental domain. A case adjudicated in 2014, *Amit Maru vs. MoEF & Ors.*,⁵⁶⁵ is clear in exposing the challenges faced by the NGT in interpreting the provisions related to its jurisdiction for both competences *ratione materiae* and *ratione personae*. The miscellaneous application filed by the project proponent (a company dealing with constructions) posed a series of critical points to the Tribunal insofar as its jurisdiction is concerned under various angles: first of all, the parallel filing of an application before the NGT and of a writ petition before the High Court; then, the absence of a cause of action to trigger the competence of the Tribunal for environmental matters and for time limits;⁵⁶⁶ finally, the insufficient requirements of the applicant as an aggrieved person.

The NGT responded to these positions by confirming its extensive reading of the provisions of the NGT Act and its previous decisions in matters related to jurisdiction. On the competence under Section 14, the Tribunal established the principle of a jurisdiction *prima facie* in environmental matters according to the material available on record. Indeed, the judges holistically considered the concept of environment, without making a clear distinction between classical cases related to personal, property, individual or collective disputes: the Tribunal linked the requirements of *locus standi* by reason of both subject-matter and applicants.⁵⁶⁷ Provided that there is a cause of action that is linked to environmental damages, the person applying to the Tribunal should

⁵⁶⁵ M.A. No. 65 of 2014 in O.A. No. 13 of 2014, dated 1st of October 2014.

⁵⁶⁶ The issue of time limits will be dealt with in paragraph d).

⁵⁶⁷ Ibidem, paragraph 11: “Any person may raise environmental dispute irrespective of his being personally affected due to the act of wrongdoer/polluter or violator of environmental Law/Norms. The only barrier is that such a person shall not file the Application with malafide intention. Secondly, he shall not be totally alien. In other words, if it is demonstrated that the Applicant is a person interested in protection of environment, or at least restitution of environment, then *prima facie*, he has *locus standi* to maintain the Application.”

thus show two major qualifications: he/she should act *bona fide* and should demonstrate to be involved in environmental protection. Thus, the Tribunal rejected a restrictive approach even for the concept of “aggrieved person”, typical of appeals: inasmuch as the applicant “is interested in protection, restitution or otherwise securing maintenance of environment” and such interest is related to environmental rights under Article 21 of the Constitution, he/she can entertain a case before the Tribunal.

The NGT maintained the liberal approach also by looking at the *Rana Sengupta* case,⁵⁶⁸ different from *Amit Maur* insofar as the record of the application did not demonstrate the status of the appellant as a person with an interest in environmental matters and in the case, and at the *Ankur* case,⁵⁶⁹ as that application was deprived of evidence in favour of the position of the proponent. Finally, the Tribunal referred to *Goa Foundation*⁵⁷⁰ for extending the doctrine of the binding precedent to the jurisprudence of the NGT: the court maintained its approach and confirmed the conditions needed to file cases before the newly established environmental jurisdiction, namely that “a person aggrieved due to loss of environment, breach of environmental norms or like causes” can access the Tribunal, the sole limitation being “that his action shall not be baseless, ill-motivated or that outcome of vendetta nor shall he be a person disinterested in such cause of environment”.⁵⁷¹ For these reasons, the Tribunal allowed the application in the *Amit Maru* case.

What arises from these judgments is a jurisprudential construction that attempts to separate issues of competences *ratione materiae* and *ratione personae*, but acknowledges the difficulties in discerning the different elements, due to the peculiarity of environmental litigation. Hence, the Tribunal has extensively considered the notion of environment, provided that there is a link to the statutes listed in Schedule I of the NGT and that the applicant/appellant has a sufficient ground for

⁵⁶⁸ Appeal No. 54 of 2012, dated 22nd of March 2013. See *infra*, paragraph c).

⁵⁶⁹ Application No. 30 of 2012, dated 18th of December 2012. See *infra*, paragraph c).

⁵⁷⁰ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

⁵⁷¹ M.A. No. 65 of 2014 in O.A. No. 13 of 2014, paragraph 20.

approaching the Tribunal. As the competence *ratione materiae* has been constantly extended,⁵⁷² the matter of *locus standi* too raised contentions for its tentative broad applicability.

c) *Locus standi*: the competence *ratione personae*

As previously analysed, the construction of the jurisdiction of the Tribunal *ratione materiae* in a liberal manner has been constructed in parallel with a wide access to justice *ratione personae*: if questions related to the environment have been dealt with by looking at them through a teleological interpretation, *locus standi* before the Tribunal received a similar treatment too.

On this, several cases concur to state that a wide access to the NGT has been guaranteed by a relaxation of the requirements concerning the configuration of the concept of “*aggrieved person*”. Since the beginning, the work of the Tribunal has been to draw the lines of the main concepts guaranteeing access to justice. In this sense, on the question of the maintainability of applications presented by various subjects, Appeal No. 5 of 2011 (*Vimal Bhai vs. MoEF*)⁵⁷³ has been one of the first examples of the role of the Tribunal in extending the notion of “*aggrieved person*”. As the Tribunal explicitly approached the question, as a preliminary matter, it set the scene by combining the reading of Section 2 and Sections 16 and 18 of the NGT Act.

If, according to a restrictive view, the concept of person should entail the presence of a “*substantial grievance as to denial of some personal, pecuniary or property right or imposition upon a party of a burden or obligation*”, a liberal stance in the reading of the provisions would result in the access to the Tribunal to “*any person whether he is a resident of that particular area or not whether he is aggrieved and/or injured or not*”. The NGT adhered to the second theory, supporting the view that in environmental matters a relaxation of the requirements concerning the presentation of cases is beneficial. Moreover, on the combined

⁵⁷² See, for instance, the recent practice of *suo motu* proceedings, *supra*, paragraph a).

⁵⁷³ Appeal No. 5 of 2011, dated 14th of December 2011.

interpretation of Sections 2, 16 and 18, the Tribunal distinguished between the activation of the clause provided in Section 18(2) – in cases where the person is *injured* and can “*claim relief, compensation or settlement of disputes*” – and the notion of “*person aggrieved*”, under Sections 14 and 16. In *Vimal Bhai*, this reading has been even substantiated through the reading of Articles 48A and 51A of the Constitution. Indeed, as citizens are required to protect and improve the natural environment, access to the remedies of the NGT is open to every citizen as a direct consequence. Thus, the Tribunal supported the maintainability of the appeal on the grounds that the notion of aggrieved person “*must be given a liberal construction and needs to be flexible*” and that it should be separated from the concept of “*injured person*”. Furthermore, the Tribunal confirmed this view in the *Jaya Prakash Dabral* case in the same day, on an application filed by the President of an NGO dealing with environmental issues of the Himalayas and by a former Professor of Environmental Economics, considered to be persons aggrieved from the damages to the environmental caused by the construction of an hydroelectric dam on the river Mandakini.⁵⁷⁴

From these judgments, the Tribunal refined the notion of “aggrieved person” according to the different cases, in order to extrapolate the essential features of it. In *Jan Chetna vs. MoEF & Ors.*,⁵⁷⁵ the Tribunal rendered a decision on the necessity of granting environmental clearances to projects concerning the enlargement of existing sites⁵⁷⁶ from an appeal filed by a social and environmental group against the MoEF and the proponent company (M/s. Scania). In this specific case, the preliminary objections advanced by the respondent concerned the maintainability of the appeal in light of the passage from the NEAA to the NGT and of the definition of affected person. On the first remark,

⁵⁷⁴ O.A. No. 12 of 2011, dated 14th of December 2011: “*for all the above reasons, which arise under similar circumstances to this case, we are of the considered opinion that the applicants are persons aggrieved, in a matter of this nature. Therefore, the applicants are entitled to maintain an application of this nature.*”

⁵⁷⁵ Appeal No. 22 of 2011, dated 9th of February 2012.

⁵⁷⁶ In detail, plants producing sponge iron.

the respondent supported the interpretation of the transfer of cases according to the provisions guaranteeing access to the NEAA, and not under the NGT Act: as the NEAA Act prescribed, as a rule of *locus standi* for appeals, access only to persons affected by the grant of an EC or to associations likely to be affected (Section 11), the NGT should dismiss the appeal insofar as Jan Chetna did not fulfil the requirements under any of the Acts. To this, the new environmental judge replied by setting the provisions of both the NEAA and NGT Acts in the framework of the international instruments approved from 1972 and of the jurisprudence of the Supreme Court (especially *Vellore Citizens*).⁵⁷⁷ Hence, the Tribunal analysed Section 11 of the NEAA Act by drawing a distinction between directly affected persons and those affected not “*in the manner traditionally understood*”, considering the far-reaching effects of environmental pollution. The NGT, irrespective of the Act governing the procedure, thus confirmed the possibility of filing an appeal by organisations such as Jan Chetna, insofar as they participated in the proceedings for the grant of the environmental clearance, as a way to fulfil the “*legislative intentions of granting access to justice*”. The Tribunal eventually established a link between the concepts of “affected” and “aggrieved” person and confirmed the maintainability of appeals from the NEAA to the NGT.

Again, an aggrieved individual (or group) has been defined in the Goa Foundation case as “*a person who has suffered a legal grievance, against whom a decision has been pronounced or who has been refused something. This expression is very generic in its meaning and has to be construed with reference to the provisions of a statute and facts of a given case*”.⁵⁷⁸ Thanks to this liberal construction, the Tribunal admitted that access to environmental justice can be granted also in absence of “*direct or personal interest in invoking the provisions of the Act*” or by showing that the cause of action “*affects the environment*”.

However, this extensive reading has encountered limits posed by the Tribunal, in the interest of guaranteeing a fair access to justice and a disposal of environmental cases in a coherent and credible manner.

⁵⁷⁷ See *infra*, Chapter III, Section II, paragraph c).

⁵⁷⁸ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

Indeed, the Tribunal limited access to its remedies in order to avoid futile litigation derived by a lack of requirements for *locus standi* and also because of the absence of evidence supporting the applications. Hence, a series of applicants have been denied access to the Tribunal, whether they were individuals or groups that attempted to show their interest in the matter presented before the NGT.

In this framework of prudence, the *Ankur* case⁵⁷⁹ is peculiar: the applicant (a public trust) filed a request for revocation of environmental clearance of an open iron ore mine in Kalane, Maharashtra, and for restoration of the environment by removing mining wastes in agricultural lands.

The NGT analysed the issues to adjudicate as follows: on the matter of *locus standi*, the Tribunal did not include the applicant trust among those who are entitled to file an application under Section 18, insofar as the trust, representing agriculturists, should be considered as an aggrieved person. In fact, *Ankur* was not registered as a public trust and the documents supporting the application do not show how it could represent the interests of farmers. Moreover, on the substantial question of the application, the maps presented did not show the encroachments of the mining activities on the agricultural fields and the applicant did not prove that the respondent caused air or noise pollution from its activities. Thus, the NGT dismissed the application and deprecated the use of PIL for such litigation.

The case *Rana Sengupta vs. Union of India*⁵⁸⁰ is significant insofar as it demonstrates the logical and reputational approach that the NGT is employing in his activity. The Tribunal, on an appeal filed by a self-defined “public spirited citizen, working for welfare of people” against the grant of environmental clearance for the expansion of a steel plant in West Bengal, returned on the matter of *locus standi* for aggrieved people. In this case, the Tribunal rejected the reasons proposed by the

⁵⁷⁹ Application No. 30 of 2012, dated 18th of December 2012.

⁵⁸⁰ Appeal No. 54 of 2012, dated 22nd of March 2013.

appellant for access to the court,⁵⁸¹ considering that no evidence was presented by the applicant to show that he is a person aggrieved and that his contentions are of a self-proclaimed nature, unsupported by public activity (for instance, representation of an NGO). As a consequence, the Tribunal not only dismissed the case, but ordered the appellant the payment of a sum in order to discourage frivolous litigation.

Hence, the concept of “aggrieved person” has been elaborated by the NGT by showing both an enlargement of the access to justice - congruent with the purpose of the NGT Act - and a certain concern for balancing the requirements of *locus standi* - to avoid litigation detrimental to environmental protection. In this discourse, it is noteworthy to remark the possibilities granted to non-governmental organisations as key actors in the protection and enhancement of the environment thanks to the liberal approach undertaken by the Tribunal, that followed the tradition of the relaxation of requirements set by the Supreme Court with the tool of Public Interest Litigation.⁵⁸²

This is further confirmed in the landmark judgment *K.K. Royson vs. Union of India & Ors.*,⁵⁸³ As the respondents challenged the validity of the appeals presented against the environmental clearance granted for the construction of an airport in Kerala for absence of *locus standi* of the appellants, the Tribunal held that the latter, although individuals that would not be normally considered as aggrieved persons, they “constitute a social and environment group with the objective of working for the welfare of the local community and small land holders and have been creating awareness on environmental issues” and are thus affected by the project. Moreover, the Tribunal maintained the possibility of appeal also in cases where “the appellants have not participated in the proceedings

⁵⁸¹ *Ibidem*, paragraph 13: the appellant declared to be “a public spirited citizen with working experience in steel and iron industry and has full knowledge of the impact of these industries on ecology, environment and human lives”.

⁵⁸² See *infra*, Chapter III, Section I, paragraph c).

⁵⁸³ Appeal Nos. 172, 173, 174 of 2013 (SZ) and Appeal Nos. 1 and 19 of 2014 (SZ), dated 28th of April 2014.

*of the public hearing,” as “they would not lose their right to challenge the approval or the EC.”*⁵⁸⁴

The jurisprudence analysed so far shows the relevance of affected groups in promoting environmental protection in the same manner as non-governmental organisations or single individuals appealed to the Supreme Court for upholding the environmental rights enshrined in the Constitution of India. Indeed, the **role of NGOs** as applicants or appellants has been the subject of a series of judgments in the recent history of the Tribunal. Appeal No. 9 of 2011, dated 13th of December 2013 - the so called *Samata* case⁵⁸⁵ - has been the occasion to settle these issues for the Tribunal. The *Samata* case originated as a transfer of an appeal filed before the NEAA after the constitution of the NGT. It was presented by two NGOs - Samata (focused on the rights of tribal groups) and Forum for Sustainable Development (active on social and environmental issues) - with the purpose of quashing an order for an environmental clearance granted for a project of a coal power plant in Andhra Pradesh. The grounds for quashing the EC, according to the appellants, comprise the presence of false statements on the project in the EIA Report and of flaws in the public hearing.

The first point of contention before the Tribunal was, however, the jurisdiction of the Tribunal for an appeal presented by NGOs. On the preliminary objections questioning the maintainability of the appeal, the respondents (the MoEF, the local Pollution Control Board and the company in charge of the project) stated that no evidence was presented to the Tribunal so that it could confirm that the two organisations were persons affected or that they were concerned by the project by their nature of environmental bodies, especially because they were based 170 kilometres from the project.

While the NEAA Act provided for a competence *ratione personae* that required the appellants to “*be able to show they are ‘likely to be affected’*”, Section 18 of the NGT Act also included such a provision, but its

⁵⁸⁴ *Ibidem*, paragraph 149.

⁵⁸⁵ Appeal No. 9 of 2011, dated 13th of December 2013 (NEAA Appeal No. 10 of 2010).

analysis has been the object of a substantial scrutiny by the Tribunal. Indeed, in the *Samata* case “aggrieved person” has been considered as the one who “must have suffered a legal grievance that he has been wrongfully deprived of something or refused wrongfully, (...) either directly or indirectly”, regardless of the fact that the appellants are resident of an area or have not participated in public hearings or similar procedures, provided that they fear a risk toward the ecology and the environment. Thus, the two NGOs, duly registered, have their own right of appealing before the NGT as aggrieved persons.

The aforementioned cases are significant insofar as they present an environmental court that has proactively operated for extending the possibilities of applicants to accede to the statutory remedies. In line with the traditional openness of the Supreme Court in accepting cases presented by civil society through Public Interest Litigation, the National Green Tribunal has accomplished a similar interpretive effort in widening *locus standi*. However, the liberal construction of the environmental court must be coordinated with the provisions on the temporal limits for filing cases. As the legislature restricted the access to the Tribunal *ratione temporis* in order to ensure the effectiveness of court proceedings, the NGT has a duty to fulfil its mission also in this sense.

d) Time limits and time frames: the jurisdiction *ratione temporis* and the grant of orders

The question of time limits is the last relevant characteristic to be analysed in the working of the Tribunal. What comes at the forefront of the practice of the NGT is, on the one hand, the strict adherence to the temporal requirements set in the founding Act and, on the other hand, the fulfilment of the aim of speedily disposing of environmental cases and the tangible maintenance of this disposal also as far as the grant of directions and orders is concerned. Indeed, the cases presented before the Tribunal are characterised by a rapidity in obtaining the decision and a bar of jurisdiction for applications presented beyond the prescribed time limits.

The NGT Act, as known, presents three provisions on the limitations to approach the Tribunal according to time requirements: for access under Section 14, the limit set by the legislature for presenting a case is six months, with a possible extension of sixty days in case a “sufficient

cause" barred the applicant from submitting a dispute; for relief and compensation to victims of environmental damages, a five-year period is calculated from the date on which the cause for relief or compensation first arose (with the same clause on the sixty-days extension); finally, for appeals, the temporal limitation is restricted to thirty days from the administrative order allowing or prohibiting a certain activity under the statutes listed in Schedule I, with an extension of sixty days valid if the appellant proves he/she was prevented from filing a case.

On its own jurisdiction *ratione temporis*, the NGT adjudicated a case, *Bajinath Prajapati vs. MoEF*,⁵⁸⁶ where it substantiated its views on the role of the Tribunal. Since the matter arose as a frivolous litigation presented by an appellant that eventually withdrew his case, the Tribunal confirmed its role in the judicial system as the guardian of "effective environmental management and conservation (...) and sustainable development" and the custodian of "relief and compensation for damages to persons and property and connected matters", with a view to "avoid frivolous cases", as the ratio for establishing the NGT was the speedy disposal of cases and the adjudication of environmental matters with due weight of environmental and scientific circumstances.

Indeed, the competence *ratione temporis* has been a key element in furthering the work of the Tribunal, starting from the first cases adjudicated, especially as far as the transfer of cases from other Courts is concerned. In the POSCO case,⁵⁸⁷ the NGT stated its interpretation on the period of limitation for presenting an appeal. As the environmental clearance dated back to 2007, the Tribunal ought not to have competence over this case. To this, however, the NGT took note of the date of the final order on these projects (30th of January 2011, within the six-month period prescribed in the NGT Act) and maintained the application against this latter order.

⁵⁸⁶ Appeal No. 18 of 2011, dated 20th of January 2012.

⁵⁸⁷ Appeal No. 8 of 2011, dated 30th of March 2012. See *infra*, Section II, paragraph a), for a detailed analysis of the case.

The relevant aspect in the three modalities of access to the Tribunal is the calculation of the possible extension for allowing a case to be filed in the special jurisdiction. As the sixty-days period is linked to the existence of a “sufficient cause” preventing the submission of the case, the Tribunal has extensively dealt with this matter in both miscellaneous applications, as preliminary objections to the admissibility of a case, and in applications and appeals. The general orientation of the Tribunal has been to avoid substitutions to the literal provisions, while attempting to ensure a reading of the time limits as extensive as possible, case by case, for guaranteeing the widest access to environmental justice. This is an approach that has been followed by the NGT in a range of cases varying from strict procedural limits to the presentation of an application or an appeal to more complex issues of environmental clearances and environmental questions relying on the concept of the “continuing cause of action”, that would allow - in principle - a relaxation of time requirements.

On the strict procedural limit and the matter of condonation of delays, the NGT adjudicated the *Consumer Federation Tamil Nadu* case in 2012.⁵⁸⁸ In this miscellaneous application, the Tribunal granted an order that dismissed the entire appeal on the ground of its late filing. Indeed, as the appellant attributed the delay to absence of information from the project proponent and elaborated on the possible condonation of the delay for the sake of a teleological interpretation that would safeguard environmental principles even though a technical provisions would limit the presentation of a dispute, the Tribunal asserted its speciality in a two-fold way: on the one hand, it stood to the time limits set in Section 16 of the NGT Act and rejected a possible application of the Limitation Act; on the other, it forbade to modify the provisions of the Act, as the Tribunal is not entrusted with the powers deriving from Articles 226 and 227 of the Constitution.⁵⁸⁹

⁵⁸⁸ M.A. No. 21 of 2012 arising out of Appeal No. 33 of 2011, dated 30th of April 2012.

⁵⁸⁹ Ibidem, paragraph 11: “the Tribunal can condone delay only up to sixty days after expiry of thirty days, if it is satisfied with the reasons assigned. Thus, there is a

From this order, the issue of time limitation was again the object of a miscellaneous application in the *Nikunj Developers vs. State of Maharashtra* case,⁵⁹⁰ arising from the will of the applicants to present a dispute on the construction of buildings in Mumbai although the appeal had been filed beyond the 30-days delay prescribed in Section 16 of the NGT Act. As the requirement for condonation of delay is the existence of a “sufficient cause” barring the applicant from presenting an appeal, the Tribunal endeavoured to elaborate the notion in an elastic manner, as to reserve its application according to the circumstances of each case. Also in this case, the judges aimed at constructing the concept in a liberal sense. However, the question of the existence of a sufficient cause has been answered by looking at the meaning of the notion with a link to the general connotation of reasonableness, as a doctrine guiding the legal system in its entirety. Indeed, through a scrutiny of the case law of the Supreme Court,⁵⁹¹ that set the principles governing the condonation of delay, namely a test of reasonableness engaging to observe that a cause is sufficient if it could not have been avoided by the exercise of “due care and attention”, testifying of a *bona fide* behaviour of the applicant.

In *Nikunj Developers*, the Tribunal did not find the existence of a “sufficient cause” for two reasons: on the one hand, the appellants were three and only one did not receive the questioned order; on the other, the 90-days time limit had already elapsed when the appeal was filed. In the words of the judges, the authoritative interpretation of Section 16 of the NGT Act is that “once the period of 90 days lapses from the date of communication of the order, the Tribunal has no jurisdiction to condone the delay”. Hence, by both a literal and purposive interpretation of the

complete exclusion of Section-5 of the Limitation Act. That apart, the period prescribed under the NGT Act, 2010, which is a special Statute, shall over ride normal acts.”

⁵⁹⁰ M.A. No. 247 of 2012, arising out of Appeal No. 76 of 2012, dated 14th of March 2013.

⁵⁹¹ *Balwant Singh (Dead) vs. Jagdish Singh & Ors.*, (2010) 8 SCC 685: “Liberal construction of the expression ‘sufficient cause’ is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable.”

statute, the NGT refrained from possibly applying the principle of equity in this case, insofar as the legislative intent in drafting Section 16 was manifestly clear.⁵⁹² It is to be noted, however, that the test of reasonableness was applied in favour of the appellant in a specific case where medical problems have been reported to the Tribunal: in *Ramesh Agrawal vs. Union of India*,⁵⁹³ the judges condoned a delay in presenting an application due to the impossibility to travel to the Principal Bench of the Tribunal.⁵⁹⁴

Notwithstanding the different possibilities facing the Tribunal on a case-basis, the matter of limitation was thoroughly examined by the Tribunal in the *Kehar Singh* case.⁵⁹⁵ The judges considered Section 14(3) of the Act by looking at the notion of cause of action and at the wording of the provision. Section 14(3) distinguishes between two possibilities: access to the NGT within six months from the cause of action and within a maximum period of eight months, provided that the sixty days delay is justified by the applicants with facts that prevented the presentation of the case in the prescribed time limit. Moreover, the mandatory time limit must be confronted with the existence of a cause of action linked to an environmental issue related to the Acts listed in Schedule I, otherwise the six (or eight, in specific circumstances) months period would not be triggered. As the cause of action in this case was the publicity of the project for the installation of a sewage

⁵⁹² M.A. No. 247 of 2012, arising out of Appeal No. 76 of 2012, paragraph 25: *“the legislative command must take precedence over equitable principle. The language of Section 16 of the NGT Act does not admit of any ambiguity, rather it is explicitly clear that the framers of law did not desire to vest the Tribunal with powers, specific or discretionary, of condoning the delay in excess of total period of 90 days.”*

⁵⁹³ Appeal No. 8 of 2013 (CZ), dated 22nd of August 2014.

⁵⁹⁴ Ibidem, paragraph 27, I: *“we are inclined to accept the same as the respondent too not controverted the facts or disputed the medical records of the Appellant who reportedly got injured in a shooting incident and had to undergo treatment for gunshot wounds as well as attend follow up procedures till February, 2013 and despite the fact that notice was sent to him by the Project Proponent, he was unable to travel to Delhi for filing this appeal.”*

⁵⁹⁵ Application No. 124 of 2013, dated 12th of September 2013.

treatment plant on the 19th of May 2013 - to be considered as the environmentally relevant fact - and the application was filed four days later, the Tribunal maintained the case.⁵⁹⁶

Again, the same interpretation was given in the *Kalpavrishka* case:⁵⁹⁷ concerning the time limits for the application, the Tribunal confirmed the maintainability of the case, as it had been transferred from the High Court of Delhi in 2013. Indeed, the case had been filed as a Writ Petition, on the 25th of April 2011, within the six-month period, as the question was known to the petitioners on the 11th of November 2010. Moreover, on the same topic, it is interesting to notice how the Tribunal guaranteed the transfer of petitions from apex courts to the newly established special jurisdiction also as far as temporal jurisdiction is concerned. In *Ms. Betty C. Alvares vs. State Of Goa*,⁵⁹⁸ the Western bench of the Tribunal asserted the maintainability of an application that had been transferred from the High Court of Bombay. In this case, as the parallel filing of a writ petition under Article 226 was deemed maintainable by the High Court, that subsequently directed the transfer of the case to the NGT, the Tribunal considered the case to be acceptable, since it was based on a substantial question related to environment, irrespective of the precedent filing of a petition before a High Court.

Notwithstanding the strict conditions posed by the Tribunal concerning the six-month time limit, the environmental court also delved into the matter of **continuous causes of action**, one of the dubious points left by the formulation of Section 14(3) of the NGT Act. As a matter of fact, since the period for applying to the Tribunal indicated in the provisions of 2010 seems a categorical limit, the Tribunal has interpreted it on a

⁵⁹⁶ The respondent contested the jurisdiction of the Tribunal as it considered that the cause of action was the acquisition of the land in 2010, but the judges refused to consider the mere acquisition of land, from a notification issued under Sections 4 and 6 of the Land Acquisition Act, to be per se a substantial environmental matter.

⁵⁹⁷ Application No. 116 (THC) of 2013, dated 17th of July 2014.

⁵⁹⁸ M.A. Nos. 32 and 33 of 2014, in O.A. No. 63 of 2012, dated 12th of February 2014.

case by case basis. In *Amit Maru*,⁵⁹⁹ the applicant alleged the existence of a continuing cause of action insofar as the illegal construction activities challenged were still ongoing at the time of the application. The Tribunal, looking at the record of the case, confirmed the view of the applicant by dividing the reading of Section 14(3) into two options: the possibility of filing an application within six months from the “‘commencement of cause of action’ for ‘such dispute’” and a second circumstance, the “‘first date of arising of cause’ of action”. In this sense, the judges elaborated on the second usage of the concept of cause of action under Section 14(3) and enucleated the principle according to which such cause arises only when enough information and knowledge of an illegal action is at the disposal of an applicant.⁶⁰⁰ The Tribunal has thus confirmed a strict limit on temporal requirements, while allowing an interpretation on a case basis that could encompass a range of disputes with a view to guarantee access to justice when substantial environmental questions arise.

This interpretation of the continuing cause of action had been the object of analysis in more cases, not always allowing the defence of the environment in circumstances where the initial project dated back in the years, but whose effects were ongoing at the time of the application to the National Green Tribunal. In *Aradhana Bhargav vs. MoEF*,⁶⁰¹ for instance, a project on a dam approved in 1986 was reconsidered by looking at the activities of the project proponent in later years. If the counsel for the respondents clearly considered that the application was barred by time under Section 14(3) and 15(3) of the NGT Act, and that an interpretation contrary to the strict reading of the provision would lead to “serious, anomalous and undesirable consequences”, the Tribunal, in principle, upheld the view of the applicant, namely that “if there is continues injury affecting the fundamental right continuously, it cannot be said that cause of action would seize as it would amount to waiver or giving up of the fundamental right under Article 21 of the Constitution.”⁶⁰² However,

⁵⁹⁹ M.A. No. 65 of 2014 in O.A. No. 13 of 2014, dated 1st of October 2014.

⁶⁰⁰ *Ibidem*, paragraph 30.

⁶⁰¹ O.A. No. 46 of 2013, dated 12th of August 2013.

⁶⁰² *Ibidem*, paragraph 14.

the NGT differentiated this case from *Goa Foundation* in two aspects: on the one hand, *Goa Foundation* was not focused on the question of temporal limits and, on the other, the case concerned an Act listed in Schedule I of the NGT Act, while *Aradhana Bhargav* is centred on previous statute law. Recalling another judgment on the matter of time limits, *Medha Patkar & Ors. vs. MoEF*,⁶⁰³ that curtailed the possibility of interpreting the issue of continuous causes of action, the Tribunal rejected the view that the application be admissible for its cause of

⁶⁰³ Appeal No. 1 of 2013, dated 11th of July 2013, paragraph 16: “*The Tribunal must adopt a pragmatic and practical approach that would also be in consonance with the provisions of the Act providing limitation. Firstly, the limitation would never begin to run and no act would determine when such limitation would stop running as any one of the stakeholders may not satisfy or comply with all its obligations prescribed under the Act. To conclude that it is only when all the stakeholders had completed in entirety their respective obligations under the respective provisions, read with the notification of 2006, then alone the period of limitation shall begin to run, would be an interpretation which will frustrate the very object of the Act and would also cause serious prejudice to all concerned. Firstly, this completely frustrates the purpose of prescription of limitation. Secondly, a project proponent who has obtained environmental clearance and thereafter spent crores of rupees on establishment and operation of the project, would be exposed to uncertainty, dander of unnecessary litigation and even the possibility of jeopardizing the interest of his project after years have lapsed. This cannot be the intent of law. The framers of law have enacted the provisions of limitation with a clear intention of specifying the period within which an aggrieved person can invoke the jurisdiction of this Tribunal. It is a settled rule of law that once the law provides for limitation, then it must operate meaningfully and with its rigour. Equally true is that once the period of limitation starts running, then it does not stop. An applicant may be entitled to condonation or exclusion of period of limitation. Discharge of one set of obligations in its entirety by any stakeholder would trigger the period of limitation which then would not stop running and equally cannot be frustrated by mere non-compliance of its obligation to communicate or place the order in public domain by another stakeholder. The purpose of providing a limitation is not only to fix the time within which a party must approach the Tribunal but is also intended to bring finality to the orders passed on one hand and preventing endless litigation on the other. Thus both these purposes can be achieved by a proper interpretation of these provisions.*”

action started in 2012, when the applicants came to know about their right (as the authorisation for the project dated back to 1986 and a subsequent communication had been issued in 2005). The NGT thus limited its pragmatic approach with a view to safeguard the object of the Act and to revive the consciousness of tentative aggrieved persons.⁶⁰⁴

The interpretation of the Tribunal with regard to time limitations has thus fulfilled a double objective: on the one hand, the extension of its competence in the widest possible manner, through the reading of the continuous cause of action; on the other hand, the maintenance of certain limits that could ensure the effective and rapid decision-making process provided for by the NGT Act. This second feature related to the temporal dimension - the speedy disposal of cases - has been another characteristic of the working of the Tribunal, that presented a series of instruments since the early days of working. The first cases of the NGT, indeed, show a variety of solutions aimed at ascertaining the jurisdiction - *ratione personae* and *temporis* - while engaging in a constructive way to fulfil the purpose of protecting the environment as comprehensively as possible, within the boundaries of the rule of law. In this context, the Tribunal extended its powers to imagining alternatives to plain orders, that range from the grant of interim protection to the usual resort to monitoring committees, despite refraining from maintaining jurisdiction.

In M.A. No. 32 of 2011, dated 10th January 2012, arising out of Application No. 32 of 2011,⁶⁰⁵ the NGT posed the case of granting **interim protection**, embodied in the limits to pursue a project although environmental clearance has been granted, on the ground that it would cause irreparable damage to the ecology of a forest. The NGT referred

⁶⁰⁴ O.A. No. 46 of 2013, dated 12th of August 2013, paragraph 31: "*a person who wishes to invoke the jurisdiction of the Tribunal or Court has to be vigilant and conscious of his rights and should not let the time to go by not taking appropriate steps.*"

⁶⁰⁵ M.A. No. 32 of 2011, arising out of Application No. 32 of 2011, dated 10th January 2012.

to the case *Dalpat Kumar* in the Supreme Court,⁶⁰⁶ that set the requisites of balance of convenience and irreparable loss as principles governing the grant of interim orders, and indicated the balance of convenience in favour of the respondent, while listing the final hearing of the case 8 days after the discussion of the miscellaneous application.

The applicant presented the case - on the operation of a coal based thermal power plant - again as Appeal No. 19 of 2011 (on the environmental clearance), as Appeal No. 37 of 2011 (on the CRZ clearance for the use of sea water) and as Application No. 8 of 2011.⁶⁰⁷ In the last judgment, the NGT recalled its decision of the 8th of February - directing the company to either follow the terms of the environmental clearance of 2010 or apply to the competent authorities if the project were to change - and referred to the report of the State Environmental Impact Assessment Authority (SEIAA) of Gujarat. As the latter observed that the project proponent started construction before the grant of CRZ and forest clearances, the NGT directed the SEIAA, in a time frame of four months, to start necessary proceedings against the project proponent and take action if violations were to be found.

The concern for a speedy disposal of cases, however, has been balanced by the judges through a fair recourse to orders and directions when needed. The environmental court, in fact, endeavoured to find equilibrium in its decisions by using the powers at its disposal only if no other means to approach institutions competent in granting authorisations or staying proceedings were considered. In Application No. 28 of 2011 and No. 9 of 2012,⁶⁰⁸ for instance, the Tribunal joined proceedings on two cases presented by the same applicants on the construction of a port and on a thermal power project, considered composite insofar as the port should have been used to import coal used in the thermal power plant, but refrained from a decision on the case, as it would have amounted to a pre-judgment. The applicants, two citizens of Junagadh, Gujarat, asked for quashing of the public

⁶⁰⁶ *Dalpat Kumar vs. Prahlad Singh*, AIR 1992, (1) SCC 719.

⁶⁰⁷ O.A. No. 8 of 2011, dated 10th of May 2012

⁶⁰⁸ Application No. 28 of 2011 and No. 9 of 2012, dated 20th April 2012.

hearings conducted for the projects and to request new environmental clearances. The NGT found itself confronted with a case still in progress, as no decision on environmental clearance had been taken by the Ministry of Environment and Forests. The Tribunal acknowledged the broad interpretation of Section 14 of the NGT Act, on the “*substantial question related to environment*”, presented by the applicants, but recalled the steps needed for the grant of an EIA⁶⁰⁹ and rejected the application, as the applicants had the possibility of approaching the Expert Appraisal Committee or the Ministry of Environment and Forests, since no environmental clearance had yet been granted.

On the contrary, the Tribunal also acted in cases that considered as dismissed, with a view to uphold its mission of socio-centric court and guardian of the environment. In Application No. 1 of 2011,⁶¹⁰ the applicant, a citizen of Kozhencherry, Kerala, sought directions for the removal of solid bio-wastes treatment plant in the stadium of his city, that allegedly caused water pollution. Notwithstanding the fact that the NGT dismissed the application on the ground that consent to operate had been granted in 2010, the Tribunal studied a detailed report made by the district engineer, that showed that scientific parameters were congruent with the environmental clearance, and directed to continue monitoring those parameters once a month. Thus, the Tribunal allowed standing of a person directly - allegedly - affected by a question related to the environment and directed the local institutions to present a second report, in order to assess the case in a more precise way.

Moreover, the question of maintaining a balance between ecological and economic concern was again faced with a coherent response in the case *Adivasi Majdoor vs. MoEF*,⁶¹¹ where the Tribunal directed the repetition of an interim order granting the possibility of pursuing “*acquisition activities for acquiring land by way of acquisition or negotiation and also to do activities in favour of the environment like plantation of trees etc., till the disposal of the appeal*”, provided that the project proponent

⁶⁰⁹ See Chapter II and *infra*, Section III.

⁶¹⁰ Application No. 1 of 2011, dated 26th of March 2012.

⁶¹¹ M.A. No. 36 of 2011, arising out of Appeal No. 3 of 2011, dated 30th of November 2011.

does not carry on industrial activities. Hence, the Tribunal has been solicitous in devising strategies for keeping an equilibrium between the concerns for the environment and the economic and social development produced by the projects submitted to its adjudicatory powers. As an *amicus* environment, the NGT coherently interpreted the statutory provisions on time limits and acted with a view to safeguard the speedy disposal of cases and to protect, on the one hand, the rights of access to environmental justice and, on the other, the prerogatives of project proponents, by setting procedures aimed at controlling that economic activities follow the correct environmental path.

All things considered, the Tribunal asserted a broad jurisdiction in the field of environmental protection. The procedures so far analysed have shown how the judges have fostered the instruments provided for in the NGT Act for enlarging access to justice for a substantial range of matters and to a significant number of categories of subjects. In spite of its main mission as a court dealing with administrative proceedings, the Tribunal has the record of a socio-environmental guardian, through its decisions concerning environmental clearances. In parallel with the detailed elaborations made with regard to jurisdiction, the Tribunal has also extensively analysed the nature of this administrative procedure, referring to its single phases as well as to the role of expertise in decision-making, with a view to ensure the highest possible protection of environmental rights.

II) The NGT and the EIA procedure: an enhanced expertise

a) The adjudication of matters of environmental clearances

The cases concerning environmental clearances are certainly dominant in the working of the National Green Tribunal: the matters arising from poor implementation of the Notification of 2006 are proving to be the most relevant, as the misconduct of public administrations in dealing with the issuance of permits is the origin of multifaceted questions ranging from the interpretation of administrative provisions and the

invalidation of procedures to the relief to be granted for those contraventions and the role of international principles in dealing with such administrative issues.⁶¹²

As the Tribunal stated, “the Notification of 2006 is the regulatory regime in relation to protection and betterment of environment. It provides how and in what manner clearance is to be granted to various projects and activities to ensure adherence to maintenance of environmental standards.”⁶¹³ With a view to acknowledging the relevance of this administrative act and of enhancing its proper application, the enucleation of the different phases of environmental clearance procedures has been the object of an in-depth analysis by the Tribunal, with a double purpose of redressing the damages attested by the NGT and, incidentally, of preventing future cases through specific directions to the competent institutions for changing provisions or guidelines.

The general requirement of prior environmental clearance was analysed in *Kehar Singh vs. State of Haryana*,⁶¹⁴ where the applicants affirmed that the construction of a sewage treatment plant should be authorised only after the four stages of an environmental clearance are completed. The issue at stake being the liberal interpretation of the Notification of 2006, as to include sewage treatment plant in the more general category of effluent treatment plants, the Tribunal allowed a comprehensive interpretation of the entries under the Notification, as it considered that a legislation favouring the enhancement and the protection of social and environmental conditions must be given the widest possible embodiment.⁶¹⁵ Thus, after setting the legal parameters for maintaining the application, the judges delved into the scientific side of the matter⁶¹⁶ and concluded that the project proponent should seek environmental clearance by the State Pollution Control Board.

⁶¹² See Chapter V.

⁶¹³ Application No. 124 of 2013, dated 12th of September 2013, paragraph 43.

⁶¹⁴ Application No. 124 of 2013, dated 12th of September 2013.

⁶¹⁵ Ibidem, paragraph 34: “The entries in the Schedule to the Notification of 2006 have to be construed purposively so as to achieve the object of the principle legislation.”

⁶¹⁶ In particular, the judges analysed the concept of effluent (a notion that is not defined in any of the statutes) and concluded that the project is to be

Moreover, a general assessment of the role of Environmental Impact Assessment procedures has been the object of the landmark judgment *K.K. Royson vs. Union of India & Ors.*,⁶¹⁷ that cancelled the environmental clearance granted to the controversial KGS airport project at Aranmula in Kerala. Here, the Tribunal noted how *“the EIA is the important management tool for integrating environmental concerns in development process and for improved decision making”* and considered the single elements constituting the process and their connections. **Scoping** is defined, by the respondents, as *“the primary essential element of consideration of the application for prior EIA clearance by which the EAC determine detailed and comprehensive Terms of Reference (ToR) addressing all relevant environmental concerns for preparation of the EIA report”*;⁶¹⁸ logically, the Tribunal linked this initial phase with the rest of the procedure, and particularly with the response of the results of the appraisal of the Expert Committee to the Terms of Reference initially set. In the case of the airport in Kerala, to be built in an area covered by paddy fields and wetlands to be converted, the NGT entered into the technicalities of the administrative procedure and the conditions of impact minimisation. With regard to the Terms of Reference,⁶¹⁹ the

considered within the category of common effluent under entry 7(h) of the Notification of 2006, as it is conceived as a plant receiving not only waste waters from sewage, but also other effluents coming from human activities.

⁶¹⁷ Appeal Nos. 172, 173, 174 of 2013 (SZ) and Appeal Nos. 1 and 19 of 2014 (SZ), dated 28th of April 2014.

⁶¹⁸ *Ibidem*, paragraph 77.

⁶¹⁹ Explicitly listed in the judgment:

- (i) *baseline environmental quality along with projected incremental load to the proposed project activities such as ambient air quality,*
- (ii) *analysis and submission of details of comprehensive risk assessment and disaster management plan including emergency evacuation during natural, man-made disaster integrating with airport such as fire detection and fighting, bomb threats, earthquake, and oil spillage,*
- (iii) *Examining separately the details of construction and operational phases both for Environmental Management Plan and Environmental Monitoring Plan with cost and parameters,*

Tribunal added to the EIA report a series of environmental issues that had not been raised in the administrative proceedings on air, biological diversity and noise pollution,⁶²⁰ that rendered inadequate the environmental clearance.

(iv) Examining road/rail connectivity to the project site and impact on the traffic due to the proposed project/activities,

(v) Examining the details of afforestation measures indicating land and financial outlay, landscape plan, green belts and open spaces, and a thick green belt has been planned all around the nearest settlement to mitigate noise and vibration etc., if any,

(vi) Examining and submitting the details of noise modeling studies and mitigative measures,

(vii) Examining the details of water requirement, use of treated waste water, preparation of a water balance chart and source of water vis-à-vis waste water to be generated along with treatment facilities to be proposed.

(viii) Details of rain water harvesting proposals which should be made with due safeguards for ground water quality by maximizing recycling of water and utilization of rain water,

(ix) Examining the details of solid waste generation treatment plant and its disposal,

(x) Identification, prediction and assessing the environmental and sociological impacts on account of the project/activities and

(xi) Submission of details of corporate social responsibilities etc..

⁶²⁰ *Ibidem*, paragraph 153:

I. AIR

i) Prediction of emissions from combustion of aviation fuel (unburnt fuel droplets are a source of volatile organic compounds and give rise to odours) and their impact in the zone of influence.

ii) Vehicular emissions inside the airport and from ground service equipment (tugs for aircraft and baggage, fuel and catering Lorries, buses and vans that transport passengers etc.).

iii) Prediction of VOC emission from fuel storage tanks and transfer facilities and its management

iv) Impacts of pollution from Aircraft and airfield maintenance activities

v) Airport activities and Climate change

II. BIOLOGICAL

i) Habitat loss and habitat degradation due to 'changed' and 'different' activities in the zone of influence.

Moreover, the NGT contested the very presentation of the EIA report, as the subject charged with the draft of the analysis was not qualified to do so as a consultant. Indeed, the agency that materially wrote the report - Enviro Care India Pvt. Ltd. - was not entitled to work on Category A projects (that includes airports) and thus was not qualified as a competent consultancy agency in view of the mandatory provisions of the EIA Notification, 2006. The procedure itself was flawed, additionally, by the conduct of the public hearing. The Tribunal set the requirements for this phase of environmental clearances, namely an arrangement *"in a systematic, time bound and transparent manner ensuring widest possible participation"*.⁶²¹ In *K.K. Royson*, the public hearing was postponed and was not respondent to the need for transparency and access. As a conclusion, the bench of judges found the appraisal phase, and thus the entire EIA procedure, inadequate: the NGT directed *"the MoEF to take steps to restore the sanctity of important documents such as the EC"*, vitiated by non-application of mind by the Expert Committees, and blocked the construction of the airport, citing

ii) *Bird strikes/hits- prevention and management plan (Measures to control birds also extend beyond the airport boundary)*

iii) *The sensitivity of wildlife and local domesticated animals to the noise of aircraft, airport ground operations and airport access roads.*

III. NOISE

i) *Prediction of Noise from aircraft and from traffic going to and from airports – modelling studies. Mitigation of effects and management.*

ii) *Prediction of noise generated from taxiing aircrafts, the application of reverse-thrust (an optional braking aid on landing), engine tests and on-site vehicular traffic. Mitigation of effects and management*

iii) *It is true that the ToR issued for the EIA study do not include the above. Notwithstanding this fact, the EIA consultant who claims long experience and expertise in the field should have addressed these issues. Undoubtedly, these issues deserve attention and analysis. Such an approach would have served the cause of environmental management at large.*

⁶²¹ *Ibidem*, paragraph 158.

the public trust doctrine as a governing principle for action in the field of development.⁶²²

According to this interpretation and implementation of the Notification of 2006, the question of the conduct of **public hearings** by the Pollution Control Boards and the Committees created following the text of 2006 is crucial in apprehending the social and environmental impact of the judgments and orders of the NGT - that already adjudicated upon some of the most relevant developmental projects in India, in spite of its short life. From one of these cases related to major projects, the so called *POSCO* case,⁶²³ the NGT derived clearer guidelines on the role of public hearings in EIA procedures.

Appeal No. 8 of 2011 dealt with the environmental clearance of a steel power plant project and of a minor port project of M/s POSCO India in Orissa. Through a comprehensive analysis of the facts, the NGT showed its unwillingness to accept approvals coming by the MoEF without due consideration of the issues at stake. The projects, dating back to 2007, have been challenged by an environmental activist and an agriculturist - the Samantray - invoking the adverse impact on environment, agriculture and water resources, also with a view to the memorandum of understanding signed by the Government of Orissa and POSCO, that should have enabled the company to obtain a no objection certificate from the Orissa State Pollution Control Board in a restricted time frame by means of a EIA report presented by POSCO itself.

Since, according to the applicants, the conditions and procedures set in the EIA Notification of 2006 were not followed, the Tribunal delved into the subject by analysing three critical points: time limits for filing an appeal; procedures for public hearings; the role of experts in the procedures.

Concerning the last two aspects, the Tribunal analysed whether the EIA followed the proper procedure concerning public hearings. In this

⁶²² *Ibidem*, paragraph 186: “In a democracy like ours, all natural resources are wealth of the country and in the custody of the State as a Trustee”.

⁶²³ Appeal No. 8 of 2011, dated 30th of March 2012.

sense, according to the submissions of the respondents (Orissa State Pollution Control Board and POSCO itself), public hearings were conducted according to the system of the rapid EIA in 2007. The NGT acknowledged the facts submitted by the respondents and further held that the allegations of the appellants were out of the scope of the review of the Tribunal, since they were focused on matters related to the EIA of 2007.

Then, factually, the NGT looked into the review report of the environmental clearance by the expert committee, that was central in granting the final order of 2011. In fact, two different reports were presented, the one submitted by the majority holding that the PH was not conducted properly and that the EC granted should have been annulled, the minority report being drafted by a person that had previously been Secretary of the MoEF, thus rendering the procedure flawed.

Considering these issues, the NGT deemed the analysis of the concerned authorities as deprived of *“any comprehensive scientific data regarding the possible environmental impacts”* and *“leaving lingering and threatening environmental and ecological doubts un-answered”*. With a view to the relevance and the complexity of the project, the Tribunal requested the MoEF to draft guidelines for a single comprehensive EIA, to consider the optimisation of land requirements according to the industrial and infrastructural needs and to establish a special committee to monitor the progress and compliance to the conditions of the environmental clearance on a regular basis.

Moreover, in light of the presence of expert members in the NGT, the same Tribunal asked scientific studies on certain matters, such as the impact of source of water requirement under competing scenarios, the evaluation of the proposed zero discharge proposal (while, according to the report, 47 cubic meter per hour of wastewater is to be discharged into the sea) and the impact on biodiversity of wetlands and mangroves and the risk assessment with respect to the proposed port project.

As a conclusion, reformulating sustainable development as *“keeping in view the need for industrial development, employment opportunities, etc. but not compromising with the environmental and ecological concerns”*, the NGT directed the NGT to suspend the final order of 2011 until a fresh review would be finalised by the MoEF, to be undertaken by an expert

committee with specialists and, generally, to draft clear guidelines for project developers needing to apply for a single environmental clearance and to request the EIA right from the beginning, for the full capacity of the project.

The judgment in the *POSCO* case clearly shows how the Tribunal approached administrative matters in a way that is both respectful of the procedure and of the bar of jurisdiction and incisive toward the shortcomings arising from rapid decisions of the MoEF. The work of the Tribunal is also to be noted for the attempt at settling the environmental needs with a focus on developmental matters in a general sense, by requesting the competent authorities to undertake a review of their policies when they proved dysfunctional (here, through the suggestion of providing guidelines for single environmental clearances in case of composite projects of a considerable dimension, such as the projects by POSCO in Orissa).

On a similar matter - the role of experts in the provisions of the Notification of 2006 - the NGT aptly conducted a survey of the legislative amendments and of its consequences in the "*Kalpavriskha*" & *Ors. vs. Union of India* case.⁶²⁴ The applicants approached the Tribunal with a memoire on the role of environmental clearances and of the Notification of 2006, recalling its main elements (screening, scoping, public consultation and appraisal of the project)⁶²⁵ and the role of the committees of experts for both categories of projects (A and B).

Indeed, the controversy brought before the Tribunal relates in depth with the variation of requirements for the Chairperson and for the members of the Committees of experts, insofar as the rules of 1992, modified in 1994 and in 2006 with the last Notification (basically including only environmental policy experts), are considered more favourable by the applicants. In the words of the NGT, "*the composition of the Committee as laid down in both the Notifications of 1992 and 1994, reflected the inter-disciplinary approach required*", as it included ecologists and NGO representatives too, while the text of 1994 already eliminated

⁶²⁴ Application No. 116 (THC) of 2013, dated 17th of July 2014.

⁶²⁵ See *infra*, Chapter II, Section III.

the requirement of the interest in environmental conservation and sustainable development, and the Notification now into force shifted the focus to public administration management skills rather than expertise and interest in environment and sustainable development.

The grievance before the NGT is thus connected to the potential conflict of interest between the members of the expert committees charged with the analysis of the documents necessary to grant an environmental clearance and the public institutions, as those committees are often constituted of public officials, in line with the determinations of the Notification of 2006. In this sense, the applicants documented the decision of the MoEF to appoint the Chairpersons for three Expert Appraisal Committees on River Valley and Hydro Electric Projects; Thermal and Coal Mining Projects and Infrastructure Building Construction Projects, as the persons appointed are deemed deprived of sufficient qualifications and have conflict of interest in light of their commitments in the private sector. As a conclusion to these factual elaboration on the working of expert committees according to the Notification of 2006, the applicants call for the elimination of Appendix VI to the Notification of 2006 (on the requirements to become an expert member of a committee), as being contrary to the same Notification, and to substitute that appendix with the text of 1994.

The Tribunal confirmed the interpretation of the applicants. It thus highlighted the role of expertise in committees as a fundamental asset in guaranteeing a correct procedure of environmental clearance, with a direct impact on the environment. On the substantial question, Appendix VI of the Notification of 2006, on the criteria for eligibility of experts, the Tribunal exercised its ancillary powers concerning the issuance of guidelines and directions to achieve the objectives of the NGT Act - ensuring complete and effective justice. Thus, the Tribunal restricted the interpretation of the Notification of 2006, concerning experts coming from the public administration, and directed the MoEF not to appoint experts as members of committees *“unless the said experts in the above field are directly relatable to the various fields of environmental jurisprudence”*. Moreover, the MoEF was also directed to set criteria for the eligibility of candidates as Chairpersons.

The process of public hearings itself was the object of a specific case, *Jeet Singh Kanwar vs. Union of India*,⁶²⁶ on the installation of three coal-based Thermal Power Plants in two villages of Chhattisgarh. Following the presentation of the project to the MoEF, an Expert Appraisal Committee was formed by the local Pollution Control Board with a view to analyse the EIA report of the project proponent (M/s. Dheeru Powergen Private Limited). In 2009, a public hearing for this project was conducted and eventually led to the approval of the project on the 18th of January 2010. However, the appellants brought the case before the NGT to challenge the regularity of the proceedings as far as linguistic and temporal requirements are concerned - specifically, the publication of the EIA report summary in vernacular languages, not only in English, should have been published 30 days before the hearing - and the reading of the proceedings recorded and the consideration given to the observations of the public with regard to the project.

The NGT recalled again the necessary phases for an environmental clearance to be valid: scoping, public consultation and appraisal. On the first, the determination of comprehensive Terms of Reference (ToR) by the Expert Appraisal Committee (EAC) in order to address the relevant environmental concerns, the Tribunal stated its necessity as well as its priority character. On the public consultation, the NGT raised the relevance of holding a hearing near the proposed site and of addressing *"all the material environmental concerns expressed"*. Finally, the phase of appraisal must be conducted by the EAC, so that the MoEF could deliver an order of clearance according to its recommendations. On the allegations of the appellants, the Tribunal found that copies of the Executive Summary of the EIA Report were furnished in Hindi as well as in English in due time (thirty-days prior to the hearing) and that the hearing was conducted in a convenient venue and attended by a large public, that did not raise environmental concerns. Indeed, the NGT defined the purpose of the procedure of public hearing as a way to *"render the decision fair and participative"*, a statement that is significant insofar as it connects environmental impact assessment procedures in the realm of the wider scope of the rule of law, understood as an

⁶²⁶ Appeal No. 10 of 2011, dated 16th of April 2013.

inclusive process.⁶²⁷ However, the Tribunal eventually quashed the environmental clearance as the project was conducted in an area where the MoEF had forbidden the installation of power plants, in spite of it granting the permit.⁶²⁸

The issue of proper conduct of public hearings has also been approached in the *Samata* case.⁶²⁹ Here, the case made by the appellants was particular as it concerned not only the matter of publication and languages, but more specifically the question of the areas affected by the project in two States - Andhra Pradesh and Orissa - with only one PCB being involved in the environmental clearance procedures. Indeed, the “term ‘local affected persons’” should not have excluded “*people living in other States who are within the impact zone of the thermal power plant.*” Although the topic of transboundary effects has been a classic in the history of environmental law and in this case it was even manifest within a federal jurisdiction, the Tribunal found that the respondents acted according to the EIA Notification, that did not provide any clause for the conduct of public hearings by different PCB, or obliging a PCB to enlarge its information activities beyond its territorial scope.

On the phase of **appraisal**, the same judgment sheds light in interpreting the provisions of the Notification of 2006 in a coherent manner. Through its expertise, the NGT uncovered evidence that the EIA Report was eventually presented more “*like an environmental management and mitigation plan*”, instead of being a counter-document to the terms of reference of the project as drafted in the phase of scoping. Indeed, the Tribunal found that several scientific data had not been taken into account, such as the drainage of the area and the water regime. On the concept of appraisal, the Tribunal noted how “*the appraisal of the project requires not only evaluation, but also estimation of works in order to make an assessment or determination of the same*”, with the subjacent idea of the need for a “*detailed scrutiny*” for concluding with a “*categorical recommendation*”. Thus, the NGT set the requirement, in the

⁶²⁷ See Chapter I and, among many, Morlino, L., *op.cit.*.

⁶²⁸ See Chapter V on sustainable development.

⁶²⁹ Appeal No. 9 of 2011, dated 13th of December 2013 (NEAA Appeal No. 10 of 2010). See *supra*, Section I.

phase of appraisal, of explicitly responding to the objections made during the public hearing and of stating the reasons for the objections to be negated. Moreover, the Tribunal delved into the question of technicality, by stating that the record of technical discussions within the Expert Appraisal Committees is a task that helps guaranteeing transparency in the decision-making process, thus fostering the relevance of the environmental rule of law. Finally, the EAC was directed, in this case, to add specific conditions on the drainage system and on the discharge of treated wastewater, as well as to review the objections raised during the public hearing. The NGT thus safeguarded the validity of the EC, considering the huge entity of the project for the economy of the State, but suspended it for six months, in order to allow the EAC to review the phase of appraisal.

The phase of appraisal is logically fundamental, as it is the last step before the decision of granting an environmental clearance, and it further acquires a higher relevance the more consistent the project is in terms of dimensions and environmental impact. In the *Gau Raxa* case,⁶³⁰ the Tribunal overviewed the legality of a project of enlargement of a port in Rajula, Gujarat, that would entail the tripling of the logistic space of the infrastructure and an eight-fold augmentation of its storage capacity, to the detriment of the health of the villagers and of mangrove forest, migratory bird habitats, and various species of wild fauna. Considering the results of the public hearing held at the site of construction, that highlighted several flaws of the project, the Tribunal recalled the essence of the appraisal, “*not a mere formality*”, at “*it does require the detailed scrutiny by the EAC or SLEAC of the application as well as documents filed such as the final EIA Report, outcome of the public consultation*”.⁶³¹ As for the formal requirements, the Tribunal asserted its interpretation that the appraisal should be completed in sixty days and that the document arising from this phase should contain the reasons at the basis of the choice of clearance or rejection of the project, as rigid rules that are necessary for the assurance of the objectivity of the procedure. In fact, the externalisation of the procedure to a

⁶³⁰ Appeal No. 47 of 2012, dated 22nd of August 2013.

⁶³¹ *Ibidem*, paragraph 27.

committee of experts finds its legal *ratio* in the tentative independence of this body for examining the material arising out the the three previous phases: a report on appraisal should thus state the reasons for the decision to be taken, whether positive or negative and should not be a mere echo of a technical meeting. Appraisal means, in the reading of the judges, a thorough scrutiny of the available material and also a comparison, if possible, with similar projects. However, showing pragmatism in acknowledging the correctness of the phases of screening, scoping and of the public hearing, the NGT only quashed stage four of the environmental clearance - appraisal - while keeping intact the previous stages.

The result of such judicial activity has thus been a thorough definition of the single aspects of administrative authorisations for granting consent to pursue economic projects. It is noteworthy that the activism of the Tribunal has fostered basic safeguards contained in the concept of rule of law: by dissecting each and every phase of the proceedings, the judges have elaborated a body of legal decisions that helps orienting both the administration and private citizens in fulfilling the expectations of a real sustainable development that can bridge the socio-economic and the environmental dimensions, through the support of indisputable legal concepts. This is a result that has also been achieved thanks to the scientific expertise of the Tribunal, that comes to the forefront as a preliminary asset ensuring that legal decisions are taken on the basis of ascertained data.

b) Expertise for an investigative and systemic approach

What arises from the analysis of the jurisprudence of the National Green Tribunal is an attention to the details not only of the proceedings, but also of the scientific data presented by the parties in the process. Clearly, this approach - that could be defined as investigative - derives from the expertise brought into the court by the presence of members coming from scientific backgrounds and constitutes the added value the Tribunal could draw from the mixed composition inspired by the Australian and New Zealander predecessors.

The Tribunal itself claimed the special character of its composition and affirmed the independence of its members, whether judicial or expert (a

feature that had often been reported as insufficient with regard to its tentative predecessor, the NEAA):⁶³² in the Wilfred case, the judges held that under the Rules of 2010 *“the Government has to invite applications, screen and shortlist the same and the shortlisted candidates have to appear before the Selection Committee to be interviewed in terms of Rule 5 (5). (...) The Chairperson, Judicial Members and Expert Members can be removed on the grounds stated under clauses (a) to (e) of sub- section (1) of Section 10 of the NGT Act by the Central Government, but only after a regular enquiry is conducted by a Judge of the Supreme Court, after receiving the preliminary finding of a Committee constituted by the Government in terms of Rule 21 of the Rules. (...) The misbehaviour or incapacity of the Chairperson or Judicial or Expert Member has to be in relation to his tenure as such. It has to be in relation to performing the functions of the office in respect of the post that the Chairperson or the Judicial Member or the Expert Member holds.”*⁶³³ The asserted independence of both judicial and expert members is a key factor that influences the operation of the Tribunal and testifies of the attempt at presenting the Tribunal as a reputational institution as well as it fosters a modality of judicial reasoning that is peculiar to this environmental jurisdiction.

A variety of cases adjudicated in the history of the Tribunal shows how every order or judgment follows a pattern that initiates by the exposition of the facts and the possible procedural points leading to a rejection of the case for lack of jurisdiction, to end up with an in-depth analysis of the scientific evidence presented by the parties and an orientation of the case according to the constitutional and international environmental principles. Among these common features of the decisions of the Tribunal, the scientific analysis is patently the most significant insofar as it is the litmus test for apprehending the improvements in environmental justice.

As Gill analysed in its comprehensive and innovative contribution on the role of expert members in the decision-making process of the

⁶³² See *supra*, Chapter III, Section III.

⁶³³ M.A. No. 182 of 2014 and M.A. No. 239 of 2014 in Appeal No. 14 of 2014 and M.A. No. 277 of 2014 in O.A. No. 74 of 2014 and O.A. No. 74 of 2014, dated 17th of July 2014, paragraph 34.

Tribunal,⁶³⁴ the involvement of experts in environmental sciences has been central in fostering the appropriateness of the decisions of the Tribunal, insofar as the expert members work with a methodology focused on problem-solving, an approach that complements the accurateness that characterises the legal reasoning of the judicial members. Drawing from literature deriving from the fields of political science and epistemic philosophy,⁶³⁵ Gill analysed several cases of the National Green Tribunal in 2014 and 2015 through a set of interviews to both judges and specialists of environmental legal issues. The result of the study has been an in-depth appraisal of the role of expert members, highlighting their intrinsic value, the legitimacy attributed to the judgments thanks to the neutrality of the experts, the instrumental approach aimed at problem-solving and consultative process and, finally, the strategic “political” use of knowledge focused at enlarging the powers of the Tribunal.⁶³⁶ Here, the aspect that will be mainly considered is the investigative approach of the judges - both judicial and expert members - as a trademark of the activity of the Tribunal in adjudicating cases: as noted in the previously cited study,⁶³⁷ the collegiality of the decisions of the Tribunal is ensured through a division of tasks between judicial and expert members - the former drafting the order/judgment in legal terms, the latter preparing a

⁶³⁴ Gill, G.N., *Environmental Justice in India: The National Green Tribunal and Expert Members*, in *Transnational Environmental Law*, 1, 2016, pp. 1-31.

⁶³⁵ Kuhn T.S., *The Structure of Scientific Revolution*, Chicago, University of Chicago Press, 1970, and, specifically, Haas P.M., ‘Epistemic Communities’, in Bodansky, D., Brunée, J., and Hey, E. (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2007, pp. 791–806; Schrefler, L., ‘The Usage of Scientific Knowledge by Independent Regulatory Agencies’, in *Governance: An International Journal of Policy, Administration, and Institutions*, 23(2), 2010, pp. 309–30; Schrefler, L., ‘Reflections on the Different Roles of Expertise in Regulatory Policy Making’, in Ambrus et al. (eds.), *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?*, Cambridge, Cambridge University Press, 2014, pp. 63-81.

⁶³⁶ Gill, G.N., *op.cit.*, pp. 14-28.

⁶³⁷ *Ibidem*, p. 19.

technical note that is often plainly integrated in the decision - with phases of shared reflection and action. With a view to this methodology, the role of the “technicians” in shaping the final decision is indeed capital insofar as they are the sole actors in the proceedings endowed with the capacity of assessing scientific data through an investigative reading of the material (sometimes even complemented by inspections in site by the experts).⁶³⁸ The investigative method, regardless of its direct or indirect application, has been and is one of the key factors in adjudicating cases.

The Tribunal has thus entered the realm of environmental sciences and of planning with an investigative approach aimed not only at defining the administrative steps for environmental clearances,⁶³⁹ but also through a comparative study of the options on the table for decision-makers and of the scientific set of information available on record. The cases concerning environmental clearances are indeed a reservoir of precedents that display the correct assessment administrative agencies and Ministries should make on a range of development projects encompassing thermal power plants, urban constructions, forest management, infrastructure, etc.. Indeed, the NGT described its activity and the litigation originating from environmental issues as “*not adversarial in nature*”, but “*rather quasi adversarial, quasi investigative and quasi inquisitive in nature.*”⁶⁴⁰

Several notable cases display this intense activity and capacity of the Tribunal in ascertaining the environmental situation and the possible damages behind projects presented for environmental authorisation. In *M.P. Patil vs. Union of India*,⁶⁴¹ the Tribunal decided on the environmental clearance granted to a thermal power plant project in Kudgi, Karnataka, in order to consider the potential and actual damages created by the project, in light of the Terms of Reference presented for the environmental impact assessment analysis. The ToR

⁶³⁸ M.A. Nos. 879 of 2013 and 403 of 2014 in O.A. No. 299 of 2013, dated 16th of October 2014.

⁶³⁹ See *supra*, paragraph a).

⁶⁴⁰ M.A. No. 37 of 2013 (WB), paragraph 7.

⁶⁴¹ Appeal No. 12 of 2012, dated 13th of March 2014.

of the project indicated a series of conditions to be checked for the authorisation of the activities that included an analysis of the land, a resettlement project, pollution monitoring stations and coal characteristics: over all these aspects, the Tribunal exercised a thorough review of the facts and of the data presented by the parties in the proceedings. Concerning land use, the project proponent had communicated that the territory to be used for the power plant was mainly rocky and unfit for agriculture, while the public hearing showed that the land acquired was mainly used for agricultural purposes, thus amounting to concealment of facts to be ascribed to the respondent, that hid the nature of the land in order to avoid reexamination at the stage of scoping.⁶⁴²

As far as rehabilitation and resettlement policy is concerned, the Tribunal engaged in an enquiry on the adherence of the appraisal phase to the ToR. Indeed, in the different stages of the environment impact assessment procedure the necessity of a comprehensive rehabilitation and resettlement plan was clearly highlighted, due to the substantial number of people affected by the project. The order for the environmental clearance expressly integrated this plan as a condition to be complied with by the project proponent: the plan would have to encompass financial details on compensation and a framework for improvement of life conditions of those who had not been directly affected by the project but that would have suffered from the loss of land. As a matter of fact, however, the Tribunal found the inefficacy of the remedies provided by the project proponent, as it had not even

⁶⁴² *Ibidem*, paragraph 35: “From the various documents on record, it is clear that the land is partly agricultural and partly barren/rocky. However, a larger part of the acquired land is agricultural – either irrigated or non- irrigated. A few photographs have also been placed on record showing that the over-burdened soil is varying from 0.3 metre to 2.3 metres.” See also paragraph 38: “a perusal of the satellite imagery appended by the EIA Consultant to the EIA Report on record does not support the contention of the NTPC that the major part of the project area is barren. Further the revenue documents as well as the photographs of the area placed on record by the Appellant clearly indicate that the area under reference is mostly agricultural land.”

prepared a list of project-affected people, regardless of its mandatory character.⁶⁴³

Finally, the conditions on pollution have been the object of a serious scientific evaluation: as the coal quality on which the project has been assessed has changed in the different stages of the EIA procedure, the potential effects on the atmosphere have varied in parallel. Notwithstanding these variations,⁶⁴⁴ the Tribunal has not censored this part of the environmental clearance, as the project proponent had presented also a worst case scenario that would fit within the air pollution limits.

These decisions are a clear sign of the rationale behind the reasoning of the members of the Tribunal collectively acting: the significant and innovative feature of the NGT is the added expertise that encompass both scientific and managerial aspects of environmental issues. As in the aforementioned case, the Tribunal pragmatically acts in a way to both uphold the principles of environmental law and their adaptation to the single realities presented case by case.

In the *Asim Sarode* case,⁶⁴⁵ for instance, the Tribunal faced the matter of air pollution caused by the burning of tyres, provoking the emission of toxic gases. Since the issue was not regulated under the Environment (Protection) Act or the Air (Prevention and Control of Pollution) Act, the applicants approached the NGT with the purpose of obtaining the issuance of directions toward the Pollution Control Boards for drafting

⁶⁴³ *Ibidem*, paragraph 57: “the authorities concerned should have taken into consideration the impact of establishment and operationalisation of the project upon the persons who were likely to be displaced, even though not the owners of the acquired land at the relevant stage, particularly at the time of public hearing, for formulation of a desirable R&R scheme.”

⁶⁴⁴ *Ibidem*, paragraph 64: “the sulphur content was taken as 0.35% during the time of the preparation of EIA Report whereas at the time of grant of EC the sulphur content was mentioned as 0.5% which is higher.” Also paragraph 66: “this appears to have been deliberately done by the NTPC to project low impact on AAQ at the time of public hearing, as contended by the learned counsel of the appellant.”

⁶⁴⁵ O.A. No. 43 of 2013 (WZ), dated 6th of September 2014.

scientific guidelines on the tyre re-trading and recycling business. The Tribunal responded to this expectation with a short analysis that accounts for the enhanced expertise and the consequent decision-making capability: on the one hand, it delivered a scientific view of the problem and a technical assessment of tyre-burning activities within the applicable regulations; on the other, it aimed at tracing a path for the competent institutions so as to correct mispractices. To do this, the judges, thanks to the additional expertise of scientific members, thoroughly reviewed the threats to human health and considered the risks of the activity.⁶⁴⁶ Then, they analysed the impact on the environment, confirming the danger arising from tyre-burning and calling for a systemic approach to deal with the issue on the long-term.⁶⁴⁷ Finally, the Tribunal recognised the capability of environmental institutions in India (MoEF and PCBs) to frame regulation for tyre-burning and divided tasks between them for improving the disposal of used tyres. As a conclusion, the judges ordered a study for the management of the life cycle of tyres, and prohibited the burning in open areas and public places as well as the re-use of tyres for industrial purposes.⁶⁴⁸

This specific problem-solving approach was again reinstated in *Pathankot Welfare Society vs. State of Punjab*,⁶⁴⁹ an application on the

⁶⁴⁶ *Ibidem*, paragraph 5: “Both criteria and HAP emissions from an open tyre fire can represent significant acute (short-term) and chronic (long-term) health hazards to nearby residents. Depending on the length and degree of exposure, these health impacts could include irritation of the skin, eyes, and mucous membranes, respiratory effects, central nervous system depression, and cancer.”

⁶⁴⁷ *Ibidem*, paragraph 8: “Though, the used tyre is an opportunity in term of its contents and calorific value, there is need to systematically deal with the entire issue in a holistic manner based on “Life Cycle Approach”, considering the pollution potential, tyre generation data, technology options, techno-economic viability and social implications.”

⁶⁴⁸ *Ibidem*, paragraph 19.

⁶⁴⁹ O.A. Nos. 34, 36, 38 and 40 (THC) of 2013 and M.A. No. 1082 of 2013 in O. A. No. 106 of 2013 and M.A. Nos. 232 and 233 of 2012 in Appeal No. 70 of 2012, dated 25th of November 2014.

installation and working of Municipal Solid Waste Management facilities considered to be violative of the Municipal Solid Waste (Management & Handling) Rules of 2000. Insofar as the case at stake was significant as a pilot project, the Tribunal employed its expertise in analysing every step of the plan in order to avoid technical flaws and present a comprehensive solution for the problem of MSW site selection and construction, considering the litigations pending before the Punjab and Haryana High Court, then transferred to the NGT. In reviewing the plan presented by the environmental authorities of Punjab - based on several ecological and management principles⁶⁵⁰ - the Tribunal asserted its congruence with the concept of sustainable development and the precautionary principle as it “*provides due scientific methods*”. Hence, due to the strict control exercised over the authorities, the judges ordered the completion of the project in a two-year time frame and extended the directions of Appeal No. 70 of 2012 to all cases dealing with MSW matters in Punjab, as the judgment approved the model plan to be operationalised in the entire region.

The investigative and scientific approach thus comes as a natural consequence of the “graft” of expert members within the body of a judicial institution. Notwithstanding the relevance of the jurisprudence of the Supreme Court, helped by the resort to *amici curiae* for studying scientific and technical matters, the enhanced and comprehensive qualities of the National Green Tribunal can be observed in the construction of its decisions: as in *Pathankot Welfare Society*, the Tribunal possesses the inner capability of conducting to an environmentally sound solution by devising clear guidelines and directions for central and local authorities in charge of the environmental policy planning. This competence has been used, as the aforementioned cases testify, with a view to safeguard and improve administrative processes, but also as a method for strictly “coerce” environmental authorities to review decisions that are not in consonance with the environmental law principles. Moreover, the role of experts has been confirmed also with

⁶⁵⁰ Namely, effective segregation, collection and transportation; maximum resources recovery; effective treatment and safe disposal of Municipal Solid Wastes.

the classical device of the judicial *amicus curiae* (the only possibility for higher courts to scientifically assess the environmental problems arising in constitutional litigation), a methodology that has been employed by the NGT for inspection of sites prior to adjudication of cases, as in *M/s. Sterlite Industries*,⁶⁵¹ when the judges appointed an Expert Committee to investigate on the air quality of a copper smelter plant and, specifically, on a precise incident concerning a gas leakage causing health issues to the population leaving in the surrounding area.⁶⁵²

The role of the NGT as the watchdog of environmental principles has found material embodiment in several decisions where the judges quashed environmental clearances flawed by insufficient assessment of risks and impacts. In *T. Muruganandam vs. MoEF*,⁶⁵³ for instance, the project for a coal-based thermal power plant was deemed to be reviewed in order to present a cumulative impact assessment according to scientific parameters. In this case, the Tribunal delved into the methodology used for the impact assessment analysis in a comparative perspective and found that scientific data allowing a complete cumulative report had not been collected by the project proponent,⁶⁵⁴ as the minutes of the Expert Appraisal Committee advising in favour of the grant of the environmental clearance did not show a sufficient

⁶⁵¹ Appeals Nos. 57 and 58 of 2013, dated 8th of August 2013.

⁶⁵² Ibidem, paragraph 34: “the Expert Committee appointed by that Bench (...) visited the ambient air quality monitoring stations, maintained both by the appellant-company and the Respondent Board. (...) The Committee also conducted manual stack monitoring for all the 5 stacks to cross check the on-line results. The manually measured data and online data were compared and it was found that the SO₂ emissions from all the stacks were well within the permissible limits.”

⁶⁵³ Appeal No. 50 of 2012, dated 10th of November 2014.

⁶⁵⁴ Ibidem, paragraph 48: “when one is expected to make studies regarding cumulative impacts of all the existing as well as proposed industries, it is expected to collect actual field data regarding each of the existing industry and together with information on proposed industry interpret its impacts on land, water, noise, terrestrial ecology and socio-economic environment. Nothing of such kind appears to have been done by the project proponent.”

analysis of the problems on the ground through mathematical models.⁶⁵⁵ Hence, censoring this “casual approach”⁶⁵⁶ of the Committee, the Tribunal ordered to conduct a new environmental clearance with a study including “*impact prediction/assessment using appropriate mathematical models*” and the proposal for “*appropriate management plans for significant impacts including financial implications*”.⁶⁵⁷ Appeal No. 50 of 2012 is thus a demonstration of the investigative approach of the Tribunal based on scientific methods, not only on judicial logic.

Moreover, the investigative approach of the Tribunal finds even evidence in peculiar cases where scientific evidence is lacking. In the *Om Dutt Singh* case,⁶⁵⁸ the NGT decided on a project concerning the construction of a dam in Uttar Pradesh that dated back to the 1970s. Having ascertained the maintainability of the application, as action was not taken by the project proponent in the years following the authorisation for construction and as the applicant did not challenge the order allowing such activity,⁶⁵⁹ the Tribunal observed how the proposed construction required an environmental clearance that should follow contemporary rules governing such proceedings. Indeed, the Tribunal found absence of reports on soil erosion, afforestation, health problems and the socio-economic profile in general, in spite of a perceived necessity of such steps.⁶⁶⁰ Facing opposite contentions on a case started thirty-nine years earlier, the NGT - on the basis of photographs and other evidence - stated the mandatory character of a new environmental clearance that could account for scientific progress,

⁶⁵⁵ *Ibidem*, paragraph 58: “Logic and technique which could have probably outweighed submissions of the appellants striking at the very root of Cumulative Impact Assessment Study in question is not apparent from the entire text of EAC minutes.”

⁶⁵⁶ *Ibidem*, paragraph 62.

⁶⁵⁷ *Ibidem*, paragraph 64.

⁶⁵⁸ O.A. No. 521 of 2014 and M.A. Nos. 902 of 2014 and 14 of 2015, dated 14th of December 2015.

⁶⁵⁹ *Ibidem*, paragraph 11.

⁶⁶⁰ *Ibidem*, paragraph 12: “the project of this nature and dimension, certainly requires unambiguously stated conditions for avoiding, and in any case, minimizing its adverse impacts on environment, ecology, rivers and biodiversity of the area in question.”

consequent technical parameters and changes in the implementation of the work.⁶⁶¹ Thus, the Tribunal directed the constitution of a committee empowered to report on the environmental situation following the start of the project and on the compensatory afforestation required.

Again, on the matter of forest protection, the Tribunal demonstrated its investigative *cum* scientific and jurisprudential approach in *Sudiep Shrivastava vs. Union of India & Ors.*,⁶⁶² where the judges faced an appeal against an order granted by the MoEF - with a contrary advice of the Forest Advisory Committee (FAC) - for diversion of forest land (1898.328 hectares) in Chhattisgarh. As the disagreement between the FAC and the MoEF was based on six reasons enunciated in the order,⁶⁶³ the Tribunal investigated at first on the possibility for the Ministry to

⁶⁶¹ *Ibidem*, paragraph 19: “If the project of similar scale was proposed in the times when actual construction work had started after transfer of the required lands, it would have required serious considerations from various environmental perspectives and much harsher conditions would have been imposed on the project proponent. Some activities of the project, like the building of the roads, bridge and dams etc. would have a different impact at the construction stage and operation stage.”

⁶⁶² Appeal No. 73 of 2012, dated 24th of March 2014.

⁶⁶³ *Ibidem*, paragraph 3:

“(i) The coal blocks are clearly in the Fringe and actually not in the Bio-diversity rich Hasedo Arand forest region (a “No Go” area); and are separated by a well-defined high hilly ridge with drainage into Aten river flowing towards Hariyarpur in the opposite direction making it fall in totally different watershed;

(ii) Substantial changes in the mining plans as originally envisaged” (...) “make it possible to link renewal for phase-II to performance on reforestation and bio-diversity management in phase-I;

(iii) Wildlife concerns to be taken care of through a well prepared and well executed Wildlife Management Plan under the aegis of independent institutions;” (...)

“(iv) Coal Blocks to be linked to super-critical thermal power generation stations making such linkage as an explicit pre- condition for approval;

(v) Power generation plants of Chhattisgarh and Rajasthan being closely linked to the said coal blocks, the said States have been persistently following up;

(vi) Imperative to sustain the momentum generated in the XI plan in terms of capacity addition in keeping with broader developmental picture and balancing of different objectives and considerations.”

disagree with the advice provided by the Advisory Committee, and then considered the congruence between the six points mentioned by the MoEF and the actual environmental situation.

In this case, the jurisprudential approach of the Tribunal, an obvious feature of a judicial institution, comes to the forefront as a preliminary issue on the powers of the different administrative bodies. To the contention of the MoEF that the FAC constitutes a simple advisory body whose recommendations can be overridden by the Ministry, the Tribunal referred to landmark cases of the Supreme Court on executive powers for environmental issues⁶⁶⁴ and developed its reading of the Forest Conservation Act of 1980, granting to the FAC a mere advisory but authoritative power, whose purpose is the collation of a reasoned advice characterised by expertise and *in situ* inspections, in order to enable the MoEF to decide on the approval of projects with first-hand knowledge.⁶⁶⁵ However, the judges esteemed that for overturning the advice of the Advisory Committee, the MoEF should issue an order featuring “*appropriate reasoning backed by data*” sufficient enough to outweigh the pronouncement of the FAC.⁶⁶⁶

Hence, the investigative and scientific part of the decision of the NGT stems from this jurisprudential reasoning: having duly studied the advice of the FAC and the order of the MoEF, the Tribunal discovered flaws in both documents. If the Advisory Committee did not recommend the diversion of forest land due to a lack of guarantees for original inhabitants and wildlife that had been assessed with a general study, the MoEF overrode such advice. However, the order of the MoEF, according to the Tribunal, did not pass the Wednesbury test of reasonableness on the ground that the decision was not “*fair and fully informed and consistent with the principle of sustainable development.*”⁶⁶⁷ This conclusion was reached by investigating on the six points raised

⁶⁶⁴ *Lafarge Umiam Mining Pvt. Ltd. vs. Union of India & Ors.*, dated 6th of July 2011, 2011 7 SCC 338, and *T.N Godavarman Thirumulkapad vs. Union of India & Ors.*, order dated 4th of August 2010, 2010 13 SCC 740.

⁶⁶⁵ Appeal No. 73 of 2012, paragraph 17.

⁶⁶⁶ *Ibidem*, paragraph 21.

⁶⁶⁷ *Ibidem*, paragraph 26.

by the same Ministry on the rejection of the advice of the FAC: indeed, the issues at stake - study of the areas, sequence of mining, wildlife protection - were not clear from either the advice or the order of the MoEF. Hence, considering that the FAC *“failed to give due regard to these material issue/questions while tendering its advice to the Ministry and the Ministry largely over taken by the anthropocentric reasons ignored these material and relevant ecocentric issues”*,⁶⁶⁸ the Tribunal directed to Ministry to seek a fresh advice on all the missing issues and to subsequently grant a reasoned order on the basis of such advice.

What arises from the jurisprudence of the Tribunal, and especially from this order, is a multifaceted methodology for assessing cases. As shown in the aforementioned applications and appeals, the Tribunal heavily relies on the expert members in order to consider and compare scientific data and to reach more reasoned conclusions. Moreover, the most apparent feature of these judgments is a dependence upon the principles enshrined in Section 20 of the NGT Act, whether explicitly or implicitly. If the environmental court often refers to the anthropocentric and ecocentric aspects of an environmental or forest clearance,⁶⁶⁹ this continuous appeal to the dimensions of development clearly shows that the discourse on the environmental rule of law and on the principles governing international environmental law has been integrated in the working of the NGT and in the minds of the judges, that are empowered to foster these legal aspects through their specific scientific expertise. The relevance of the Tribunal thus lies, indeed, in the interweaving capacity of judges to mix scientific and technical expertise with legal elaboration, so as to confirm and fashion the principles of sustainable development, polluter pays and precaution in the domestic cases.

⁶⁶⁸ *Ibidem*, paragraph 48.

⁶⁶⁹ See, for instance, paragraph 48 of Appeal No. 73 of 2012.

Chapter V

The National Green Tribunal and international environmental law

Under Section 20 of the National Green Tribunal Act, the newly established court “*shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle.*” By approving such a provision,⁶⁷⁰ the legislature empowered the Tribunal to refer to international environmental law and to elaborate a domestic vision of the principles governing environmental action and adjudication, an illustration of *opinio juris* that in turn shall influence the analysis and content of the international law concepts. This Chapter will enquire on the substantial interpretation delivered by the National Green Tribunal on sustainable development and on the correlated principles, by looking through the recent jurisprudence and the reference to the previous construction of the Supreme Court on the subject.

As the prolific activity of the Supreme Court already laid the foundation for a reading of the Indian system of environmental protection whose cornerstone is Article 21 of the Constitution,⁶⁷¹ the present analysis will follow such structure. Hence, after reviewing the relevance of Article 21 and of the constitutional provisions of the Forty-Second Amendment, the focus will be centred on the principles of protection, sustainable development, precaution and polluter pays, so as to assess the role of the Tribunal in establishing international environmental legal concepts as a law of the land critically adapted to the domestic reality.

⁶⁷⁰ See *supra*, Chapter III, Section III, paragraph c).

⁶⁷¹ See *supra*, Chapter III, Section II, paragraphs a) and b).

The right to environment

a) Right to life and environmental protection

As known, the scope of the right to life sanctioned in Article 21 of the Indian Constitution has been broadened in order to include the right to a wholesome environment, understood as a right to ecological balance, the protection of the conditions of livelihood and the averment of the requirement of cleanliness of environment as a guarantee of such right to life.⁶⁷²

According to statutory provisions, the birth of the National Green Tribunal is a consequence of the world conferences held from 1972 and of the transposition of international law instruments and principles in the domestic system, through statute law and thanks to the interpretation and the directions given by the Supreme Court in a variety of cases.⁶⁷³ The judges of the National Green Tribunal have often referred to the international, constitutional and legislative framework, so as to reinforce their judgments and strengthen the authority of decisions rendered on the civil cases presented in these last years. The activity of the Tribunal has also been an instrument in redefining the main concepts related to the right to environment and in confirming the construction ideated by the Supreme Court by blending Article 21 of the Constitution with the Amendments of 1972 and the integration of sustainable development in the fabric of the domestic legal system.

The Tribunal has thus endeavoured to represent the legislative and judicial construction of the past years in a way to reinforce the links to international law. To do this, however, the starting point was the confirmation of the principles and concepts inherent to the interpretation of Article 21 of the Constitution. In *Kehar Singh vs. State of Haryana*,⁶⁷⁴ the Tribunal took the occasion to restate the coincidence of definitions between the Environment (Protection) Act of 1986 and the

⁶⁷² See *supra*, Chapter II, Section I, paragraph c).

⁶⁷³ See *supra*, Chapters II and III.

⁶⁷⁴ Application No. 124 of 2013, dated 12th of September 2013.

National Green Tribunal Act of 2010. By doing this, the Tribunal applied the double construction of the right to environment as anthropo- and eco-centric and integrated the notion of environment with the right to health:⁶⁷⁵ from the jurisprudence of the Supreme Court, indeed, there has been an expansion of *"Article 21 of the Constitution of India to include the right to clean and decent environment. Right to live with human dignity, hence, includes the right to clean environment"*. In this scheme, the role of the NGT is to guarantee the right to environment, equated to the rights enshrined in Chapter III of the Constitution, through the effective and rapid disposal of environmental cases - a mission inscribed in the Preamble of the NGT Act.

The reference to the notion of environment as a corollary of the **right to health** constitutes the key to open the door of the wider domain of adjudication related to urban and industrial activities - a field where the plain reading of Article 21 and of environmental statutes could display its effects even in absence of international legal principles, as the environmental laws of India shall be - in principle - a sufficient deterrent for preventing actions detrimental to the environment, without resorting to international environmental law.⁶⁷⁶ The cases on

⁶⁷⁵ *Ibidem*, paragraph 27: *"The word 'environment' is an expression of broad spectrum which inculcates in its sweep both hygienic atmosphere and ecological balance. The right to life with human dignity encompasses within its ambit the preservation of environment, ecological balance free from air and water pollution. It also includes maintaining proper sanitation without which it may not be possible to enjoy life. The conduct or actions, which would cause environmental pollution and disturb the ecological balance should be regarded as violation of Article 21 of the Constitution of India. Therefore, promoting environmental protection implies maintenance of environment as a whole comprising the man-made and the natural environment. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. Thus, there is a constitutional imperative on the State Governments and the municipalities to take adequate measures to promote, protect and improve both the man-made and the natural environment."*

⁶⁷⁶ See *supra*, Chapter II, Section II, for a comprehensive review of environmental statutes (originated from the international discourse, but

air and water pollution are indeed significant in showing the cogency of those statutes and thus the application of the right to a wholesome environment as a result of domestic laws, even without making express reference to the constitutional provisions.

In the *M/s. Gokulam Blue Metals* case,⁶⁷⁷ for instance, the Tribunal upheld an order of the Tamil Nadu Pollution Control Board that established the immediate closure of the stone crushing plant of the company, on the ground that it contravened to the provisions of the Air (Prevention and Control of Pollution) Act of 1981. In its order, the Tribunal did not refer to any principle, but directed the company to install the necessary equipment for preventing air pollution generated by the stone crushing activity, with a view to guarantee environmental and health protection of the people living in the surrounding area.⁶⁷⁸

Similar views on environmental protection have been expressed by the environmental judges in a considerable collection of decisions related to consent to operate. In *M/s Krishna Stone Crushers et alii*,⁶⁷⁹ a judgment rendered on nine appeals related to stone crushing activities in Haryana, the Tribunal dismissed the appeals because of temporal limitations but analysed one of them (*M/s. Jai Mata Di Stone Crushers vs. Haryana SPCB*)⁶⁸⁰ and found that, according to the parameters given by the State Pollution Control Board, the stone crushing units were not operating under the statutory limits and thus constituted a threat to human health.⁶⁸¹

deprived of express reference to international environmental principles as the NGT Act).

⁶⁷⁷ Appeal No. 42 of 2013 (SZ), dated 12th of July 2013.

⁶⁷⁸ *Ibidem*, paragraph 14.

⁶⁷⁹ M.A. Nos. 617 of 2013, 734 of 2013 and 735 of 2013, dated 9th of January 2014.

⁶⁸⁰ Appeal No. 95 of 2013, dated 9th of January 2014.

⁶⁸¹ *Ibidem*, paragraph 9: “human health is of utmost importance and must prevail over a private business interest. These stone crushers give rise to substantial quantity of fine fugitive dust emissions and high level of noise which create health hazards to the workers as well as the surrounding population by way of causing respiratory diseases and hearing impairment. (...) Presence of stone crushers in the vicinity of villages can therefore be a serious environmental and health hazard. Assuming that these stone

However, the manifest environmental afflatus of the Tribunal has also found certain limits, when possible, due to the necessity to maintain a balance between environmental and economic concerns, as two recent cases demonstrate. In the *M/s Balmer Lawrie* case,⁶⁸² concerning the effects of pollution caused by the activities of a leather chemical industry owned by the government, the Tribunal reverted the decision of the Tamil Nadu Pollution Control Board insofar as it did not account for the change in technology for treating the trade effluents and for achieving a zero discharge objective in the medium term. Moreover, this approach was followed in the *M/s Narayan Polishing* case.⁶⁸³ In this appeal on the conduct of activities by electro plating industries, producing hazardous wastes, the decisions of the Delhi Pollution Control Board denying consent to operate were set aside by the NGT because of the pervasive consequences of the closure of an industry, not supported, in the case, by sufficient evidence on the effective pollution caused by the discharge of effluents.⁶⁸⁴ However, in both cases, the Tribunal upheld the reasons of environmental protection by ordering strict measures of compliance: in the first case, the NGT inscribed in the order the mandatory control of the local PCB on the progresses in implementing the new technology for leather industries; in the latter, it directed the PCB to proceed with a new order within six weeks.

The concern for balancing opposite reasons in environmental protection - which is the typical approach underlying the concept of sustainable

crushers were adhering to the parameters, which as per the report of the HSPCB they are not, even then it is an undisputed proposition that their cumulative effect would be injurious to the health of the villagers who are living within 400 or 800 meters of the location of these crushers."

⁶⁸² O.A. Nos. 172 and 173 of 2014 (SZ), dated 29th April 2015.

⁶⁸³ Appeal No. 132 of 2015 (M.A. No. 1188 of 2015), Appeal No. 133 of 2015 (M.A. No. 1187 of 2015), Appeal No. 134 of 2015 (M.A. No. 1186 of 2015), Appeal No. 135 of 2015 (M.A. No. 1185 of 2015) and Appeal No. 136 of 2015 (M.A. No. 1184 of 2015), dated 10th December 2015.

⁶⁸⁴ *Ibidem*, paragraph 10: "*passing a direction of closure under Section 33 (A) of the Water Act is an order of very serious consequence. In fact, it amounts to civil death of a unit.*"

development - is also to be seen in the activities of the NGT aimed at enlarging its scope of action. For instance, the Tribunal acted in the field of environmental protection, with a view to widen the coverage of the relevant statutes as far as possible, also towards activities that were not deemed environmentally hazardous *prima facie*: in *M/s Ardent Steel Limited vs. MoEF*,⁶⁸⁵ the judges included pelletisation activities⁶⁸⁶ within the scope of entrepreneurial businesses requiring consent to operate under the Notification of 2006. Hence, with a view to uphold the principle of protection, embodied in the Environment (Protection) Act, the Tribunal stated the necessity to adjourn the list of activities to be subjected to environmental clearance and to include pelletisation within the realm of pollutant activities⁶⁸⁷ (specifically, primary metallurgical processes) according to the doctrine of purposive construction that has been analysed with regard to the identification of the “*substantial question related to the environment*”.⁶⁸⁸

This is a strategy that has been employed in matters that could not be classified as purely environmental at first sight, as those regarding noise pollution.⁶⁸⁹ From the first cases presented before the National Green Tribunal, the judges approached the matter of noise pollution with the integrated vision of the notion of wholesome environment, stemming also from the provisions of the Environment (Protection) Act, that include noise among the sources of pollution.

⁶⁸⁵ Appeal No. 5 of 2014, dated 27th May 2014.

⁶⁸⁶ Defined as “a process adopted for upgradation of low quality iron ore to make it fit for use in the process of making steel finished products,” *ibidem*, paragraph 14.

⁶⁸⁷ *Ibidem*, paragraph 16: “Process of pelletization is gaining momentum in the steel industry as it helps in refining the ore for removal of impurities. But it is a direct source of environmental pollution. (...) The purpose of subjecting such an industry to obtain Environmental Clearance is to ensure prevention of pollution and also that higher and prescribed standards of anti- pollution measures are maintained in the interest of the environment in general rather than being case specific.”

⁶⁸⁸ See *supra*, Chapter IV, Section I, paragraph b).

⁶⁸⁹ See *supra*, Chapter II, Section II, paragraph d) on the Noise Pollution (Regulation and Control) Rules of 2000.

Indeed, in Application No. 34 of 2011,⁶⁹⁰ presented by the Housing Societies of the Supreme Court and of the Indian Foreign Service, the Tribunal adjudicated a PIL transferred from the High Court of Delhi to the NGT on the use of loudspeakers and music systems by the All India Panchayat Parishad. Considering the Noise Pollution Rules of 2000 and the EPA, the applicants filed a request for diminishing noise, to be envisioned as a pollutant and as an offence to Article 21 of the Constitution. As a result of the contentions of the applicants, the NGT directed all concerned authorities to implement guidelines on noise pollution in Delhi and suggested - as a general method - a series of modifications to the Action Plan on noise pollution, including the establishment of a call centre, the draft of a standard operating procedure for noise control, a survey of religious places causing noise pollution and the provision of an adequate number of noise meters to all police stations. Notwithstanding the peculiarity of the decision of the environmental court, that did not direct, but only suggested measures to be taken by the different authorities in Delhi, the judgement set the scene for a broadened intervention of the Tribunal in matters related to noise pollution as a element causing adverse impacts on health.

Further decisions concur to reconstruct this comprehensive vision of environmental protection that include air, water and noise among its elements: in this sense, the twin cases *Dileep B. Nevadia* are a demonstration of the approach undertaken by the NGT. At first, the applicant, a citizen living in Mumbai, alleged violation of the Noise Pollution (Regulation & Control) Rules of 2000 by government vehicles using sirens. Hence, in Application No. 36 of 2011,⁶⁹¹ the Tribunal acknowledged the health problems caused by vehicular noise ("*high blood pressure, hearing loss, sleep disruption, speech interference and loss of productivity*") and directed the Ministry of Transports and the State of Maharashtra to notify standards of emissions and the Police Commissioner of Maharashtra prevent private vehicles to use sirens or multi-tone horns in residential and silent zones. Moreover, the same

⁶⁹⁰ Application No. 34 of 2011, dated 18th of December 2012.

⁶⁹¹ O.A. No. 36 of 2011, dated 9th of January 2013.

applicant presented a case on automobile noise before the Western Bench of the Tribunal the following year, contending the violation of the provisions of the Air (Prevention and Control of Pollution) Act of 1981, as well as the Environment (Protection) Rules of 1986 and the Noise Pollution (Regulation and Control) Rules of 2000.⁶⁹² Having attested the relevance of the matter and the effects on human health,⁶⁹³ the Tribunal directed the local Pollution Control Board to notify the noise emission standards for vehicles at manufacturing and in-use stage and to communicate those standards for compliance by the concerned authorities.⁶⁹⁴

Finally, the multidimensional nature of the anthropocentric vision of environmental protection is epitomised in the *Neel Choudhary* case,⁶⁹⁵ on the pollution of the environment caused by holding marriage parties in Bhopal. Again, referring only to the relevant statute law, the Tribunal intervened in a civil suit that dealt with pollution with a view to prevent further environmental degradation “with reference to the disposal of solid waste, discharge of sewerage, checking of noise pollution and air pollution levels”.⁶⁹⁶ The judges responded to the contentions of the applicants by reviewing the previous cases in similar matters (including Application No. 34 of 2011) and by prohibiting the activity of the 24 marriage gardens violating norms of safe disposal of wastes and of noise standards.⁶⁹⁷ The record of the Tribunal is thus consequential to the range of matters submitted by the applicants, but

⁶⁹² O.A. No. 2 of 2014 (WZ), dated 23rd of September 2014.

⁶⁹³ *Ibidem*, paragraph 20: “noise pollution is a significant environmental problem in many urban areas. This problem has not been adequately addressed and remedied despite the fact that it is growing in developing countries. (...) The effects of noise on human health and comfort are divided into four categories; physical effects, such as hearing defects; physiological effects, such as increased blood pressure, irregularity of heart rhythms and ulcers; psychological effects, such as disorders, sleeplessness and going to sleep late, irritability and stress; and finally effects on work performance, such as reduction of productivity and misunderstanding what is heard.”

⁶⁹⁴ *Ibidem*, paragraph 38.

⁶⁹⁵ O.A. No. 18 of 2013 (CZ), dated 6th of May 2014.

⁶⁹⁶ *Ibidem*, paragraph 7.

⁶⁹⁷ *Ibidem*, paragraph 24.

also to the scope of the concept of environment the judges are willing to define. In the aforementioned cases, on urban and industrial matters, the Tribunal has endeavoured to build a notion of environment that is in harmony with the jurisprudence of the Supreme Court on environmental issues and the right to life.

So far, the study on the concept of environmental protection has been focused on the human activities hampering the enjoyment of the right to life, mainly in connection with health problems. However, in addition to these judgments focused on the anthropocentric vision of the concept of environmental protection, especially on the right to a healthy environment, the Tribunal had also enquired on the eco-centric understanding of the notion in one of its first landmark cases, Application No. 38 of 2011 (*Rohit Choudhury vs. Union of India*),⁶⁹⁸ presented by a resident of a village of Assam, aggrieved by the mining activities permitted in the Kaziranga National Park (home of 3/4 of the world population of one-horned rhinoceros). In spite of the definition of a “no development zone” (NDZ), stone quarries were indiscriminately set in the area, resulting in adverse impact on the environment and facing apathy from the concerned authorities. After demonstrating the blatant violation of environmental laws - the applicant showed GPS maps that presented seven stone crushing units within the NDZ - the MoEF indicated the existence of sixty-four units, including tea estates; the State of Assam denied such data, while acknowledging that writ petitions for certain units were pending before the High Court at Guwahati, and the owners of the units declared that those were located outside the NDZ.

The NGT decided the case according to the precautionary principle and sustainable development, but having due regard to refer to the statutes granting environmental protection.⁶⁹⁹ Concerning the facts, the Tribunal acknowledged the “*stony silence*” on the part of the Central

⁶⁹⁸ Application No. 38 of 2011, dated 7th of September 2012.

⁶⁹⁹ Ibidem, paragraph 29 on the jurisprudence of the Supreme Court: “*it is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that the Parliament enacted the Anti-Pollution Laws, namely the Water Act, Air Act and the Environment (Protection) Act, 1986*”

and State Governments with regard to the implementation of the Notification of 1996 on the NDZ, that resulted in the illegal construction of stone-crushing units. On the units, the Central Pollution Control Board revealed the absence of clearance on those units (including brick kilns and tea factories) and the grant of consent for steel fabrication units and hotels within the NDZ.

From the statement of the facts, the ecological impact that follows is clearly classified by the NGT: air pollution from stone units and brick kilns; use of pesticides and coal by tea factories and gardens, polluting air and waters; a general loss of biodiversity from these activities. The Tribunal thus referred to the jurisprudence of the Supreme Court (*Indian Council for Enviro-Legal Action, M.C. Mehta vs. Union of India* of 2006, *T.N. Godavarnam* of 2012) to set the concept of environmental justice with reference to the eco-centric aspect and direct the authorities to remove the stone crushers and the brick kilns, to allow stone crushing units near the NDZ if pollution control equipments are installed and to stop operations of tea factories. Moreover, the MoEF and the Government of Assam were directed to draft a comprehensive plan and monitoring mechanism for implementing the notification of 1996 on the NDZ, as well as paying the Kaziranga National Park two lakhs rupees of damage, to be used for biodiversity conservation.

The key concept in the last judgment is indeed conservation, to be understood as the complement for protection in the eco-centric vision of the environment: if protection is more related to the anthropic dimension of the right to environment envisioned as cleanliness, conservation is characteristic of the **right to livelihood** and to the **right to an ecological balance**, in order to guarantee preservation of the ecological goods against harms and possible loss. This is an elaboration that can be derived by the aforementioned case as well from the landmark case *Goa Foundation vs. Union of India*,⁷⁰⁰ on the conservation of the ecology of the Western Ghats. In the specific case, what arises in the matter is the inaction of the authorities in the conservation of the

⁷⁰⁰ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013. See also *infra*, Chapter IV, Section I, paragraph b).

environment,⁷⁰¹ that calls for action on the part of the Tribunal, that considered the right to life also in connection with the question of ecological balance and conservation. Consequently, the judges held that “right to life includes right to environment within the meaning of Article 21 of the Constitution of India. To ensure that the environment is not degraded, it is the legal right of any person to raise issues arising from the constitutional mandate and or even the provisions of the Environment Act”.⁷⁰²

The two judgments - as the decisions previously analysed - show how the Tribunal acted on the matter of environmental pollution and protection by following the doctrine of the right to environment under Article 21, in most of the cases even without making express reference to it. However, it stems from the *Rohit Choudhury* as well as from the *Goa Foundation* cases the inextricable nature of the principle of protection with the constitutional provisions and with international environmental principles, mentioned in the judgment as a necessary corollary for eco-centric purposes. Indeed, in spite of the subjacent acknowledgment of environmental protection within the legal discourse of the courts, the NGT has also explicitly referred and upheld the construction elaborated by the Supreme Court on the essence of Article 21 of the Indian Constitution.

b) Article 21 and international principles

In addition to the aforementioned cases *Kehar Singh* and *Goa Foundation*,⁷⁰³ the Tribunal recognised the right to a wholesome environment with explicit reference to the safeguard of environmental rights enshrined in the Constitution, extending the applicability of international legal principles in the domestic domain.

⁷⁰¹ *Ibidem*, paragraph 43: “the applicant has been able to make a case of non-performance of the statutory obligation by the State and other authorities concerned on the one hand and that of the need for preventing degradation of the environment and ecology of these Western Ghats under the precautionary principle, on the other.”

⁷⁰² *Ibidem*, paragraph 43.

⁷⁰³ See *supra*, paragraph a).

First of all the Tribunal correctly interpreted the open nature of Article 21 of the Constitution as far as the subjects covered by the constitutional guarantee are concerned. In *Ms. Betty C. Alvares vs. State Of Goa*,⁷⁰⁴ the NGT maintained the case presented by a person who was not a citizen of India, as it was considered an aggrieved person and since the guarantee of a dignified life “*is not restricted only to a citizen of India*”.⁷⁰⁵ In the interpretation of the Tribunal, the constitutional provisions of Article 21, referring to persons in general, entail the sole existence of the requirement *ratione materiae* for filing an application.

Moreover, in the case *Jan Chetna*,⁷⁰⁶ the Tribunal upheld the views of the Supreme Court in linking international environmental law principles to the law of the land, starting from the Constitution, as amended in 1972, to the legislative action of the 1970s and 1980s. As the NGT too interwove Article 21 of the Constitution to the environmental fabric of the Constitution and of statute law, it additionally integrated the notion of environmental information into the right to environment. In particular, the Tribunal apprehended the process of public consultation under the EIA Notification of 2006 within the broader scope of the right to know, as constitutionally guaranteed, and as a branch of the construction of the right to environment safeguarded under Articles 21, 48A and 51A of the Constitution.⁷⁰⁷

It is noteworthy to observe, again, that the elaboration of the right to a wholesome environment comes as a corollary on the applications related to pollution and to anthropic matters - such as urban activities, collection of wastes, man-made enterprises as tourism - and later

⁷⁰⁴ M.A. Nos. 32 and 33 of 2014, in O.A. No. 63 of 2012, dated 12th of February 2014.

⁷⁰⁵ *Ibidem*, paragraph 4.

⁷⁰⁶ Appeal No. 22 of 2011, dated 9th of February 2012.

⁷⁰⁷ *Ibidem*, paragraph 27: “*It is no more resintegra that environment is a right guaranteed under Article-21 of the Constitution. The Environment (Protection) Act, 1986 and EIA Notification are the means adopted, to protect the right in discharge of the obligations enjoined under Article-48 A of the Constitution. Citizens have a right to know and also equal right to object to any activity that may impair the right to environment.*”

extends to a more eco-centric approach that includes international principles.⁷⁰⁸ In the *Rayons-Enlighting Humanity* case,⁷⁰⁹ for instance, the municipal solid waste management project proposed for the village of Razau-Paraspur was considered inadequate because of the selection of the site, occurred several years before the start of the project. As in the previous years a series of cultural, educational and economic institutions had come up, the installation of a municipal solid waste management facility in a site surrounded by human constructions would amount to a violation of the right to life and a denial of the principle of sustainable development, if one considers the balance between the risk of harm to human health and the public interest. In this particular case, the risk of air and water pollution greatly overcoming the benefits of constructing a site for wastes management in the selected area, in the interest of the citizens enjoying the constitutional right to a clean environment, the Tribunal ordered the closure of the site and prohibited the deposit of wastes, also with a view to uphold the principle of precaution for guaranteeing the health of future inhabitants.⁷¹⁰

Moreover, the right to a clean environment has also been upheld with regard to industrial activities. In the *M/s. Sterlite Industries* case,⁷¹¹ on the operation of a copper smelter plant in Tamil Nadu, the Tribunal was approached due to the complaints regarding health problems (eye irritation, breathing difficulties and throat suffocation) from people of

⁷⁰⁸ See also, *supra*, paragraph a).

⁷⁰⁹ O.A. Nos. 86, 99 and 100 of 2013, dated 18th of July 2013.

⁷¹⁰ On the motivation for the closure of the site, *ibidem*, paragraph 47: “the site in which the plant is located, is bound to cause pollution of ground water, which is relatively at a higher level, by leaches. This is inevitable especially in the rainy season. The municipal solid waste, which has been dumped in the open area at the site without any laying of impermeable membrane lining. Therefore, the contaminated water is bound to seep into the underground water and even affect the adjoining water bodies apart from affecting irrigation water. Even the dumping sites have not been prepared in accordance with the rules. The foul smell arising from the dumping at the site is bound to pollute the air quality of the area.”

⁷¹¹ Appeals Nos. 57 and 58 of 2013, dated 8th of August 2013.

the surrounding areas. As the company appealed to the NGT against the decision of the Tamil Nadu Pollution Control Board that held it liable for compensation of damages, the judges delivered a detailed examination of the scientific data collected by an *ad hoc* Expert Committee⁷¹² and then linked the question of air pollution to the general doctrine established on Article 21 of the Constitution, *"interpreted by the Indian courts to include (...) the right to clean and decent environment. Right to decent environment, as envisaged under Article 21 of the Constitution of India also gives, by necessary implication, the right against environmental degradation. It is in the form of right to protect the environment, as by protecting environment alone can we provide a decent and clean environment to the citizenry."*⁷¹³ In addition to the interpretation of the right to a clean environment, the Tribunal also dealt with the relationship between environmental and economic rights, with a view to integrate environmental concern into the right to development.⁷¹⁴

Hence, after a meticulous analysis of the scientific data and of the legal jurisprudence in the field of pollution, the judges held that the State government and the company should have acted as to uphold the constitutional right of the people living in the vicinity of the industrial site to have a clean, healthy and pollution-free environment and directed the company to comply to the suggestions made by the Expert Committee and the local Pollution Control Board to monitor such activity.⁷¹⁵

The decisions of the NGT, as analysed also in the previous Chapter, maintain a focus on both the scientific side and the legal elaboration, with an implicit reference to the principle of sustainable development

⁷¹² See *supra*, Chapter IV, Section II, paragraph b).

⁷¹³ Appeals Nos. 57 and 58 of 2013, paragraph 113.

⁷¹⁴ *Ibidem*, paragraph 114: *"the right to development itself cannot be treated as a mere right to economic betterment or cannot be limited as a misnomer to simple construction activities. It encompasses much more than economic well-being and includes within its definition the guarantee of fundamental human rights. It includes the whole spectrum of civil, cultural, economic, political and social process. (...) Development besides being inter-generational, must be balanced to its ecology and environment."*

⁷¹⁵ *Ibidem*, paragraph 148.

even in cases where the construction of Article 21 is regarded as predominant. However, the manifest embodiment of the construction elaborated around Article 21 has been delivered by the NGT in the case of the vehicular traffic at Rohtang Pass, in the first application presented on the own motion of the Court.⁷¹⁶

Facing the risk of rapid retreat of glaciers in the region of Himachal Pradesh because of the impact of black carbon, the Tribunal resorted to the classic notion of the right to a wholesome environment as elaborated by the Supreme Court. In spite of the absence of a right to environment in Part III of the Constitution, the Tribunal recognised the expansion of Article 21 to environmental matters. Indeed, *“the citizens of the country have a fundamental right to a wholesome, clean and decent environment. The Constitution of India, in terms of Article 48A, mandates that the State is under a Constitutional obligation to protect and improve the environment and to safeguard the forest and wild life in the country. By 42nd Amendment to the Constitution, the Parliament, with an object of sensitizing the citizens of their duty, incorporated Article 51A in the Constitution, inter alia, requiring a citizen to protect and improve the natural environment including the forests, lakes, rivers and wild life and to have a compassion for living creatures. The legislative intent and spirit under Articles 48A and 51A(g) of the Constitution find their place in the definition of 'environment' under the Environment (Protection) Act, 1986 (for short the 'Act of 1986').”*⁷¹⁷

The articulation of the right to a clean environment thus comes as a strengthening of the right to life, as a guaranteed fundamental liberty that entails obligations from the state and also from the citizens. In this framework, the environment is conceived as the medium that *“enables people to enjoy a quality life which is the essence of the right guaranteed under Article 21”*⁷¹⁸, with a link to the predominance that ecological balance has over concerns related to economic development. The right to a wholesome environment is thus interwoven with the notion of

⁷¹⁶ O.A. No. 237 (THC) of 2013 (CWPII No.15 of 2010), dated 6th of February 2014. See Chapter IV, Section I, paragraph a).

⁷¹⁷ *Ibidem*, paragraph 11.

⁷¹⁸ *Ibidem*, paragraph 17.

sustainable development and the judiciary is bound to apply a series of principles derived from the jurisprudence of the Supreme Court:

- the basic acknowledgement that the right to a wholesome environment is part of the right to life;
- the obligation by state agencies to abide the provisions of environmental statutes;
- the obligation upon state agencies to perform their environmental duties, regardless of impediments;
- the existence of the polluter pays principle in the law of the land;
- the role of the precautionary principle, that imposes the anticipation of the causes of pollution;
- the necessity to consider ecological factors, including the notion of sustainable development and the principle of intergenerational equity;
- the obligation to exercise the powers given by environmental statutes only for environmental purposes;
- finally, the public trust doctrine as the corollary of the environmental policy.⁷¹⁹

The case of vehicular pollution in Himachal Pradesh is thus the epitome of the integration of the elaboration on the right to life within the international environmental framework built around the notion of sustainable development. In fact, if the starting point is the action of state and citizens alike with a view to uphold sustainable development, which means that an action should be based on a balanced approach between the ecological and economic concerns, the logical consequence is the consolidation of the polluter pays principle, the precautionary principle and the principle of proportionality as complements to this approach.

⁷¹⁹ *Ibidem*, paragraph 18.

If the piecemeal analysis of the jurisprudence of the National Green Tribunal is certainly helpful in devising the judicial strategies for affirming environmental rights - whether by a silent recognition of the right to a clean or wholesome environment, by the explicit reference to constitutional principles or by the integration of international principles within the legal system - the resort to this third way, starting from the implementation of the principle of sustainable development in the single cases, shall unquestionably constitute the selected method for assessing the effectiveness of a Tribunal that is proving to be more mindful of substantial issues of environmental justice - for its own nature of mixed body - rather than being moved by concerns over technical or heuristic classifications.

I) Sustainable development in the jurisprudence of the NGT

a) A combined reading of the principles

The National Green Tribunal immediately started its activities with the discussion of a series of appeals arising from its competence under Section 18 of the NGT Act and from the possibility to transfer cases.⁷²⁰ Since the very first cases, the Tribunal endeavoured to implement the provision contained in Section 20 of the Act, in order to link its decisions to the principles of international environmental law. However, if the statutory aim of the Tribunal is manifest, the very aim of the Tribunal could result in a conundrum of its jurisprudence: the reference to the multifaceted notion of sustainable development - that bridges economic, social, environmental and legal dimensions - could have been the origin of a *corpus* of “asymmetrical” decisions, some reflecting a strict reading of environmental statutes, some accounting for a more economic-oriented approach.

The first cases decided by the NGT show, in this regard, the application of the statutory provisions. On the 14th of December 2011, the Tribunal adjudicated Appeal No. 5 of 2011, a case filed for challenging a forest clearance granted by the MoEF for a development project in

⁷²⁰ See Chapter IV, Section I, paragraph b).

Uttarakhand. The case, resulting from an environmental clearance already granted in 2007 and regarding a major hydroelectric project on the river Ganges,⁷²¹ had already been presented before the Supreme Court: the residual questions before the NGT thus only concerned the forest clearance, but was the occasion for a summary of the procedural steps undertaken by the project proponents. The judges, in organising the questions to be answered for delivering the decision, explicitly addressed the matter of the congruence between the project approved – involving the diversion of forest land – and the principles of sustainable development and precaution. Since previous administrative acts already comprehended the necessity to study the ecological sustainability of the project with reference to the aquatic eco-system and bio-diversity, the Tribunal entered into these issues by noting the good practice established in this case, as the project consisted of innovative initiatives such as the involvement of an NGO to act with locally affected communities, the use of less invasive technologies for pursuing certain works (e.g. tunnels) and benefits for the population in terms of educational training, employment and services.

However, the Tribunal delved into the matter of cumulative effects of the project vis-à-vis sustainable development, considering that the alleviation of single aspects does not entail a comprehensive prevention of adverse effects, including *“impacts such as quantum loss of agricultural land, barren land, river bed land, number of project affected families, villages, infrastructure, geological setting etc.”*. Thus, the Tribunal concluded that *“an integrated and comprehensive study for the purpose of a flawless approach”* was necessary for establishing coherence with the principles of sustainable development and precaution. Finally, it directed the constitution of a committee charged of the redaction of a cumulative impact assessment report.

On the contrary, the Tribunal confirmed the environmental clearance granted to the construction of a coal based thermal power plant in Maharashtra in *Balachandra Bhikaji Nalwade vs. MoEF*.⁷²² On similar

⁷²¹ *T.N. Godavarman Thirumulpad vs. Union of India & Ors.*, orders dated 27th of April 2007 and 20th of February 2009.

⁷²² Appeal No. 21 of 2011, dated 29th of November 2011.

allegations by the appellants, that argued the inconsistency of the project with reference to the impacts on the ecosystem and to sustainable development and the precautionary principle, the judges demonstrated a critical stance by applying their practical and heuristic tools to the specific case.

First of all, the Tribunal upheld the effective integration of scientific data into the appraisal phase of the project, a preliminary condition that had been directed by the High Court that initially took notice of the case.⁷²³ Then, it analysed the contention on possible damages to mango orchards and aquatic life in light of the precautionary principle: another false allegation, as it stemmed from the records of the Expert Appraisal Committee that the MoEF included in the conditions of the project the construction of a desulphurisation system, the plantation of trees as buffer and the possible measures to be applied in case the levels of sulphur dioxide exceed the standards.⁷²⁴ Finally, it reviewed the coal plant project in connection with sustainable development and stated that since the *“production of electricity is very essential for industrial growth apart from domestic need (...), in the light of the existing power scenario in the country, the project under consideration when operated within the eco-legal frame work may contribute significantly to sustainable industrial development in the area under consideration”*.⁷²⁵ Hence, the Tribunal dismissed the appeal, while confirming the necessity of actions in conformity with environmental principles.

⁷²³ *Ibidem*, paragraph 9: *“the sub-group of EAC specifically refers to Science & Technology Park (STP), Pune had compiled the information on impact of coal based power plants, particularly mango and aquatic ecology based on the published research and development papers. This was specifically evaluated and considered by the EAC. In the meeting held in the months of November and December 2009, the representatives of KKVD and Maharashtra Pollution Control Board considered their expert views prior to finalizing and forwarding recommendations. Apart from this, Prof. Saimullah of Aligarh Muslim University shared his expert knowledge and literature on the subject and his views were considered by EAC sub-group.”*

⁷²⁴ *Ibidem*, paragraphs 11-12.

⁷²⁵ *Ibidem*, paragraph 14.

The relevance of these two early judgments is the way in which they laid the foundation for the judicial reasoning of the environmental tribunal. On the one hand, the multidisciplinary and scientific approach emerges as a constituting element of the decision and catalyses the impact of the judgment, reinforced by such scientific analysis.⁷²⁶ On the other, the judges attempt to integrate international and national sources with a view to create a truly comprehensive environmental rule of law: as in the *Balachandra Bhikaji Natwade* case, the Tribunal considered the application of the precautionary principle within an administrative procedure. This is a methodology that embodies the essence of Section 20 of the NGT Act - through a combined reading of international environmental principles - and that enables the Tribunal to undertake an activist strategy towards the adjudication of cases, while maintaining the respect of the rule of law.

This activist approach is also to be seen in the case *Jeet Singh Kanwar vs. Union of India*,⁷²⁷ where the Tribunal quashed an order of the MoEF granting an environmental clearance for a coal power plant by rephrasing the principle of sustainable development and applying it to the project. While the NGT deemed the procedure of public hearing correct - another substantiation of the care the Tribunal applies with regard to upholding the rule of law - it analysed the action of the Expert Appraisal Committee and of the MoEF and considered these to be inconsistent with the environmental situation and the policies enacted by that Ministry. Indeed, the order of consent required a forest clearance and concerned an area that was not reserved for constructing polluting projects such as a coal power plant. The NGT thus condemned the general nature of the order granted and its conditional nature, as it subjected the project proponent to a series of restrictions that should have been solved beforehand. Namely, the Tribunal found the environmental clearance to be inconsistent with the principle of sustainable development and the precautionary principle. On the former, the NGT recalled the active nature of the concept of sustainable development as a “balancing act” that “requires proper evaluation of both

⁷²⁶ See *supra*, Chapter IV, Section II, paragraph b).

⁷²⁷ Appeal No. 10 of 2011, dated 16th of April 2013.

the aspects, namely, degree of environmental degradation which may occur due to the industrial activity and degree of the economic growth to be achieved". On the latter, the EAC should have examined the "probability of environmental degradation (...) and the viability of the project (...) in an area declared as critically polluted" to a "project which involved "ifs & buts". (...) Therefore, by applying precautionary principle, the EC should not have been granted by the MoEF". Since the project proponent did not succeed in discharging its onus of proof by showing that the activities were not sustainable, the NGT quashed the order by highlighting the major principles arising from the jurisprudence of the Supreme Court, namely:

"- environmental measures to be taken by the Government and statutory bodies must anticipate, prevent any attack which causes environmental degradation;

- where there are threats of serious irreversible damage, lack of scientific certainty cannot be used as a reason for postponing measures to prevent such degradation;

- the onus is on the developer to show that his actions are environmentally benign."

Hence, the Tribunal confirmed its role as a watchdog of the environment and the heritage of the Supreme Court as far as the combination of the principles is concerned. Notwithstanding the analytical work of the judges is defining the single elements of sustainable development and the application of the principles complementing it,⁷²⁸ the main strategy of the Tribunal has been to advance the integrated reading of sustainable development, precaution and polluter pays within a comprehensive paradigm.⁷²⁹

The role of the principles of international environmental law is highlighted also by the indication of them by the applicants filing a case before the Tribunal, an approach that accounts for the wisdom the

⁷²⁸ See *infra*, Section III, for the precautionary principle and the polluter pays principle.

⁷²⁹ See also, as the most relevant example, O.A. No. 237 (THC) of 2013 (CWPIIL No.15 of 2010), dated 6th of February 2014.

legislature used in including a redrafted Section 20 in the NGT Act and shows the awareness of the public with regard to the new judicial institution. In *Ramesh Agrawal vs. Union of India*,⁷³⁰ for instance, the case involving an environmental clearance was presented by the appellant as a flawed approval of a project due to the “*clear violation of the 'Precautionary Principle' and principle of 'Sustainable Development'*”. Notwithstanding the fact that the coal-based super thermal power project to be built in Chhattisgarh was approved without a proper and detailed Rehabilitation and Resettlement plan that could account for the socio-economic challenges in the area, the Tribunal held that it is possible to single out the process of environmental clearance and the presentation of a rehabilitation and resettlement plan, provided that full information regarding key issues such as the nature of the land acquired for the project and the economic activities of project affected people.⁷³¹ Hence, the Tribunal, after analysing all the scientific material reported in the different stages of the environmental clearance, dismissed the appeal due to the non-existence of the alleged violation of the principles of precaution and sustainable development.⁷³²

Again, a similar approach was pursued by other applicants to the National Green Tribunal, that inserted the principle of intergenerational equity within the judicial construction of the concept

⁷³⁰ Appeal No. 8 of 2013 (CZ), dated 22nd of August 2014.

⁷³¹ *Ibidem*, paragraph 27 V: “*if it is permissible for delinking the R&R from EC process then surely it cannot be a material defect by not providing this information in detail in the DEIAR so as to affect the grant of EC after final assessment.*”

⁷³² A conclusion that is not clearly stated - the principles are not mentioned in the judgment - but that is elaborated on the basis of the acceptance of the procedure of approval of the project, provided that if flaws in implementing environmental standards occur, the aggrieved people can approach the competent Tribunal (*ibidem*, paragraph 34: “*The PAPs can also in the event of non-implementation of R&R measures or CSR measures approach for their implementation and seek additional measures if required in the interest of general public.*”)

of sustainable development in the *Wilfred* case.⁷³³ In this application presented by fishermen aggrieved by the construction of the Vizhinjam deepwater port project in Kerala, the proponents alleged a direct violation of the principle of intergenerational equity since the project affected the ecology of the coastal area, albeit not protected by federal legislation.⁷³⁴

The paradigm applied by the National Green Tribunal seems thus aimed at fostering the reasons for environmental protection - which is a statutory mission - to the detriment of economic and purely human-centred concerns. Indeed, the purpose of the Tribunal is to set up an environmental adjudicatory mechanism that upholds the provisions contained in the most relevant statutes for environmental protection. However, the inclusion of sustainable development - and, thus, of its definitional conundrums⁷³⁵ - calls for an approach that could effectively account not only of the respect of environmental statutes, but also of the socio-economic conditions involved in the application of sustainable development, in order to foster a *corpus* of jurisprudence that assimilates a balance between human-centred actions and ecological safeguards.

b) A legally balanced approach?

As stated in the general part on international law principles, the embodiment of the notion of sustainable development comes as a result

⁷³³ M.A. No. 182 of 2014 and M.A. No. 239 of 2014 in Appeal No. 14 of 2014 and M.A. No. 277 of 2014 in O.A. No. 74 of 2014 and O.A. No. 74 of 2014, dated 17th of July 2014.

⁷³⁴ *Ibidem*, paragraph 15: “the Central Government has omitted to discharge its obligation with respect to preservation and protection of ‘coastal areas of outstanding natural beauty’. Intergenerational Equity is an integral element of ecological sustainable development and has been incorporated into international law as well. Applying that principle, it is the duty of all concerned with the present to ensure that the next generation is not exposed to undue hardship or ecological or environmental degradation.”

⁷³⁵ See *infra*, Chapter I, Section III.

of the activity of domestic courts, on a case basis.⁷³⁶ Evidently, this is also the case of the National Green Tribunal, that applied the concepts derived from international law in the Indian context, in all the environmental issues presented since its establishment. Following the definition of sustainable development of the Brundtland Report and the interpretation of the Supreme Court since the 1990s, the Tribunal addressed the applications and the appeals filed within its competences with a view to identify the correct balance between economic reasons, social requirements and environmental concerns, aided by its specialised character and its enhanced expertise. Moreover, the National Green Tribunal developed its reading of the principles by complementing the decisions of the Supreme Court, so as to build an efficient relationship with the most recent pronouncements of the apex tribunal.

One of the first cases before the Principal Bench of the National Green Tribunal epitomises the typology of judicial reasoning applied by the Tribunal. Appeal No. 7 of 2011 (T),⁷³⁷ on the expansion of a coal-based thermal power plant in Nagpur, is characteristic of the balancing approach. The appeal was presented by environmental groups and individuals affected by the project, on the ground that the expansion/substitution of the already existing power unit, in the vicinity of human habitations, would cause irreparable damages and ecological pollution. To analyse this case, the Tribunal initially confirmed the contentions of the respondent - namely, that the expansion of the plant would not provoke air and water pollution.⁷³⁸ Moreover, the judges acknowledged that the impact assessment had been conducted by consciously considering the socio-economic

⁷³⁶ See *supra*, Chapter I, Section II.

⁷³⁷ Appeal No. 7 of 2011 (T), dated 20th of September 2011.

⁷³⁸ *Ibidem*, paragraph 3: “there is no danger for environment and human life in establishing the present expanded project. There is no wastage of water. The municipal waste water is proposed to be recycled and used. Thus there is no additional requirement of fresh water from the other source. The Koradi river is 1 km away from the project site. All the precautions as to controlling the fly ash and the utility of the bottom ash have been taken care of.”

advantages arising from the implementation of the expansion project - the necessity of energy and the location of the site far from residential areas,⁷³⁹ as well as the benefits in technological advanced solutions applied to the new units.⁷⁴⁰ However, the Tribunal pointed out that the procedure did not take into account the possibility of nuclear radiation produced by the site: to analyse this health and ecological risk, two nuclear experts appeared before the judges in order to estimate the level of nuclear radiation in and around such plants. As a result, the Tribunal directed the the MoEF to study the question of nuclear radiation produced by thermal power plants and, in the specific case, stayed the project until consent to operate could be granted on the basis of cumulative impacts of nuclear radiation and water pollution are concerned, with a view to safeguard human health and ecological conditions.⁷⁴¹ Therefore, mindful of the potential risks implied in the project, the Tribunal adopted a restrictive approach, implicitly invoking the precautionary principle: while the judges upheld the correctness of the EIA procedure, that followed legal provisions, they also pointed out the inaccuracy of certain parts, with a view to obtain a comprehensive, cumulative impact assessment.

This delineation of approach - attentive to legal procedure as well as substantive reasons - was confirmed in later judgments. In the *Samata*

⁷³⁹ *Ibidem*, paragraph 6: “7 villages in the immediate vicinity of the power plant were taken up and it was found that:

i) Energy/power station was and is a primary need to assure economic growth; and
ii) Site selection of the present Environment Clearance was environmentally proper at the time of its installation because it was away from any residential area. It was then located near derelict and abandoned mica mine area and also close to proven coal deposits of Western Coalfield Ltd.”

⁷⁴⁰ *Ibidem*, paragraph 8: “the existing plant has old technology and the entire machinery is worn out and has become outdated. When they were not able to meet the norms prescribed in maintaining various pollution standards, they are going for erection of new technology plant. As many as four units are proposed to be replaced by the new technology.”

⁷⁴¹ *Ibidem*, paragraph 10.

case,⁷⁴² an appeal proposed by two non-governmental organisation with the purpose of quashing an environmental clearance for a coal-based thermal power plant in Andhra Pradesh, the project was analysed with regard to the satisfaction of the principle of sustainable development and the requirements of administrative correctness. The judges, after having read the contentions of the appellants concerning the environmental clearance procedure, delved into the appraisal phase and set administrative requirements for the analysis of a project. As the Tribunal noted a variety of environmental aspects to be appraised by the competent Committee - water issues, conservation of biodiversity, impact of fuel on the land⁷⁴³ - the judges took note of the work of the experts and ordered a review of every single aspect of the proceedings: *"the EAC should record and maintain the details of technical discussion amongst its members. This procedure demonstrates transparency in decision making and helps framing not only sector specific, but also site-specific technical conditions, both during construction and operation phases of projects."*⁷⁴⁴ Hence, the Tribunal considered the legal aspect of sustainable development, in order to guarantee a proper environmental rule of law.

With a view to uphold this elaboration, the court decided on the balance between environmental, social and economic activities by suspending for six months the environmental clearance, in the highest

⁷⁴² Appeal No. 9 of 2011, dated 13th of December 2013 (NEAA Appeal No. 10 of 2010). See also Chapter IV, Section I, paragraph c) and Section II, paragraph a).

⁷⁴³ *Ibidem*, paragraph 56: *"the main objections raised were in respect of the existence of Janjavathi river within half a kilometre from the project site and the same was not shown in the site selection criteria, the land use of the study area as well as the project area, whether there were any national park, sanctuary, elephant/tiger reserve, animal migratory route exist within 15 km, that the EIA did not mention whether the site required any filling and if so the details of filling, the important drainage on the surrounds, the information regarding surface hydrology, non availability of data in respect of meteorology, the quantum of fuel required and non availability of a confirmed fuel linkage, no statistics is made available as to the availability and use of requisite availability of water, discharge of water not provided to the downstream users, non mentioning of ash pond impermeability and soil analysis report."*

⁷⁴⁴ *Ibidem*, paragraph 58.

interests of the environment and ecology, so that the Expert Appraisal Committee could reappraise the single issues highlighted by the Tribunal.⁷⁴⁵ This decision thus stroke a balance that could in turn safeguard the environment as well as the economic projects already undertaken: the work of the Tribunal has thus been, on the one hand, to scrutinise technical data and, on the other, to employ those data for ensuring a strict control of administrative procedures, based on transparency and the rule of law. Thus, the approach of the Tribunal in identifying the responsiveness of a project to sustainable development starts from the ascertainment of scientific facts, then includes a study of the legal provisions prohibiting or allowing such activity, in order to finally appraise the possible equilibrium between environmental and economic reasons.

The same framework was derived by precedent cases adjudicated by the Tribunal, as in *Gau Raxa*⁷⁴⁶ and in *Rudresh Naik vs. Goa Coastal Zone Management Authority*.⁷⁴⁷ In the latter, the judges examined in detail the legal aspects pertaining to the construction of a marine slipway for touristic purposes and affirmed the arbitrariness of the decision of Goa authorities to forbid the construction of a dock, since the reasons presented by the administrative body were clearly out of the scope of the issue and not based on evidence.⁷⁴⁸ By adopting the *Wednesbury* principle and referring to the relevant jurisprudence of the Supreme Court, the environmental judge set aside the order and maintained the coherence of the project with regard to ecological necessities.

This balanced approach read in legal terms has again been expressed in the case of the *sand quarrying activities in River Cauvery and River*

⁷⁴⁵ *Ibidem*, paragraph 64.

⁷⁴⁶ Appeal No. 47 of 2012, dated 22nd of August 2013. See also Chapter IV, Section II, paragraph a).

⁷⁴⁷ Appeal No. 20 of 2013, dated 16th of May 2013.

⁷⁴⁸ *Ibidem*, paragraph 12: “the proposal of the appellant has been rejected on the ground that execution of the proposal is likely to cause extensive damage by undertaking unauthorised hill cutting and would thereby cause irreparable damage to the hilly terrain. Thus, the sole ground on the basis of which the proposal of the appellant has been rejected is founded on the factum of the area being a hilly terrain.”

Coleroon in Tamil Nadu,⁷⁴⁹ where the Tribunal delved into the issue of the exploitation of minor minerals - a subject apparently considered of a limited relevance in comparison with the major developmental projects.⁷⁵⁰ After a first appraisal of the issue by the High Court of Tamil Nadu and of the Supreme Court, that acknowledged the combined impact of small projects on the environment, the National Green Tribunal was seised of the issue by a number of appellants concerning the grant of the environmental clearance to these projects.⁷⁵¹ Referring to the *Deepak Kumar* case before the Supreme Court, that enabled local Governments to issue such permits,⁷⁵² the judges settled for the contentions of the appellants. As they pointed out the relevance of sand mining activities for the economy of the region, they also recalled the necessity of paying due respect and implement the principles of environmental protection: ⁷⁵³ hence, in absence of

⁷⁴⁹ Appeal Nos. 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 of 2013 (SZ), dated 24th of February 2014.

⁷⁵⁰ See, for instance, the judgments analysed in Chapter IV, Section II, on environmental clearances.

⁷⁵¹ *Ibidem*, paragraph 2: “the Hon’ble Madurai Bench of the Madras High Court in W.P. (MD).No.4699 of 2012 directed to stop the operation of sand quarries. (...) The report on sustainable mining of minor minerals submitted in March 2010 to the Central Government clearly states that the mining of minor minerals individually is perceived to have lesser impact as compared to mining of major mines because of the smaller size of mine leases. However, the activity as a whole is seen to have significant adverse impacts on the environment.”

Paragraph 3: “the Hon’ble Supreme Court of India in Special Leave Petition (C) Nos. 19628-19629 of 2009 has observed that the quarrying of river sand (...) may have an adverse effect on bio- diversity as loss of habitat caused by sand mining will affect various species, flora and fauna and it may also destabilize the soil structure of river banks and often leave isolated islands.”

⁷⁵² *Deepak Kumar & Ors vs. State of Haryana*, I.A. Nos. 12-13 of 2011 in Special Leave Petition Nos. 19628-19629 of 2009 dated 27th of February 2012.

⁷⁵³ Appeal Nos. 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 of 2013 (SZ), dated 24th of February 2014, paragraph 26: “indiscriminate sand mining without assessing the carrying capacity of the area and the environment and without a holistic and comprehensive assessment of the impact of

guidelines from the competent Ministry for this category of economic activities, the Tribunal extended the decision in *Deepak Kumar* to the cases in Tamil Nadu, while ordering the sole continuation of present activities for six months, under strict environmental conditions. The judges thus entered into the domain of the executive due to the inaction of the MoEF⁷⁵⁴ and stroke a balance that guaranteed the economic needs of the districts, while pushing for a stricter local governance of the processes, in order to achieve an efficient compromise that would safeguard the reasons of ecological protection.

The manifestation of efficient compromises is, however, not a constant characteristic of the implementation of sustainable development by state and private actors. The case *Krishan Kant Singh vs. National Ganga River Basin Authority*⁷⁵⁵ is an illustration of the challenges faced by the Tribunal, following the neverending litigation process pending before the Supreme Court on the pollution of the Ganges. In this application, the environmental judges considered the dramatic situation of the river, contaminated by pollution arising from multiple sources,⁷⁵⁶ in

mining is contrary to the Principles of Sustained Development and Precautionary Principles. The Hon'ble Supreme Court of India in Research Foundation for Science Technology and Natural Resources Policy vs. Union of India (AIR 2007 SC (Supp) 852), has reaffirmed the 'Precautionary Principle' and 'Polluters-Pay' principles are part of the concept of Sustainable Development. The applications of those principles are well settled and they govern the law in our country as is clear from Articles 47, 48-A and 51-A (g) of the Constitution of India."

⁷⁵⁴ *Ibidem*, paragraph 48: "with regard to categorization of river sand mining projects, no guidelines were evolved by the MoEF from September 2006 to December, 2013. We are of the considered view that the present litigations would not have knocked the doors of the Tribunal if only the mandated guidelines were made available in time by the MoEF."

⁷⁵⁵ M.A. Nos. 879 of 2013 and 403 of 2014 in O.A. No. 299 of 2013, dated 16th of October 2014.

⁷⁵⁶ *Ibidem*, paragraphs 1-2: "260 million litres of industrial waste-water, largely untreated, is discharged by these units while the other major pollution inputs include runoff from the agricultural fields. It is submitted that more than 6 million tonnes of chemical fertilizers and 9,000 tonnes of pesticides are used annually within the basin. (...) Sulphur dioxide is produced by fuel combustion and burning of sulphur about 3-4

particular from sugar mills, and attempted to respond to the requests of the applicants for prohibiting the discharge of toxic effluents.

In light of the proven lack of compliance by the industries,⁷⁵⁷ confirmed by an inspection directed by the Tribunal,⁷⁵⁸ the judges acknowledged the corporate social responsibility of the sugar mills, that are bound to adhere to environmental rules, without raising financial issues on the

times daily, for sulphitation and sugar mills and distiller. The leakage of SO₂ causes eye irritation and if greater in amount, even leads to acid rains. Fly ash that escapes through chimneys with CO₂ not only contributes to air pollution but causes immense harm to human health. The sugar mill discharges about 1.25 lakh litres effluents approximately per hour for lagooning. The seepage of the effluents pollutes the ground water. The water becomes harder, oily and greasy and unfit for consumption. Thus, the unit causes both air and water pollution."

⁷⁵⁷ *Ibidem*, paragraph 7: "the unit was to install incineration boiler for spent wash management, restrict total storage capacity of storage lagoons to 30 days of spent wash generation for composting and install Sewage Treatment Plant for management of domestic effluent"

⁷⁵⁸ *Ibidem*, paragraph 27: "in the report, the Expert Members noticed various defects and shortfalls in the functioning of these units and that they still were a source of serious pollution. It was particularly noticed that the effluents flowing in Phuldera drain was having high level of pollution and that such level of pollution was not possible, especially the BOD, COD and TDS, except due to discharge of sugar mill effluents. (...) Such highly concentrated pollutants would only result from a sugar factory and not even from any sewage discharge. The distillery unit had provided treatment facility but the treatment units were not adequately working. The concept of Zero Liquid Discharge was also not adhered to. The unit had no separate arrangement for collection, treatment and disposal of leachate and storm water, therefore, the entire storm runoff gets contaminated by spent wash, press mud or bio-compost as it is all in open and is exposed to rain. The sugar mill ETP was found to be operational, however, the lagoon receiving its treated effluent was having very high level of pollution. (...) The Expert Members, taking advantage of the site inspection even provided a "way ahead", giving different suggestions and steps that the Unit should undertake to ensure no pollution. Out of the 14 suggestions made, 13 related to the Simbhaoli Sugar Mills and Distillery Unit for preventing and controlling the pollution resulting from their activities."

matter.⁷⁵⁹ As a result, the green court considered the responsibility of the industries and the financial liability for relief and compensation with regard to these violations of the precautionary principle and of the polluter pays principle, “*in consonance with the principle stated under Section 15 read with Section 20 of the NGT Act*”.⁷⁶⁰ Hence, the Tribunal fixed a compensation of 5 crores rupees and directed the company to fulfil its obligation concerning preventive measures.

This judgment can be considered a stepping stone insofar as the domestic application of sustainable development is concerned. Firstly, it embodies the balancing test that is needed for implementing the principle: as the Tribunal stated, “*right to carry on business cannot be permitted to be misused or to pollute the environment so as to reduce the quality of life of others. Risk to harm to environment or to human health is to be decided in the public interest according to ‘a reasonable person’s test’*.”⁷⁶¹ As the sugar mills have constantly missed the equilibrium between social, economic and environmental reasons, in combination with the lack of legality on the whole procedure for consent to operate, the judges could not but censor the conduct of the company, that failed its obligations arising from corporate social responsibility. Moreover, the misconduct with regard to environmental statutes resulted in the violation of both the complementary principles, precaution and polluter pays.⁷⁶² Therefore, the judges implicitly affirmed the non-compliance with sustainable development, with reference to the human side (the corporate social responsibility of the enterprise), but also of the ecological aspect, if one considers the environmental damages produced on the fluvial ecosystem of the Ganges.

⁷⁵⁹ *Ibidem*, paragraph 35: “*the unit is a regular source of pollution till the time it achieves Zero Liquid Discharge. It cannot be stated that the unit would become a compliant or non-polluting unit. The plea of financial burden cannot be permitted to raise as a defence for non-compliance of law particularly, in the field of environment and secondly, such financial implication is indispensable part of the Corporate Social Responsibility of this unit.*”

⁷⁶⁰ *Ibidem*, paragraph 49.

⁷⁶¹ *Ibidem*, paragraph 51.

⁷⁶² See also *infra*, Section III.

The aforementioned cases are typical of a court that adjudicates environmental cases arising as appeals from local authorities involved in regulation of polluting activities: as businesses are not compliant to the environmental rules, and local bodies lack enforcement abilities, the Tribunal operates as a watchdog for ensuring the respect of the environmental rule of law in human activities and for guaranteeing the balance between economic and environmental rights of the citizens. However, this is not the only perspective of the issue, since purely ecological concerns too are introduced as a constant operationalised view of sustainable development.

c) Sustainable development and ecological concerns

Although the Tribunal has frequently been focusing on the human side of sustainable development, the ecological part of the principle has not been neglected by the environmental judge. If many decisions reflect the anthropocentric view of the concept - due to the nature of applications, based on the relief toward situations affecting people living in a particular area - the Tribunal has also developed a jurisprudence devoted to purely ecocentric concerns. This constitutes another evidence of the multidimensional nature of the National Green Tribunal, that accounts for an enhancement of the quality of judicial decisions, producing in turn - on paper - an improvement in environmental protection and conservation.

However, conscious of its powers, the Tribunal endeavoured to draw certain limits to its action on the basis of international law principles. Noting the pervasiveness of the principle of sustainable development, that could enable the judges to pronounce in each and every issue, the Tribunal stated the preeminence of statute law in small cases, allowing the display of international principles in adjudicating more substantial issues. This was the view presented in *Devendra Kumar*,⁷⁶³ a case on environmental degradation on the Aravalli Hills of Haryana allegedly caused by the activities of sale of marble, liquor and business of gas

⁷⁶³ O.A. No. 91 of 2012 and M.A. Nos. 26, 27, 35, 36,37,38,39 of 2013, dated 14th of March 2013.

godowns. As the case dealt with the contravention to a notification indicating the extent of forest area - and the subsequent prohibition of pursuing certain commercial and industrial activities - the Tribunal affirmed the non-necessity of resorting to sustainable development,⁷⁶⁴ but only to the polluter pays principle in case the violations exceed the scope of law.⁷⁶⁵

This judicial restraint is at any rate rarely applied by the Tribunal, especially when adjudicating issues more strictly related to the ecocentric aspect of sustainable development. The judges delved into plain ecological matters in *Ossie Fernandes vs. MoEF*,⁷⁶⁶ a case filed by Coastal Action Network, a group of organisations (representing fishing, environmental and legal interests) aiming at protecting bio-diversity in the coastal area of Tamil Nadu, against an environmental clearance granted to a project for the construction of a thermal power plant. As the appellant claimed the insufficiency of the public hearing and of the final Environmental Impact Assessment report leading to the approval of the project, citing irregularities in the procedure and substantial variation of data, the Tribunal analysed the procedure for environmental clearance step by step. Notwithstanding the fact that the judges did not find discrepancies in the modalities of conduct of the EIA report,⁷⁶⁷ some ecological features of the project were deemed unsatisfactory, such as the protection of turtle nests,⁷⁶⁸ the impact of fly

⁷⁶⁴ *Ibidem*, paragraph 11: “these are not the cases, which need to be determined on principles of equity or sustainable development.”

⁷⁶⁵ *Ibidem*: “it is a fit case where the intervener-applicant should be directed to take certain steps to correct and make good, the damage that has been caused to the environment of the area in question on the basis of the ‘Polluter Pays’ principle.”

⁷⁶⁶ Appeal No. 12 of 2011, dated 30th of May 2012.

⁷⁶⁷ *Ibidem*, paragraph 8a: “the procedures contemplated in the EIA Notification, 2006 beginning with the submission of Application in Form I by the project proponent, issuance of ToR, EIA Study and Report by MoEF, GoI accredited consultant, PH by State Pollution Control Board and appraisal of proposal by EAC have been complied with in full.”

⁷⁶⁸ *Ibidem*, paragraph 8b: “EAC has not verified and considered this issue and simply relied only on the presentation made which does not even mentions sources of study,

ash due to the use of coal in the plant⁷⁶⁹ and more generally the impact on marine environment.⁷⁷⁰ Hence, keeping in mind the provisions of Section 20 of the Act, the Tribunal only directed to update the EIA report according to the ecological requirements advanced by the appellants.

The same approach towards ecological protection is to be seen in *Shobha Phadanvis vs. State of Maharashtra*,⁷⁷¹ on the use of forests and natural resources in general. Despite the constant reference to sustainable development and the judicial argumentations analysed so far,⁷⁷² the explicit enunciation to the method for implementing the principle and the constitutional reference to natural protection and conservation have been delivered in this judgment. Indeed, on the prevention of illegal cutting and smuggling of seasonal wood in Maharashtra, the Tribunal affirmed that “*natural resources are the assets of entire nation. It is the obligation of all concerned including Union Government and State Governments to conserve and not waste these resources. Article 48A of the Constitution of India requires the State shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country. Under Article 51A, it is the duty of every citizen to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. In the present case, the question is about conservation, preservation and protection of forests and*

etc. May be Olive Ridley Turtles were not recorded, (...) but then there being no mention of Turtles sighting in proximity in the EIA report sudden inclusion of precautionary measures at the time of presentation before EAC raises some doubts.”

⁷⁶⁹ *Ibidem*, paragraph 8c: “*there appears to be a drastic variation in the ash content of the proposed coal use. This definitely creates a doubt in the mind as to what is the correct position of the usage of coal.*”

⁷⁷⁰ *Ibidem*, paragraph 8f: “*the appraisal does not reflect consideration to the fact that how hot water would be brought to a temperature which is only 5 degrees Celsius above normal before discharging back into the sea. Similarly, what shall be the procedure for discharging ash pond slurry and its impact on marine environment needs to be examined appropriately.*”

⁷⁷¹ O.A. No. 135 of 2013 (WZ), dated 13th of January 2014.

⁷⁷² Both in Chapter IV and V.

the ecology."⁷⁷³ Moreover, the constitutional safeguard of nature has been complemented by the confirmation of the "interactive" definition of sustainable development delineated by the Supreme Court as "*the development, that can take place and which can be sustained by nature/ecology with or without mitigation,*" taking into account a balance that "*has to be struck, for the reason that if the activity is allowed to go, there may be irreparable damage to the environment and there may be irreparable damage to the economic interest.*"⁷⁷⁴

Mindful of this definition, the environmental judges directed the continuation of action plans related to forest management and preservation, the maintenance of interim orders based on the precautionary principle and the adoption of remote surveillance techniques.⁷⁷⁵ Therefore, the Tribunal reasserted the role of ecological principles - implicitly based on the public trust doctrine and on intergenerational equity - within the constitutional and international framework, an ecological approach that gradually - and only partially - shifts the equilibrium of sustainable development toward an eco-centric notion, or at least an "eco-aware" aspect. This is a view that has been occasionally advanced by the green judges, especially in cases involving conservation of biodiversity. For instance, the case of the dolomite mining in Kanha National Park, threatening the tiger reserve located in the natural park, that has already been mentioned as a *suo motu* proceeding,⁷⁷⁶ is a consistent illustration of the eco-sensitive approach.

In this framework, a series of decisions can be considered. Although the Tribunal should not be vested with jurisdiction on wildlife, as the correspondent Act is not part of Schedule I, the judges considered to be seised of the matter of the passage of tigers in the corridor between

⁷⁷³ *Ibidem*, paragraph 22.

⁷⁷⁴ *Ibidem*, paragraph 21.

⁷⁷⁵ *Ibidem*, paragraph 24.

⁷⁷⁶ O.A. No. 16 of 2013, dated 4th of April 2014. See also supra, Chapter IV, Section I, paragraph a).

national parks due to the extensive definition of environment.⁷⁷⁷ Therefore, the Tribunal endeavoured to pragmatically study the interrelation between men and animals caused by the growing anthropic activities (in this case, mining between natural reserves) and concluded that *“wildlife and its habitats are part and parcel of environment and preservation of environment shall form the centre stage of implementation of management practices and therefore it is for the authorities to examine how far the existing Dolomite mines in Mandla District are permitted to continue their operations as these mines are located in close proximity to the wildlife habitats”*.⁷⁷⁸ As a result, the environmental court left to the competent administrations the decision on the steps to be undertaken for safeguarding wildlife - with a crystal-clear eco-centric inclination - that shall include penal action for those industries operating without consent and coordination among local and governmental actors in order to find a suitable solution for the problem.⁷⁷⁹

Notwithstanding these decisions centred on the conservation of natural resources, in general judgments are focused on the human side of the matter, even though the ecological concerns raise awareness on the part of judges. This tentative ecological approach is also to be seen in the *M.P. Patil* case,⁷⁸⁰ where the Tribunal ordered the rescrutiny of environmental conditions for allowing the continuance of operations on the big thermal power project in Kudgi, Karnataka. Having acknowledged the inconsistency of the analysis of the Expert Appraisal Committee with regard to the impact of the developmental project on the environment, the Tribunal elaborated several rules of sustainable development that included:

- a complementary definition of **protection** (the maintenance of current environmental conditions) and **conservation** (the effort

⁷⁷⁷ *Ibidem*, paragraph 23: *“wildlife is a part of environment and any action that is causing damage to the wildlife or that may likely to lead to damage to the cause of wildlife, cannot be excluded from the purview of this Tribunal.”*

⁷⁷⁸ *Ibidem*, paragraph 28.

⁷⁷⁹ *Ibidem*, paragraph 34.

⁷⁸⁰ Appeal No. 12 of 2012, dated 13th of March 2014. See also Chapter IV, Section II, paragraph a).

aimed not only at preserving, but chiefly at improving the state of environmental resources);

- an **administrative process** based on the rule of law - a proper environmental rule of law - that accounts for participation, transparency, efficiency and reflects the needs of local populations (social as well as environmental) through consensus.⁷⁸¹

Hence, from the present analysis, the main points of purview of the eco-centric aspect are thus mainly related to human-based

⁷⁸¹ *Ibidem*, paragraph 75: “Rapid and unchecked development would adversely affect the environment. Protection of the vital resources is the need of hour. Gandhian postulation recognized the rules for sustainable development and described them as follows:

”1). **CONSERVATION**: Preservation and nurturing of the vital resources, that still remain, are the *sine qua non* for good environmental management. Conservation as an idea is not merely confined to retaining whatever that is left, but involves a whole range of activities aimed at rejuvenation and propagation.

2). **PROTECTION**: Securing the resource and insulating it from any shocks of destruction and degradation is in contemplation here.

3). **NON-DEGRADATION**: Ensuring the intrinsic quality of the resources is not lost, while putting the same to use, and constitutes the basic tenet of proper and scientific resource use.

4). **ADMINISTRATION** that is **TRANSPARENT**, **ACCOUNTABLE** and **PARTICIPATORY** is a major requirement. This acknowledges the fact that the resources cannot be managed from above and finding local solutions to environmental problems would ensure effective and efficient environmental management.

5). **LAW, POLICY AND PRACTICE** in environmental management should emerge from and evolve out of people’s needs and compulsions and be the result of crystallized home spun wisdom.

6). **EQUITABLE SHARING OF BENEFITS** is another underlying principle of good environmental governance, and

7). **CONFLICT AVOIDANCE AND CONSENSUS BUILDING THROUGH CONSULTATIVE PROCESSES** in Environmental decision-making is the crowning aspect of the system of administration. The litmus test for the existence of a healthy and wholesome environment, in any system, depends upon the internalization of these principles in the legal ordering.”

requirements: on the one hand, the necessity of guaranteeing intergenerational equity not only as a value in itself, but chiefly as a method for ensuring the future livelihood of mankind; on the other, the embodiment of ecological aspects into the framework of the respect of the rule of law. Therefore, in the comprehensive review of the notion of sustainable development in the interpretation of the National Green Tribunal, the main approach is constituted of a visible stance in favour of environmental protection - preeminently leaning towards the man-centred concept - that confirmed the tripartite notion of sustainable development, precautionary principle and polluter pays principle.

II) Precautionary principle and polluter pays: necessary complements

a) The precautionary principle as the embodiment *ex ante* of sustainable development

If the Tribunal often refers to sustainable development as the principal goal to attain in adjudicating disputes presented before the environmental jurisdiction, the necessary complement to this concept - in order to replenish of content the decisions - is the implication of the principle of precaution and the polluter pays principle. Indeed, as the Supreme Court fostered the notion of sustainable development with reference to the other two pillars of international environmental law,⁷⁸² the National Green Tribunal followed the path opened by the apex court in devising an efficient strategy of decision-making by enriching its judgments through a constant reference to those international principles relevant to the analysis of the single cases - an approach that is also indicated in Section 20 of the foundational Act. Concerning the precautionary principle, the Tribunal endeavoured to construct a concept open to both anthropocentric and ecocentric visions, in spite of a general emphasis on the former aspect.

Two “streams” of decisions adopting the principle of precaution as the focus of the analysis exemplify this approach: on the one hand, the

⁷⁸² See *supra*, Chapter III, Section II.

judgments on environmental clearance for power projects show a tendency of the Tribunal toward the preservation of nature as a value in itself; on the other, the recurrent issues on municipal solid waste management clarify the man-centred content of precaution for present generations, in order to diminish pollution and health hazards.

In this framework, the Tribunal started to pursue an international approach since its first judgments. In the case *Sarpanch Grampanchayat vs. MoEF*,⁷⁸³ whose decision was issued on the 12th of September 2011, the Writ Petition transferred by the High Court of Bombay on a case of environmental clearance granted for the project of mining at Tiroda Iron Mine was adjudicated following the precautionary principle and the polluter pays principle.⁷⁸⁴ As the Tribunal ascertained the absence of measures of precaution following the environmental clearance procedure, it ordered the respondent to seek a “*fresh consideration*” of the matter by the Expert Appraisal Committee, based on a “*fresh report in so far as causing air, noise and water pollution keeping in view the proximity of the school as observed in this judgment and may recommend for relocating the school by constructing a new building at a safe location within Tiroda revenue village with similar accommodation and suitable playground around*” and “*as to existence of number of iron ore mines in Sawantwadi Taluk and their cumulative effect on the environment and ecology of the area particularly the Tiroda village.*”⁷⁸⁵

The same approach on precautionary measures is to be observed in several cases dating back from the first months of activity of the Tribunal. In *Vimal Bhai*,⁷⁸⁶ a case on the adjudication of a forest clearance for a project of a diversion dam across a river in Uttarakhand for generating hydroelectricity power (involving a deforestation of 80.507 hectares), the Tribunal acknowledged the contentions of the

⁷⁸³ Appeal No. 3 of 2011, dated 12th of September 2011.

⁷⁸⁴ *Ibidem*, paragraph 11: “the EC ignored both the ‘precautionary principle’ and the ‘polluter pays principle’ which is contrary to the pronouncements of the Hon’ble Supreme Court.”

⁷⁸⁵ *Ibidem*, paragraph 21.

⁷⁸⁶ Appeal No. 5 of 2011, dated 14th of December 2011.

appellant vis-à-vis the hydroelectric project,⁷⁸⁷ but recognised that the environmental flows fixed by the authority were in accordance with the principles of sustainable development and precaution,⁷⁸⁸ as well as the consideration of the impact on the ecology made by the Forest Appraisal Committee.⁷⁸⁹ Again, on a similar matter, *Jaya Prakash Dabral vs. Union of India*,⁷⁹⁰ the Tribunal adopted an identical approach,⁷⁹¹ although it refrained from deciding over the issue of an incident on a dam due to the parallel pendency of a Writ Petition before the High Court of Uttarakhand.

Again, the scope of the principle of precaution was deployed in *T. Murugandam vs. MoEF*,⁷⁹² a judgement addressed to evaluating the validity of an environmental clearance for a coal based thermal power

⁷⁸⁷ *Ibidem*, point c: “negative impact of tunneling on water springs and its subsequent impact on forests and agriculture; Methane emissions from reservoirs; deterioration in water quality due to less absorption of beneficent chemicals; loss of aesthetic and ‘non-use values’; value of free-flowing rivers; breeding of mosquitoes in reservoirs and the negative impact on health; deprivation of sand and fish to local people; negative cultural impacts; and negative impact of blasting/ tunneling, etc.”

⁷⁸⁸ *Ibidem*: “after examining the figures and facts and the arguments made and considering the provisions made in the stipulations in the FC based on a scientific study by IITR within the available timeframe and resources coupled with flexibility option for revising the same, we are of the considered opinion that the stipulations regarding environmental flow certainly follows the sustainable development and precautionary principles.”

⁷⁸⁹ *Ibidem*: “the project is a national project undertaken by the Government of India and all the precautionary principles were incorporated in the EC and FC to meet the mitigative measures in handling the project; may be in the form of stipulations to implement all the measures as suggested by the respective institutions/authorities.”

⁷⁹⁰ O.A. No. 12 of 2011, dated 14th of December 2011.

⁷⁹¹ *Ibidem*: “suppose, there is no possibility of improving the situation which resulted in environmental and ecological threats, appropriate steps may have to be taken by this Tribunal while keeping in view the principles of sustainable development; the precautionary principle and the polluter pay principle. May be the forest clearance cannot be directly dealt with but we can definitely examine the matter in the light of the above discussion.”

⁷⁹² Appeal No. 17 of 2011 and NEAA No. 20 of 2010, dated 23rd of May 2012.

plant in Tamil Nadu, allegedly causing damages to the marine environment as well as on the health of fishermen living in the surrounding areas. As in a number of decisions on environmental clearances,⁷⁹³ the Tribunal argued the absence of cumulative impact assessment of the project and directed the competent authorities to review the procedure for granting the authorisation only for proposing mitigative measures respondent to the precautionary principle for preserving the marine environment.⁷⁹⁴

Moreover, the Tribunal confirmed the reading of the reversal burden of proof,⁷⁹⁵ as in the *Pandurang Sitaram Chalke* case,⁷⁹⁶ with the judges stating (in a case on mining activities) that the evidence that the change in the environmental status quo would not lead to pollution or ecological deterioration must be brought by the proponent of a developmental project, not by applicants interested in the safeguard of the environment.⁷⁹⁷

⁷⁹³ See *supra*, Chapter IV, Section II, paragraph a).

⁷⁹⁴ Appeal No. 17 of 2011 and NEAA No. 20 of 2010, paragraph 20: “*we strongly feel keeping in view the precautionary principle and sustainable development approach, cumulative impact assessment studies are required to be done in order to suggest adequate mitigative measures and environmental safeguards to avoid any adverse impacts on ecologically fragile eco-system of Pichavaram Mangroves and to the biological marine environment in the vicinity. We, therefore, direct that cumulative impact assessment studies be carried out by the Project Proponent especially with regard to the proposed Coal Based Power Plant (2x660 MW) of Cuddalore Power Company Ltd. and the Nagarjuna Oil Refinery and other industrial activities within a radius of 25 km from the Power Project of M/s. IL&FS Tamil Nadu Power Co. Ltd. (3600 MW).*”

⁷⁹⁵ See *supra*, Chapter III, Section II, on the jurisprudence of the Supreme Court.

⁷⁹⁶ O.A. No. 14 of 2012, dated 1st of October 2013

⁷⁹⁷ *Ibidem*, paragraph 17: “*the environmental governance principle of ‘Precautionary Principle’ has led to the special principle of ‘Burden of proof’ in the environmental cases where Project Proponent has been entrusted with responsibility of proving that the project activities will not cause any injurious effects of the pollution on the environment. This is very important principle as this is often termed as reversal of the burden of proof because otherwise in the environmental cases the common citizen will*

The gist of the reasoning of the Tribunal is thus aimed at an enlargement of the administrative domains in which the precautionary principle can be applied, with a view to ensuring a sort of *Drittwirkung* of this principle. Indeed, by imposing administrative steps - such as the cumulative impact assessment - that force the competent authorities to take into account precautionary measures, the same approach has to be envisioned and implemented by private companies, in order to obtain environmental clearance. As a result, in the opinion of the environmental judges, the precautionary principle has thus to be integrated in public policies as well as in private enterprises - since every project potentially dealing with environmental issues has to pass an “environmental threshold” to be analysed by the competent authorities, thanks to the strict regulatory framework (at least on paper) defined in the Notification of 2006. Hence, if the precautionary principle shall be applied by state authorities, that under the doctrine of public trust must protect the environment for future generations and actively seek to prevent possible harm,⁷⁹⁸ privates too shall aim at internalise precautionary measures.

While the Tribunal has often adjudicated cases involving companies engaged in developmental projects (thermal or hydroelectric plants, for instance, as in the previous section), a “stream” of cases concerning public policies or projects testify of the insufficient implementation of

be asked to provide the scientific and technological data in order to preserve the “Status Quo” and for opposing or raising concerns of the environmental degradation.”

⁷⁹⁸ Among many, refer again to the *Pandurang Sitaram Chalke* case (O.A. No. 14 of 2012, dated 1st of October 2013), where the Tribunal stated, in paragraph 19 of the judgment, that “*all the Regulatory Authorities including the District Mining Officer and the State Pollution Control Board shall take enough precaution based on the ‘Precautionary Principle’ to mitigate environmental impacts and damages. The Doctrine of the public trust is one of the settled principles of the environmental governance. This Doctrine is more an affirmation to the State Power for utilization of public property for public good. It is also an affirmation of the duty of the State to protect people’s common heritage and environment and therefore, these Regulatory Authorities are expected to play a pro-active role in the enforcement and compliance of the environment regulations in order to avoid such conflicts.*”

the panoply of environmental laws enacted since the 1970s. Among these streams of jurisprudence, a relevant part concerns the management of solid wastes, a never-ending issue that could not but be aggravated by the constants demographic growth.⁷⁹⁹ One of the first cases decided by the Tribunal in 2011, *Gram Panchayat Totu (Majthai) vs. State of Himachal Pradesh*,⁸⁰⁰ epitomises the difficulties of governmental authorities in devising strategies for managing a sustainable development that is mindful of economic and environmental needs.

In the abovementioned case, local villagers of Totu, near Shimla, have challenged the construction of the solid bio-waste management plant due to the vicinity to the township. Although the operation of the plant would result in the degradation of the environment for the inhabitants, the project had already been approved and supported by the directions of the local High Court, that ordered the speedy construction of the waste management plant because of an accident involving another plant in Shimla. Recalling the relevance of the precautionary principle, as advanced in the jurisprudence of the Supreme Court,⁸⁰¹ the judges ascertained the non-compliance of the MSW Rules on the part of local authorities charged with the implementation of the directions of the High Court. However, the result of the order of the High Court of Himachal Pradesh was caused by the obsolescence of the regulations, dating back to 2000: in the view of the environmental judges, the directions of the court, imposing the construction of the plant in Totu, had been framed so as to identify a place where environmental damages could be avoided. The difficulties in fulfilling such directions - due to the large scope of action left to the authorities for managing solutions, without specific reference to preventive measures - resulted in a decision to maintain the project already approved (and suggested) by the High Court, with the obligation of pursuing the construction of the plant following the “mandatory requirement stipulated in *Municipal Solid Waste (Management and Handling) Rules, 2000 as well as after*

⁷⁹⁹ See also *infra*, paragraph b), on the *Yamuna river* case.

⁸⁰⁰ O.A. No. 2 of 2011, dated 11th of October 2011.

⁸⁰¹ *Ibidem*, paragraphs 20-22. See *infra*, Chapter III, Section II, paragraph b).

obtaining EC under the provisions of EIA Notification, 2006”,⁸⁰² but also with the recommendation to the MoEF to review the MSW Rules in order to integrate the precautionary principle into the regulation, in order to indicate specific requirements to implement environmental protection for the sake of the ecology and of human livelihood.⁸⁰³

While the process of amending the Rules of 2000 is still ongoing,⁸⁰⁴ the authorities have undertaken several steps for inserting measures respondent to the precautionary principle within legislation and executive rules - a process that the National Green Tribunal has recognised and positively valued. This is the case of *Jarnail Singh vs. Union Territory Chandigarh*,⁸⁰⁵ where the Tribunal upheld the validity of the rules framed by the Chandigarh Authority that imposed the total ban on manufacture and use of polythene carry bags (although the Plastic Waste (Management and Handling) Rules of 2011 still permit the production of such bags). In spite of the apparent contradiction between a notification of a local government and central rules enacted in a three-year period, the Tribunal confirmed the local regulations as

⁸⁰² *Ibidem*, paragraph 31.

⁸⁰³ *Ibidem*, paragraph 30: “we feel that the MoEF should review the MSW Rules, 2000, and make it more realistic and comprehensive in terms of the environmental requirement for protection of natural habitat, human settlement, water bodies and other sensitive areas etc. by specifying the minimum distance required to be maintained from the MSW Plant vis-à-vis those areas. Prescribing minimum distance criteria of ecologically sensitive areas and human habitation etc. from the proposed site will go a long way towards preventive measures to avoid environmental ramification, including the problem of obnoxious / foul smell / odour associated with such other hazards. The precautionary principle as enunciated under Section-20 of the NGT Act vis-à-vis the authoritative pronouncement of the Hon’ble Supreme Court, (*Supra*) requires and mandates that the MoEF should prescribe criteria which are workable, unambiguous and not vague. This Tribunal therefore, call upon the MoEF to critically review the MSW Rules, 2000 and make it more pragmatic, and workable.”

⁸⁰⁴ See *supra*, Chapter II, Section II, paragraph b). For a scientific yet legal analysis of the phenomenon, Mane A.V., *A Critical Overview of Legal Profile on Solid Waste Management in India*, in *International Journal for Research in Chemistry and Environment*, Vol. 5, Issue 1, 2015, pp. 1-16.

⁸⁰⁵ O.A. No. No. 26 of 2013 (THC), dated 8th of August 2013.

they stemmed from Section 5 of the Environment (Protection) Act, a provision that enables prevention of environmental harm; in this framework, the Rules of 2011 have been deemed equally valid, but with a mere regulatory aim that does not impede emergency or specific measures as the notification of the Union Territory of Chandigarh.⁸⁰⁶ Hence, the Tribunal supported the action of local authorities towards the indication of specific measures embodying the precautionary principle - in this particular case, the introduction of recyclable bags - and recommended the adoption of similar steps in all the territory of the country.⁸⁰⁷

Again, the matter of solid waste management was addressed in the *Rayons-Enlightening Humanity* case,⁸⁰⁸ where the environmental court applied the test of reasonableness to the proposed project for a waste management plant only aimed at segregating and dumping.

⁸⁰⁶ *Ibidem*, paragraphs 14-16: “the emphasis on exercise of powers under Section 5 of the Environment Act is polluter centric. These powers could be exercised by invoking precautionary principle, polluter-pays principle or could even be prohibitory where the situation so demands. In the present case, the contention of the UT Administration is that they had conducted studies and tried various other measures despite which they failed to control the environmental hazards resulting from the manufacture and sale of plastic carry bags, which resulted in issuance of the above notification, has merits. The closure, prohibition or regulation referred to in Explanation to Section 5 of the Environment Act is relatable to an industrial activity, operation or process raising environmental issues or hazards. It is in exercise of this power that the notification dated 30th July, 2008 has been issued by the competent authority. On the other hand, the scheme under Sections 3, 6 and 25 of the Environment Act is distinct. The Environment Act has been enacted with the object of protection and improvement of the environment. (...) The scheme underlying these provisions clearly show that these provisions are regulatory and operate in a specific field. (...). It is with reference to these provisions that the Rules of 2011 were framed by the Government in exercise of its power of delegated legislation.”

⁸⁰⁷ *Ibidem*, paragraph 35: “we also consider it appropriate to direct the authorities concerned in all the States to explore the possibility of introducing use of bio-degradable or compostable plastic bags as opposed to polythene plastic bags of any thickness.”

⁸⁰⁸ O.A. Nos. 86, 99 and 100 of 2013, dated 18th of July 2013. See also *supra*, Section I, paragraph b).

Considering the poor results the project would produce on the residents, the NGT refused to maintain the plant at the proposed site and argued this decision with regard to the precautionary principle, as the balance between actual benefits from the project and larger public interests - also for future generations - evidently tilted in favour of the latter.⁸⁰⁹

The role of the precautionary principle in the decisions of the Tribunal is thus central for the construction of a concept of sustainable development that could truly reverberate the environmental and health needs of the citizens. In the aforementioned cases, pertaining to the stream of decisions regarding the management of solid wastes, the precautionary principle has been identified exclusively with reference to an anthropocentric vision of development. However, the principle of precaution entails by itself a concern toward the ecology proper, as the paradigm beneath it consists in the transition from an *ex post* approach of impact-assimilation of damages to the environment to an *ex ante* strategy of preventing possible harm to the nature (and to human health). Although the two dimensions are often interrelated, the Tribunal has dwelled more upon the study of health hazards than on the pure ecological side of the matter.

In this regard, the question of ecological balance was analysed in *Sarang Yadwadkar*,⁸¹⁰ on the construction of a road in a river bed in the region of Pune, allegedly “*bound to cause massive environmental, ecological and social damage*”.⁸¹¹ With a view to the possible advantages in building the road - diminution of traffic congestion and of vehicular pollution - the Tribunal ordered the completion of the project, but imposed

⁸⁰⁹ *Ibidem*, paragraph 48: “*while applying the principle of balance as a facet of sustainable development, with reference to the facts of the present case, we have to keep in mind the precautionary principle as well. It is better to take precaution today than to suffer the consequences tomorrow. It is the future of thousands of students and residents of the villages which is at stake. (...) To us, the public health and future of the coming generations certainly weighs against permitting the MSWM plant to continue at the site in question.*”

⁸¹⁰ O.A. No. 2 of 2013, dated 11th of July 2013.

⁸¹¹ *Ibidem*, paragraph 1.

environmental conditions that responded to the imperative of precaution.⁸¹² The logic of the Tribunal was to follow the international principle of precaution, embodying the principle of intergenerational equity, and to define it, for domestic implementation, in the following terms: *“the precautionary principle (...) contemplates that an activity which poses danger and threat to environment is to be prevented. Prevention is better than cure. It means that the State Governments and the local authorities are supposed to anticipate and then prevent the causes of environmental degradation. The likelihood of danger to the environment has to be based upon scientific information, data available and analysis of risks. Ecological impact should be given paramount consideration and it is more so when resources are non-renewable or where the end result would be irreversible. The principle of precaution involves anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. Again it is based on scientific uncertainty.”*⁸¹³ The judges thus endeavoured to draw a “strategic” line of action for the application of the precautionary principle, based on the competences of federal and local authorities in anticipating ecological damages, in absence of certain results on the environment, and on the doctrine of public trust as a guide for ecological conservation.⁸¹⁴

Again, the ecological view of the matter and the “line of action” came to the forefront with the *Goa Foundation* case,⁸¹⁵ where the Tribunal recognised its jurisdiction with regard to precautionary measures to be implemented in favour of the safeguard of the environment of the

⁸¹² *Ibidem*, paragraph 39: *“the precautionary principle, which is a part of the law of the land now and is a Constitutional mandate in terms of Articles 21, 48A and 51A(g) of the Constitution of India, that require the State to safeguard and protect the environment and wild life of the country. It is expected of Respondents No.1 and 3 to anticipate and then prevent the causes of environmental degradation.”*

⁸¹³ *Ibidem*, paragraph 30.

⁸¹⁴ *Ibidem*, paragraph 33: *“the doctrine of public trust (...) is more an affirmation of State power to creation of public property for public purpose. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”*

⁸¹⁵ M.A. No. 49 of 2013 in O.A. No. 26 of 2012, dated 18th of July 2013.

Western Ghats. Indeed, the Tribunal interpreted inaction as non-compliance of the principle of precaution, resulting in the attraction of its jurisdiction.⁸¹⁶ Hence, in the final disposal of the application,⁸¹⁷ the Tribunal censured the ambiguities of the MoEF on the matter, with the latter eventually deciding to thoroughly examine all issues related to ecological protection of the region, in order to issue a final notification on such protected areas.⁸¹⁸ It is noteworthy that the Tribunal did not undertake direct action, but left the initiative to the competent Ministry, provided it acknowledged through an affidavit the necessity to rapidly and comprehensively create eco-sensitive areas.

While the Tribunal recovered the ecological point of view of the precautionary principle in several judgments, ensuring an application in consonance with the double-sided concept of sustainable development, the missing link in the chain was the introduction of a

⁸¹⁶ *Ibidem*, paragraph 42, and also *supra*, Chapter IV, Section I, paragraph a): “an anticipated action will also fall within the ambit of the jurisdiction of the Tribunal. (...) The precautionary principle would operate where actual injury has not occurred as on the date of institution of an application. In other words, an anticipated or likely injury to environment can be a sufficient cause of action, partially or wholly, for invoking the jurisdiction of the Tribunal in terms of Sub-sections (1) and (2) of Section 14 of the NGT Act. (...) The precautionary principle is permissible and is opposed to actual injury or damage. On the cogent reading of Section 14 with Section 2(m) and Section 20 of the NGT Act, likely damage to environment would be covered under the precautionary principle, and therefore, provide jurisdiction to the Tribunal to entertain such a question. The applicability of precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of substantial questions relating to environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act. By inaction, naturally, there will be violation of the precautionary principle and therefore, the Tribunal will have jurisdiction to entertain all civil cases raising such questions of environment.”

⁸¹⁷ O.A. No. 26 of 2012 and M.A. Nos. 868 of 2013, 47 of 2014 and 291 of 2014, dated 25th of September 2014.

⁸¹⁸ *Ibidem*, paragraph 13.

sanctioning machinery eager to substantiate the precautionary principle. This was the object of the *M/s. Sterlite* case,⁸¹⁹ where the Tribunal endeavoured to define the precautionary principle in relation with punitive measures. After having defined the precautionary principle as the concept within sustainable development that “essentially has the element of prevention as well as prohibition”,⁸²⁰ the Tribunal indicated the “ingredients” of the principle:

- (a) *There should be an imminent environmental or ecological threat in regard to carrying out of an activity or development;*
- (b) *Such threat should be supported by reasonable scientific data; and*
- (c) *Taking precautionary, preventive or prohibitory steps would serve the larger public and environmental interest.*⁸²¹

If the judges confirmed the definition of the principle, they advanced a reading that distinguished between precaution and punitive actions, as the principles operate in different fields: the former is an action *ex ante*, while the latter is a measure *ex post* for damages and restoration of the environment, based on a nexus between an event, a source of pollution and the injury caused.⁸²² This legal reflection has consequences on the operationalisation of both international principles and domestic statutes, as it derives different conclusions on the two necessary principles for sustainable development: on the one hand, the precautionary principle is more easily identified and applied, provided that sufficient technical data are at the disposal of the court. On the other, the question of punitive measures comes to the forefront in connection with the polluter pays principle. Several aspects concur to

⁸¹⁹ Appeals Nos. 57 and 58 of 2013, dated 8th of August 2013.

⁸²⁰ *Ibidem*, paragraph 120: “precautionary principle is one of the most important concepts of sustainable development. This principle essentially has the element of prevention as well as prohibition. In order to protect the environment, it may become necessary to take some preventive measures as well as to prohibit certain activities. These decisions should be based on best possible scientific information and analysis of risks.”

⁸²¹ *Ibidem*, paragraph 122.

⁸²² *Ibidem*, paragraphs 125-127.

advance a more detailed analysis of this principle: first of all, the necessary *ex post* character of polluter pays ensures an easier task for the judge in ascertaining damages; secondly, its essence of “case-based” principle enables a domestic vision that can help in elaborating legal strategies to implement it. However, the latter aspect is double-edged, insofar as the Indian legislation provides for penalties (as in the Water and in the Air Acts), but the mission of the National Green Tribunal is the disposal of civil cases related to the environment, not on criminal liability. Hence, a conundrum between an effective application of the polluter pays principle and the role of the Tribunal could arise, to be solved by looking at the single cases.

b) The polluter pays principle: a domestic construction

As analysed in precedence, the Tribunal confirmed the construction of the Supreme Court concerning the three principles since the beginning of its operation. Nevertheless, with a view to its statutory limitations, the application of the polluter pays principle - the typical “punitive” leg of sustainable development - could become the object of self-restraint on the part of the environmental court: if civil liability is certainly included within the jurisdiction of the Tribunal, punitive measures under criminal law cannot be enforced by the NGT. Thus, a particular care in devising judicial strategies for implementing the polluter pays principle.

In this regard, the first landmark case adjudicated by the NGT was *Hindustan Coca-Cola Beverages vs. West Bengal Pollution Control Board*.⁸²³ As the company proposed an appeal against the direction of the local Pollution Control Board, that ordered the assurance of the continuous and smooth functioning of the pollution abatement system, the submission of an action plan concerning the treatment of liquid effluents and the deposit of 500000 rupees as a bank guarantee, the Tribunal relied on the jurisprudence of the apex court on placing the

⁸²³ Appeal No. 10 of 2011, dated 19th of March 2012.

burden to pay the cost of pollution abatement upon the producer⁸²⁴ and on Section 20 of the NGT Act to state that “*the precautionary principle and the principle of polluter pays are the integral part and parcel of national environmental law*” and that “*a polluter is bound to pay and eradicate the damage caused by him and restores the environment. He is also responsible to pay for the damages caused due to the pollution caused by him.*”⁸²⁵ However, the Tribunal linked to this general principle the necessity of ascertaining the damage caused by the polluter, in order to determine the amount required for restoring the environmental situation. As this requirement was not met by the directions of the West Bengal Pollution Control Board - having merely ordered the deposit of a bank guarantee without evidence on the source of water pollution - the judges allowed the appeal and ordered the PCB to renew the required analysis on water with a view to decide on consent to operate.

The question of imposing costs by administrative or judicial institutions was indeed one of the key critical points in developing a coherent application of the polluter pays principle. In theory, Section 20 of the NGT Act should allow the environmental court to order reparation costs in cases concerning pollution. However, a strict reading of the relevant legal provisions would lead to an opposite conclusion, since the power to impose a penalty should be proper of a penal jurisdiction (unlike a Pollution Control Board or the National Green Tribunal). Apart from the *Hindustan Coca-Cola Beverages* case, where the matter was not presented in all its aspects, the question resurfaced in *Dvc Emta Coal Mines vs. Pollution Control Appellate Authority of West Bengal*,⁸²⁶ on the direction to deposit 10 lakh rupees as pollution cost for non-

⁸²⁴ *Ibidem*, paragraph 15: “several decision of Supreme Court dealing with the principles of sustainable development, precautionary principle and polluter pays principle were relied upon. The polluter pays principle, it is submitted is the ethos of international environmental jurisprudence in the matter of correcting a civil norm by award of cost / damages on a polluting industry. The core of the principle, derives from the fundamental proposition, that the person who generate pollution should bear the cost of abatement.”

⁸²⁵ *Ibidem*, paragraph 17.

⁸²⁶ Appeal No. 43 of 2012, dated 15th of March 2013.

compliance of the environmental norms for mining activities. As in the previous case, the Tribunal limited the power to impose directions under Section 33A of the Water (Prevention and Control) of Pollution Act of 1974: as the provision is general in nature but does not specifically entrust the Pollution Control Board (or its Appellate Authority) to levy pecuniary penalties, the Tribunal confirmed the interpretation maintained in *Hindustan Coca-Cola Beverages* and allowed the appeal against the decision of the Appellate Authority of West Bengal.

However, the Tribunal returned on the question of bank guarantees in the *Tarun Patel* case, on one of the most important waste water treatment plant of the country.⁸²⁷ The environmental court considered the decision of Gujarat Pollution Control Board to impose a pecuniary guarantee as a penal measure on small scale industries in the Common Effluent Treatment Plant of Vapi Industrial Estate, in order to fulfil the technical requirements for discharging effluents, as well as the record of the plant in non-complying with the standards set by the Environment (Protection) Rules.⁸²⁸ Due to the peculiar history of absence of fulfilment of environmental standards, the local Pollution Control Board ordered a bank guarantee as an innovative measure for compliance: in spite of the existence of an established jurisprudence contrary to the imposition of penal measures under the Water Act, the Tribunal maintained the directions of the PCB as it considered the case as a question related to the environment that should be prevented.⁸²⁹ As a result, the Tribunal allowed the use of bank guarantees as a

⁸²⁷ O.A. No. 34 of 2013 (WZ), dated 1st of April 2014.

⁸²⁸ *Ibidem*, paragraph 23: “CETP at Vapi, is one of the major CETP in the country, however, it has been on the radar of the Regulatory Agencies, as well as, Judiciary, in view of continuous non-compliance of the standards. This takes us to Comprehensive Environmental Pollution Index of Vapi Industrial cluster, whereby Vapi, has been declared as one of the “Critically” polluted areas in the country.”

⁸²⁹ *Ibidem*, paragraph 74: “we hold that the condition requiring the respondents to furnish the bank guarantee is not penal and encashment thereof is neither unjustified nor covered under any of the exceptions stated in the judgment of the Supreme Court in the case of *Vinetec Electronics Pvt. Ltd.*”

possible direction aimed at ensuring respect of environmental norms and as a way for compensating environmental damage only in cases where such infractions are declared following the correct penal procedures.⁸³⁰

Hence, the Tribunal apparently posed harsh conditions for the deployment of the polluter pays principle. However, the statutory provisions are clear in assigning to the National Green Tribunal the power to grant relief and compensation for environmental damages occurred for human activities, as indicated in Section 15 of the NGT Act. Likewise, Section 20 includes the polluter pays principle among the international legal references of the action of the Tribunal, thus strengthening the provisions of Section 15 with an anchor that is reflected from international law. In *Mr. Vitthal Gopichand Bhungase vs. The Ganga Sugar Energy Ltd.*,⁸³¹ on the continuous damage provoked by the toxic discharges of a sugar factory in Mannath lake where fishing rights had previously been granted, the Tribunal applied its mind in verifying the evidence brought by the applicants and decided to grant relief for environmental damages. Hence, having acknowledged the facts,⁸³² the environmental judge granted an order favouring the fishermen of the area, as it involved a deposit of 50 lakh rupees to be

⁸³⁰ *Ibidem*, paragraphs 75-76: “the Board should ensure that its order provides for a ‘time targeted action plan’. In default of which and upon inspection, such bank guarantee would be liable to be invoked/encashed for environmental compensation and restoration purposes. (...) GPCB can use the BG regime as per the defined policy of the Board to ensure the time-bound and well defined improvements in pollution control systems and the BG forfeiture shall not be done as a substitute for penal actions separately prescribed under the law.”

⁸³¹ M.A. No. 37 of 2013 (WZ), dated 20th December 2013.

⁸³² *Ibidem*, paragraph 20: “the material on record reveals *prima facie* that aquatic life in the ‘Mannath lake’ is being lost and the water is being contaminated, polluted and degraded due to the acts of the Respondent Nos.1 and 2. MPCB has already made a statement on 4-12-2013, that the Sugar Factory of the Respondent Nos.1 and 2, falls in the catchment area of the pond and there is no other Industry of which (J) Misc.Appln. No.37 of 2013 effluent is collected to the said pond. We deem it proper, therefore, to grant interim relief, in view of the peculiar circumstances of the present case.”

eventually disbursed in the event the case is adjudicated in favour of the applicants, so as to compensate for the loss of fish stock.⁸³³

Following the miscellaneous application of 2013, the case of the Mannath lake was adjudicated in *Godavari Magasvargiya Mastya vs. The Ganga Sugar Energy Ltd.*⁸³⁴ Firstly, the Tribunal recognised its competence, as the application could not be barred by limitation: as the spillover of molasses in the lake had occurred in June 2010, the Tribunal maintained jurisdiction under Section 15 of the NGT Act, that provides for a 5-year limitation.⁸³⁵ Then, the judges confirmed that remedies were available under Section 18 of the NGT Act, including restitution, restoration and compensation and under Section 20 of the Act, in order to operationalise the polluter pays principle, to be read in the following terms. “*The Polluter Pay's Principal is commonly interpreted as, the Polluter must pay for, the cost of Pollution abatement, cost of environment damage recovery, cost of incident management and compensation costs for the victims of the incident, if any, due to Pollution. It implies that those who caused environmental damage by polluting should pay the costs of reversing that damage and also controlling the further damage. Though the Principle is very simple, its implementation is rather difficult and complex mainly due to the difficulty in identification of the Polluters and apportioning their responsibilities. Another concern, in implementation of this principle is to how the polluter should pay. Even the difficulties in restoring the ecological system, once it is disrupted or contaminated makes the assessment of payment in the terms of loss (loss of bi-diversity, loss of habitat, loss of top soft soil so on and so forth) difficult. Moreover, the payment is, at the end of the day, probably in terms of money. It is well documented that the monetary compensation do not essentially fully make up for ecological loss or loss of resource such as ground water, top soil, biodiversity and therefore, in reality to some degree, at least, the polluter never pays the real cost of the pollution, even if, some restitution or compensation is possible. The environmentalist generally, therefore, advocate the importance of 'Precautionary Principle' over the 'Polluter Pay's Principle' in the enforcement policies. The environment damage costing is an evolving*

⁸³³ *Ibidem*, paragraph 24.

⁸³⁴ O.A. No. 30 of 2013 (WZ), dated 30th of July 2014.

⁸³⁵ *Ibidem*, paragraph 14.

subject and can involve both non market valuation as well as market valuation."⁸³⁶

Hence, the Tribunal operated by discerning two different plans: on the one hand, it did not grant relief to the applicant, as it could not prove damages to his fishing activities; on the other, it ordered the sugar company to pay relief and restoration of environment under Section 15 of the NGT Act.⁸³⁷ What is relevant in the definition of the Tribunal is the reference to separate functions of the polluter pays principle: as monetary compensation is deemed insufficient and not enabling a concrete reestablishment of the environmental situation, precautionary measures are considered more efficient in environmental policies. Additionally, the implementation of the polluter pays principle is questioned as far as pecuniary measures are concerned: if the use of bank guarantees has been restrained, the problem of identifying correct ways of funding relief and restoration is to be solved, whether by specific bodies entrusted with capacities of pointing out real measures to be funded, or by environmental studies aimed at preventing further damages. Nevertheless, it is noteworthy to acknowledge the strategy advanced by the Tribunal: on the one hand, a strict obedience to the rule of law, in order to provide certainty to the rules on liability and compensation, on the basis of Section 15 of the NGT Act; on the other hand, a precise operationalisation of the polluter pays principle, leaving to more specific committees the task of identifying measures when the Tribunal is unable to provide directions.

This construction linked to Section 15 of the Act has been furthered in *Ramubhai Kariyabhai Patel vs. Union of India*,⁸³⁸ on the compensation arising from the damages to the ecology caused by a toxic waste spread

⁸³⁶ *Ibidem*, paragraph 21.

⁸³⁷ *Ibidem*, paragraph 27: "c) The Respondent No.1 shall pay the cost of replenishment of water in Mannat lake and cost of environment damages in the powers conferred upon this Tribunal vide Section 15(1) of National Green Tribunal Act.

e) The Respondent No.1 is liable to pay Rs.5,00,000/- (Rs. Five lacks) towards the environment restitution costs to Collector, Parbhani who shall spend this amount for environment awareness initiative and also performances like plantation etc."

⁸³⁸ O.A. No. 87 of 2013 (WZ), dated 18th February 2014.

and spilled in 2012 in agricultural fields, due to the handling of hazardous wastes in a storage facility in a village of Gujarat. As the applicant claimed to be entitled for compensation of the loss to ecology and livelihood in accordance with the polluter pays principle, the Tribunal recognised the liability of the respondents and linked the restitution of the environment to the international principle by means of Section 20 of the Act. Moreover, the judges confirmed the polluter pays principle in the terms set in *Godavari Magasvargiya Mastya*.⁸³⁹

Mindful of the difficulties in implementing the principle and acknowledging the deficiency of granting a mere monetary compensation, the Tribunal ended up by ordering the respondents to pay for the actual loss and non-pecuniary damages, but also for conducting specific studies on contamination as well as directing the local Pollution Control Board to develop capacity-building programmes for an efficient handling of incidents.⁸⁴⁰ It is thus evident the approach the Tribunal integrates in its judgements: on the one hand, a strict test on the restoration of damages if the polluter is found liable; on the other, a firm linkage to the international principles, to be understood as a coherent order. Indeed, the implementation of the polluter pays principles is to be effected so as to include precautionary measures - due to the patent limitation of a simple reference to pecuniary compensation, deemed insufficient for guaranteeing a true environmental justice.

This double approach is also to be seen in cases involving mere compensation for environmental damages, as the decisions of the Tribunal always entail a part of measures dealing with prevention and protection. In *Himanshu R. Barot vs. State of Gujarat*,⁸⁴¹ the operations of the company Anil Products Ltd., a business involved in the manufacture of starch products, were the object of the investigation of the Tribunal, from an application alleging the absence of safety measures and the use of harmful chemicals in the production of glucose. After a scientific review of the production methods of the

⁸³⁹ *Ibidem*, paragraph 24.

⁸⁴⁰ *Ibidem*, paragraph 34.

⁸⁴¹ O.A. No. 109 (THC) of 2013 (WZ), dated 22nd of April 2014.

company and the examination of such aspect in relation with the Air (Prevention and Control of Pollution) Act of 1981 and the Water (Prevention and Control of Pollution) Act of 1974, the Tribunal directly applied the polluter pays principle - without any reference to Section 15 of the NGT Act - in favour of the public at large and ordered the deposit of 10 lakh rupees to be employed for environmental purposes⁸⁴² as well as the compliance to the recommendation made by the Gujarat Pollution Control Board, with a view to prevent further air and water pollution.⁸⁴³

Again, the case of remedial measures to be considered as part of sustainable development - through Section 15 of the NGT Act and the polluter pays principle - was confirmed in *Janardan Pharande vs. MoEF*.⁸⁴⁴ As in the previous case, the applicants protested against the operation of a company (Jubilant Organic Ltd.) using chemical products in its molasses distillatory plant in a river, endangering human activities as well as biodiversity. Having appraised the conclusions of the local Pollution Control Board, that acknowledged the persistence of water pollution in spite of the installation of treatment facilities,⁸⁴⁵ the Tribunal applied the polluter pays principle and ordered the company to deposit 25 lakhs rupees for compensating

⁸⁴² *Ibidem*, paragraph 19: “this is a fit case in which “Polluters’ Pays” principle will be applicable. The public members of the surrounding area are the victims of such pollution. In this view of the matter, we are of the opinion that Anil Products shall pay compensation of Rs.10,00,000/- in general (...). This amount shall be utilized for development of green belt or establishment of play ground or appropriate park with jogging track in the area of Bapunagar, Ahmedabad.”

⁸⁴³ *Ibidem*, paragraph 20.

⁸⁴⁴ O.A. No. 7 (THC) of 2014 (WZ), dated 16th of May 2014.

⁸⁴⁵ *Ibidem*, paragraph 39: “After going through the result and physical observations, it is concluded that the ground water quality in the area is adversely affected by indiscriminate disposal of untreated/treated effluent in the past even though today industry has provided adequate waste water treatment facility. The quality of ground water still remains polluted in the nearby area. It will still require sufficient long time for restoration of water quality by natural process. It is observed that the riparian rights of the people for access to the good quality of water are violated and the people are deprived of quality water”.

damages, to be calculated in detail by a Committee charged with the evaluation of environmental loss.⁸⁴⁶

Remedies and prevention are thus essential features of sustainable development, as part of international principles and thanks to the constant elaboration of Indian statute law by domestic tribunals. A comprehensive assessment of the doctrine of the Tribunal on the combination of the precautionary principle and of the polluter pays principle is the case of the *Yamuna river*, a recurrent environmental situation that has also been adjudicated by the National Green Tribunal in *Manoj Misra vs. Union of India*.⁸⁴⁷ The Yamuna, the historical river that flows through Delhi and reaches the Ganges at Allahabad, has a pitiful environmental record,⁸⁴⁸ due to the pollution caused by the insufficient management of wastes in the area and by the presence of polluting industries. Since 1994, the Supreme Court of India had been seised of the matter through Public Interest Litigations, in order to ameliorate the environmental conditions of the river and of the inhabitants of the region: however, *“nothing mentionable was achieved for prevention, control*

⁸⁴⁶ *Ibidem*, paragraph 51: *“the net result of the foregoing discussion is that there is reliable evidence to draw inference about continuation of Pollution caused to water of ‘Nira’ river as a result of discharging of Industrial effluent/spent wash by Jubilant Industry. The water pollution has remained unabated. The so called efforts taken by Jubilant Industry were inadequate and did not completely stop the water pollution. (...) The Committee shall cause evaluation of loss caused to the agriculturists, if any, due to discharging of industrial effluents in the water of River ‘Nira’ which assessment may be done after soil testing, examination of the past revenue assessment and other relevant factors.”*

⁸⁴⁷ O.A. No. 6 of 2012 and M.A. Nos. 967of 2013 and 275 of 2014, dated 13th of January 2015.

⁸⁴⁸ *Ibidem*, paragraph 4: *“river Yamuna is critically threatened by unrelenting encroachments on its flood plain and by increasing population load, emanating as much as from domestic refuse, as from the agricultural practices in the flood plains and industrial effluents from the catchment area draining into Yamuna. The flood plains and river bed of Yamuna are under increasing pressure of alternative land use for various purposes, which are driven primarily by growth of economy at the cost of the river’s integrity as an eco-system.”*

and restoration of River Yamuna on behalf of the concerned authorities"⁸⁴⁹ as the environmental judges acknowledged in 2015, despite the issuance of directions by the Supreme Court for almost two decades.

The matter was thus presented also before the National Green Tribunal under Sections 14 and 15 of the NGT Act, with a view to both obtain an adjudication on the environmental situation - considered to be a blatant violation of the right to life⁸⁵⁰ - as well as compensation for the damages created by the continuous pollution, primarily due to the dumping of debris and wastes into the river.⁸⁵¹ As a new plan for restoration of the environment would be implemented (the "Maily Se Nirmal Yamuna" Revitalization Plan, 2017), the applicants called for action on the part of the competent authorities so as to implement the already existing regulation.

Following a comprehensive study of an *ad hoc* Expert Committee, the Tribunal took note of the recommendations provided for by the special body and elaborated its views on the application of international principles to the case at stake, as "*the Principle of Sustainable Development takes within its ambit the Principle of Inter- generational Equity. In fact, all these three principles, i.e. the Precautionary Principle, the Polluter Pays Principle and the Principle of Sustainable Development have to be collectively applied for proper dispensation of environmental justice*".⁸⁵² Firstly, the judges acknowledged the existence of agricultural degradation and indicated the necessity to halt agricultural production by virtue of the application of the principle of intergenerational equity, converted into a "principle of comparable hardship" that commands the termination of activities that would produce major health damages than actual

⁸⁴⁹ *Ibidem*, paragraph 1.

⁸⁵⁰ *Ibidem*, paragraph 6: "*the present case, according to the applicant, is a glaring example of total failure of both the constitutional obligation of the State and fundamental duty by the citizens under Articles 48A and 51A(g) respectively of the Constitution of India.*"

⁸⁵¹ *Ibidem*, paragraph 6: "*the applicant also invoked special jurisdiction of the Tribunal in terms of Section 15 of the NGT Act, praying for complete restitution of the environment and ecology of the river bed and for making Yamuna pollution free.*"

⁸⁵² *Ibidem*, paragraph 68.

benefits.⁸⁵³ Then, the Tribunal endeavoured to apply the polluter pays principle with regard to the inaction of the authorities on the management of municipal solid wastes and to the liability of private companies. On the former, the judges suggested to identify measures for environmental compensation based on property or house taxes.⁸⁵⁴ On the latter, the Tribunal ordered the establishment and maintenance of common effluent treatment plants, to be operationalised on the basis of the dimensions of production, the characteristics of the process and the consumption of water and electricity, as well as to pay restoration of damages (2/3 of the sum for the implementation of common effluent plants to be paid by public authorities, 1/3 to be allotted to private industries).⁸⁵⁵ Finally, as a preventive and precautionary measure, the NGT ordered the competent authorities in Delhi and Haryana to maintain the environmental flow of river Yamuna throughout the year through a fixed quantity of water that should be released so that

⁸⁵³ *Ibidem*, paragraph 52: “the principle of ‘Inter-generational Equity’ would require that today’s younger generation should not be exposed to serious health hazards and thus, it will not only be desirable but essential that such contaminated produce/vegetables are not offered for consumption to the people at large. The Principle of Comparative Hardship would clearly mandate that where the injury is much greater in proportion to the benefit that would accrue as a result of such activity, the activity must be stopped in the larger interest of the public and of public health.”

⁸⁵⁴ *Ibidem*, paragraph 62: “the safest criteria for determining the quantum of environmental compensation payable by people of Delhi, would be the certain percentage of the property/house tax payable by an individual. It may be noticed that certain kind of charges like education cess, sewage tax and certain other charges, do form part of the property/house tax payable by individuals, thus, environmental compensation can also form part of such property/house tax. But this, we would leave primarily at the discretion of the authorities concerned.”

⁸⁵⁵ *Ibidem*, paragraph 72: “such industrial units within a particular industrial cluster have to pay these amounts on the ‘Polluter Pays’ Principle, for the pollution already caused by them and even which they are causing presently, as well as to prevent pollution in future on the Precautionary Principle. Major part of such costs, obviously have to be borne by the authorities concerned, let us say 2/3rd, while 1/3rd of the total costs should be borne by the industries.”

prevention and control of pollution could be guaranteed.⁸⁵⁶ As a conclusion, concerning the actual cause of action of the application - the dumping of debris in the river - the judges prohibited such activity as a precautionary measure.⁸⁵⁷

The *Yamuna river* judgment constitutes the epitome of the activities of the Tribunal in guaranteeing sustainable development through judicial means and delivers a reasoned summary of the implementation of international principles incorporated in domestic law. On the mere domestic side, by accepting the report of the *ad hoc* Committees (preservation and restoration of the river banks; drainage system in Delhi and revitalisation of the river)⁸⁵⁸ and ordering their implementation by the 31st of March 2017, the Tribunal demonstrated a remarkable administrative capacity. On the one hand, the Tribunal followed the path traced by the Supreme Court in its traditional judicial activism, but maintained limits of application through the express definition of jurisdictional competences. On the other, its enhanced expertise guaranteed an essential second check on the work of the special committees: while a Supreme Court judgment would only have relied on this scientific work to adjudicate a dispute, the presence of expert members in the National Green Tribunal ensured the correctness of such contributions, enabling the judges to incorporate technical data with a higher degree of assurance.

On the role of international environmental principles, the judgement reflects a well-established approach of the Tribunal in integrating all dimensions of sustainable development. First of all, it linked the international principle to the construction of Article 21 of the Indian Constitution. Then, it confirmed the interpretation that indicates the precautionary principle and the polluter pays principle as necessary complements to the application of sustainable development in the single cases. On the former, the environmental judge subsumed precautionary concerns as part of the very concept of sustainability. Concerning the latter, the Indian experience reflects the elaborations of

⁸⁵⁶ *Ibidem*, paragraph 85.

⁸⁵⁷ *Ibidem*, paragraph 87.

⁸⁵⁸ The “Maily Se Nirmal Yamuna” Revitalization Project, 2017.

international legal scholars insofar as the polluter pays principle has its main application in domestic law: the National Green Tribunal aptly used Section 15 of the NGT Act as well as Section 20 to ground its directions for relief and payment of damages within this framework, through strict tests on liability that reinforce the perception of a court that established an environmental rule of law, at least on paper.

It is thus not a coincidence that the *Yamuna river* case comes as a conclusion of the path undertaken in the analysis of the Indian jurisprudence on environment and sustainable development. Indeed, the case highlights the positive aspects of the Indian experience, with an active judiciary that elaborated original views on environmental law, as well as the negative sides, such as poor implementation, excessive length of proceedings, lack of enforcement of decisions - critical points that the establishment of the National Green Tribunal shall have improved.

Conclusions

The National Green Tribunal has been a major tool in advancing the reasons of environmental justice at the international and national level: as Gitanjali Nain Gill stressed in her works on the Tribunal,⁸⁵⁹ the newly established court has endeavoured to fulfil its mandate of ensuring a fast track approach to solve environmental disputes, thanks to procedural devices, wide powers and reference to international principles. Additionally, the working of the Tribunal has been accompanied by a constant attention of the Supreme Court to environmental rights and principles, as two recent decisions show. In *Gulf Goans Hotels Co. Ltd. vs. Union of India*,⁸⁶⁰ the Supreme Court recalled the relevance of international law principles as set in the *Gramophone* case of 1984⁸⁶¹ - if it is not in conflict with domestic law, but

⁸⁵⁹ Gill, G.N., *Environmental Justice in India: The National Green Tribunal and Expert Members*, in *Transnational Environmental Law*, 1, 2016, pp. 1-31; Gill, G.N., *The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law*, in *Environmental Law Review*, 16 (3), 2014, pp. 183-202; Gill, G.N., *Access to Environmental Justice in India with Special Reference to National Green Tribunal: A Step in the Right Direction*, in *OIDA International Journal of Sustainable Development*, 6(04), 2013, pp. 25-36; on the birth of the Tribunal, Gill, G.N., *A Green Tribunal for India*, in *Journal of environmental law*, 22(3), 2010, pp. 461-474.

⁸⁶⁰ *Gulf Goans Hotels Co. Ltd. vs. Union of India*, Civil Appeals Nos. 3434-3435 of 2001, dated 22nd of September 2014.

⁸⁶¹ *Gramophone Company of India Ltd. vs. Birendra Bahadur Pandey & Ors.*, AIR 1984 667, 1984 SCR (2) 664, judgment dated 21st of February 1984, paragraph 5: "there can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules

ensuring a non-confrontational interpretation with international law as far as possible — but stated that environmental legal principles shall be necessarily embroidered in the fabric of internal law.⁸⁶²

In this framework, the apex tribunal reaffirmed its view on the principle of sustainable development with a more nature-centred approach in *T.N. Godavarman Thirumulpad vs. Union of India & Ors.*,⁸⁶³ in partial opposition with the jurisprudence of the National Green Tribunal, that has mostly applied sustainable development through balancing environmental and socio-economic visions. In the aforementioned judgment, the Supreme Court maintained its established construction on the role of constitutional provisions (Articles 48A and 51A) and held that “*environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays*

except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.”

⁸⁶² *Gulf Goans Hotels Co. Ltd. vs. Union of India*, paragraph 14: “the Stockholm Declaration in its core resolutions, merely enunciate very broad propositions and commitments including those concerning the sea beaches as distinguished from specific parameters that could have application, without variation or exception, to all the signatories to the declaration. The Stockholm Conference having nowhere expressed any internationally approved parameters (...), incorporation of any such feature of international values in the Municipal Laws of the country cannot arise even on the principle enunciated in *Gramophone Company of India (supra)*.”

⁸⁶³ *T.N. Godavarman Thirumulpad vs. Union of India & Ors.*, judgment dated 13th of February 2012, paragraph 14.

principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature include both human and non-humans."

Notwithstanding this apparent contradiction, due to dealing with a case focused on wildlife protection, the Indian Courts have endeavoured to follow a **balanced path between anthropocentrism and ecocentrism**, according to the different cases and with a view to confirm the interpretation of the Constitution that poses the right to life as the cornerstone of environmental protection and the international triptych of sustainable development, polluter pays principle and precautionary principle as domestic complements.⁸⁶⁴ The National Green Tribunal has not drifted away from these foundational indications, but has substantially complemented single domestic aspects of their implementation. Therefore, while constantly asserting that sustainable development is part of the law of the land, the environmental judges have contributed in interpreting the principles on a case basis, delivering concrete judgments that embody the existence of *opinio juris* concerning international law.

If one considers the **institutional innovation** of the National Green Tribunal in the context of the Sustainable Development Goals, it is apparent that the environmental court is an asset for "*promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels*", especially with a view to achieve the targets of the development of participatory, accountable, transparent and efficient institutions. Considering the most famous terms ideated by Amartya Sen, the National Green Tribunal is evidently a tool for enhancing

⁸⁶⁴ Amirante, D., *Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience*, in *NUJS Law Review*, 6, 2013, pp. 213-229.

capabilities;⁸⁶⁵ the speedy track proposed by an environmental court endowed with a wide jurisdiction is an institutional experiment that aims at countering the manifold difficulties in achieving substantial justice, in a country that is characterised by a considerable resort to the judiciary and by an inherent slowness in proceedings.⁸⁶⁶

Hence, two elements come to the forefront in positively consider the “third way” of constituting a specialised environmental court such as the National Green Tribunal: on the one hand, the **inclusiveness** of *locus standi* before the Tribunal - that effectively allowed the broadest possible access to justice to individuals and non-governmental organisations considered to be aggrieved by decisions or activities affecting the environment;⁸⁶⁷ on the other hand, the role of experts in the Tribunal and the prolific dialogue with judicial members constitutes an asset in guaranteeing decisions that are effectively sound with the environmental situation.

The body of judicial decisions of the NGT demonstrates how the judges accept every plaint that is presented by a person even obliquely affected by a situation allegedly characterised by environmental degradation of by such threat. In this sense, the role of NGOs as watchdogs of the environment has been capital in strengthening the environmental rule of law that the Tribunal upholds, with a “fertile disorder” that contributes to protect environmental rights and to substantiate sustainable development.⁸⁶⁸

⁸⁶⁵ Sen, A., *Development as freedom*, Oxford, Oxford University Press, 1999; Sen, A., *Development as capability expansion*, in *Journal of Development Planning*, 19 (1), 1989, pp. 41–58.

⁸⁶⁶ Nariman, F.S., *India's Legal System: Can it be saved?*, New Delhi, Penguin Books, 2006.

⁸⁶⁷ On the role of NGOs and social movements in environmental litigation in India, see Khoday, K., Natarayan, U., *Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India*, in *Leiden Journal of International Law*, 25, 2012, pp. 415–441.

⁸⁶⁸ Malaguti, M.C., *Un (fertile) disordine economico mondiale*, in *Nuova Antologia*, Vol. 615, Ottobre-Dicembre 2015, pp. 148–151.

As far as **expertise** is concerned, the main enhancement from the decisions of the Supreme Court has been the resort to precise analysis of scientific data in the corpus of orders and judgments, so as to internalise the technical reasoning and deliver decisions that are immediately applicable by the competent institutions or by privates. The result of this blend of legal and scientific expertise is a faster and more reliable approach on environmental matters, that should eventually produce effective judicial decisions. Indeed, as Robinson stated concerning the specialisation of courts, *“environmental courts and tribunals facilitate speedier environmental adjudications and foster consistent rulings across time and the wide range of environmental law cases. Judges in environmental courts become well versed in environmental science, which is the foundation of environmental legislation, MEAs, and other treaties; this helps to ensure that judicial rulings are scientifically literate. These judges and court administrators come to have a sound understanding of environmental law itself, despite never having the opportunity to study it in their own legal education. Environmental ministries and non-governmental organisations alike find professionalism and independence in these environmental tribunals. These specialised courts ensure that States can meet their obligation to provide access to justice in accordance with Principle 10 of the Rio Declaration.”*⁸⁶⁹

Hence, the advances reached thanks to the enactment and implementation of the National Green Tribunal Act are mainly three-fold:

- an **enhanced efficiency**, due to the possibility to recur to faster judicial proceedings for protecting environmental rights (in a context characterised by a “low-yielding” judiciary, with delays, backlogs, insufficient capacities of case management and lack of environmental expertise);
- a greater **consistency of decisions**, the added value of the institution, thanks to the centralisation of the jurisprudence on the environment and the problem-solving approach of the expert members of the Tribunal;

⁸⁶⁹ Robinson, N.A., *Ensuring Access to Justice through Environmental Courts*, in *Pace Envtl. L. Rev.*, 29, 2012, pp. 363-395.

- the disposal of a “**transformative tool**”, that is adapted to the challenges and the objectives posed by the Sustainable Development Goals, insofar as it fosters the definition and application of sustainable development in the domestic system, for a variety of situations linked to the main purpose of poverty eradication.

These aspects - highlighted in the outline of the present work - are, however, to be appraised in the context of each country, where different solutions have been devised in order to uphold the reasons of environmental protection, from the birth of specialised courts to the idea of specific procedures for addressing ordinary tribunals or even the highest jurisdiction - as the *writ of kalikasan* in the Philippines - but also to the resort to the old system of general jurisdiction, as in continental Europe.⁸⁷⁰ Hence, can the notion travel? The answer is not clear-cut: on the one hand, environmental jurisdictions concur in spreading a “green culture” for legal experts, that is fundamental for upholding the “environmental rule of law” presented in this work; on the other, specialised tribunals tend to resort to creeping jurisdiction in order to attract a higher number of cases and present the inherent danger of monopolising developmental subjects with a single-issue approach based on the mere ecological reasons. As the experience of the National Green Tribunal shows, the very notion of sustainable development is a blend of environmental, social and economic aspects: to “outsource” the responsibility of defining and applying the concept would result in the risk of jeopardising the attainment of a golden balance between industrial and social development and ecological preservation.

In this regard, notwithstanding a general trend toward the creation of specialised tribunals, the very notion of green court is challenged also in India. With the publication of the T.S.R. Subramanian Report, the Ministry of Environment and Forests has proposed an Environmental

⁸⁷⁰ Pring, G., Pring, C., *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, in *Journal of Court Innovation*, 3, 2010, p.11; Davide Jr., H.G., Vinson, S., *Green Courts Initiative in the Philippines*, in *Journal of Court Innovation*, 3, 2010, p.121.

Laws (Management) Act that includes the creation of specialised environmental courts in every district, but also the implementation of a National Environment Management Authority (NEMA) - and homologous bodies at the State level - endowed with the exclusive competence on environmental clearances, barring “*any judgment, decree or order of any court*” to have effect in cases of projects of “*public importance*” to be indicated by the Government and limiting the National Green Tribunal to barely review appeals from the Appellate Board created by the Act.⁸⁷¹

The proposal of curtailing the powers of the National Green Tribunal is probably the proof of its pervasiveness in its first years of working. Whereas the T.S.R Subramanian Report has the merit of repositioning the system of laws enacted from the 1970s into a more coherent body, the reduction of the role of the NGT (to be substituted by a series of institutions similar to the unsuccessful experiences of the NET and of the NEAA) would result in a loss of capabilities for citizens, unable to resort to a highly responsive jurisdiction in the environmental domain. This would deprive the legal system of an added tool for attaining Goal 16 of the Sustainable Development Agenda and would lead to an “infertile” disorder conducive to increased environmental degradation.

In consideration of the abovementioned reasons, it is apparent that the existence of a specialised environmental tribunal, absent provisions on judicial training on environmental matters and, more generally, on the speedy disposal of cases (coupled by devices to broaden access to justice), is an institutional innovation subject to be exported in legal systems lacking efficient mechanisms for environmental adjudication.

⁸⁷¹ Government of India, Ministry of Environment, Forest and Climate Change, *Report of the High Level Committee on Forest and Environment*, November 2014 (http://envfor.nic.in/sites/default/files/press-releases/Final_Report_of_HLC.pdf). For a critical view, Ghosh, S., *A better law for the jungle?*, in *The Hindu: Business Line*, 27th January 2015.

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Appeal No. 8 of 2013 (CZ), dated 22nd of August 2014;

Appeal No. 50 of 2012, dated 10th of November 2014;

Appeal No. 132 of 2015 (M.A. No. 1188 of 2015), Appeal No. 133 of 2015 (M.A. No. 1187 of 2015), Appeal No. 134 of 2015 (M.A. No. 1186 of 2015), Appeal No. 135 of 2015 (M.A. No. 1185 of 2015) and Appeal No. 136 of 2015 (M.A. No. 1184 of 2015), dated 10th December 2015.