

**REMEDIES FOR ENVIRONMENTAL HARM: DHARMIC DUTY AND TORT  
LIABILITY IN INDIA — IS THERE A COMMON GROUND?**

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*This paper examines how dharmic values and tort liability justifications co-exist and have been marshalled to meet environmental objectives and fashion civil remedies for environmental claims in India. It is argued that recent decisions by the Supreme Court reflect application of a complementary theory and a pragmatic approach to resolve environmental claims and provide remedies to victims. This pluralistic legal culture which provides tortious remedies for environmental claims can form a basis for clear theory that can add to the environmental liability framework in India. Although the scope of tort law in environmental claims may be limited by the nature of claim the use of tort law functions can further supplement the public liability regime. The challenge that the lawmakers and the judiciary face in India is to balance the legal law with dharmic concepts and make it mainstream.*

I INTRODUCTION

Contemporary environmental liability framework in India reflects a staggered picture for pursuit of environmental justice.<sup>1</sup> On the surface, three significant characteristics are discernible. Firstly, the increasing conflict between development, environment and engagement with vindication of fundamental rights under the Constitution.<sup>2</sup> Secondly, inefficiently enforced regulatory standards and inadequacy in the design of regulations leading to environmental health hazards. Thirdly, the pro-human rights and environmentally sensitive activist role of the Indian Supreme Court to vindicate

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<sup>1</sup> Environmental liability includes liability for violation of constitutional provisions (interpretation of right to life under Article 21 – right to a healthy environment and environmental duties under Articles 48-52), over 500 regulatory laws (inter alia, Environment (Protection) Act 1986, Water (Control and Prevention of Pollution) Act 1974; Air (Control and Prevention of Pollution) Act 1981) and common law liability, i.e. tort of negligence, trespass to the person, land, strict liability and nuisance).

<sup>2</sup> See Constitution of India Articles 14, 21, 48A and 51. See also Charu Sharma, ‘Human Rights and Environmental Wrongs—Integrating the Right to Environment and Developmental Justice in the Indian Constitution’ in *Human Rights, Criminal Justice and Constitutional Empowerment*, C Raj Kumar and K Chockalingam (eds), (Oxford University Press, 2011) 321–347.

and invent remedies through constitutional and equitable means within the public law liability domain for all of the above. Simultaneously one also notes a reliance of the Court upon dharmic values of the Indian indigenous legal tradition and the compensatory and reparative justice functions of tort liability to fashion remedies in respect of environmental claims. The concept of dharma — which lays down various values — is an aspect of Hinduism and all other religious teachings within Buddhism and Jainism. It stands for ‘self righteousness’, virtues and the duty to do the ‘right’ thing within each varna or caste.<sup>3</sup> The dharmic tradition also attaches significant importance to ethical and philosophical values in the context of legal development.<sup>4</sup>

With respect to environmental jurisprudence, the same dharmic tradition based on the philosophy from the Rig Veda reflects concern and respect for animate and inanimate objects.<sup>5</sup> However, dharma does not arise from law, rather it finds its validity in a pre-existing culture, from traditional cultural precepts being followed from times immemorial.<sup>6</sup> It encompasses justice, morality, religious precepts — but all these facets are applied depending on the specificity of the individual situation.<sup>7</sup>

The new National Green Tribunal Act 2010, (‘NGTA’) evidences the legislative intent to provide compensation to individuals in environmental damages claims for violation, inter alia, of their right to a healthy environment. This marks a significant development within Indian environmental law jurisprudence. As earlier, the role of tort for vindicating environmental claims in India was minimal and riddled with procedural difficulties.<sup>8</sup> This legally recognised right to pursue a claim is premised on a corresponding legal duty of the harm doer not to infringe upon such a right. The constitutionally recognised environmental right and duty along with the right under NGTA centres on an individual and their environment that is enforceable but the dharmic duty toward environment centres on the environment per se that is non-enforceable. Apparently this causes a dissonance between the limited scope of private liability and wider range of public liability for environmental issues. The question

<sup>3</sup> For discussion on ‘dharma’ and its relation with environmental duties see infra, Section III and IV.

<sup>4</sup> See generally CA Moore, (ed) *The Indian Mind: Essentials of Indian Philosophy and Culture* (University Press of Hawaii, 1967); see in particular DM Datta, ‘Some Philosophical Aspects of Indian Political, Legal and Economic Thought’ 267–298 and CP Ramaswami Aiyer, ‘The Philosophical Basis of Indian Legal and Social Systems’, 248–266.

<sup>5</sup> Under the Vedic terminology ‘rta’ (from the Rig Veda) signified the cosmic order and was the same for nature as well as human beings, hence the righteous knowledge of dharma prevented human beings from indulging in wrongdoing or going against the rta, and the dharma of the state or the king was to guide and make people conscious of their ‘swa dharma’, or self-dharma, see DM Datta, ‘Rig Veda IV (Translation)’ in H S Bhatia (ed), *Vedic and Aryan India*, (Deep and Deep Publications, 2<sup>nd</sup> ed, 2001) 35–42.

<sup>6</sup> Ibid.

<sup>7</sup> See generally Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006) 128, see also Pankaj Jain, *Dharma and Ecology of Hindu Communities: Sustenance and Sustainability* (Ashgate New Critical Thinking in Religion, Theology and Biblical Studies, 2011) 105, 116.

<sup>8</sup> See R Ramamoorthy, ‘Difficulties of Tort Litigants in India’ (1970) 12 *Journal of Indian Law Institute* 313, 332; Ram Naik, Member of Parliament (Lower House), (1995) 41 (1) Lok Sabha Debates, 200–260, 217–218; Vinod S Mishra, ‘Environmental Justice Delivery System: An Alternative Forum’ (2002) 44 (1) *Journal of Indian Law Institute* 62, 84; P Leelakrishnan, ‘The Public Law of Nuisance: A Tool for Environmental Protection’ (1986) 28 *Journal of Indian Law Institute* 229, 231.

that naturally arises is whether the legally recognised tortious duty conflicts with the dharmic duty in vindicating environmental damage claims within India? Or whether upon closer examination of theoretical underpinnings one can unravel the basis of remedies so fashioned to argue for recognition of parallel regimes that coexist in a mixed liability system based upon morality and fairness? This paper argues that the dissonance, diversity and uncertainty existing within the environmental liability framework has rebounded to compel discussion and investigation of the overlapping domains of public and private law liability and dharmic duty for environmental claims. The inventiveness and ingenuity of the Court to devise remedies reflects the overlap and interconnectedness of tort law, public law, and dharmic duties within the indigenous legal tradition.

Accordingly, this article is divided into six parts. Part two briefly enumerates the tools available under the environmental liability framework within India. Part three examines the concept of dharma and its enumeration and understanding within environmental decisions. Part four examines and contrasts the western concepts of corrective, distributive and reparative justice considerations and economic analysis and cost internalisation aspects amalgamated within environmental cases. Part five reflects upon the pluralistic or mixed objective explanation that provides at least a theory of complementarity and a pragmatic approach to resolve environmental claims. The conclusion provides a contextual discussion and the way forward to overcome the challenges faced by environmental victims, the judiciary and the government.

## II LIABILITY AS AN INSTRUMENT TO ACHIEVE ENVIRONMENTAL OBJECTIVES AND JUSTICE

To achieve environmental justice within the Indian context, a framework of environmental liability should have clear objectives, a valid theoretical basis and appropriate procedural tools. The instrument of civil liability under tort law as a tool for settling environmental claims in India in modern time was recognised seriously only after Bhopal Gas Tragedy (1984) and then Shriram Gas Leak case (1987).<sup>9</sup> Thereafter environmental jurisprudence developed largely based on the procedural mechanism provided by the Constitution of India (COI) and the legislative framework as envisaged in the Water Pollution (1974), Air Pollution (1982) and the Environmental Protection Act (1986)<sup>10</sup> amongst others through judicial activism by modifying procedural locus standi rule under the Constitution and the tool of Public Interest Litigation or Social Action Litigation.<sup>11</sup>

<sup>9</sup> *Charan Lal Sahu v Union of India* AIR 1990 SC 1480 (the Bhopal Gas case) (it was argued on behalf of the victims, inter alia, that the injuries arose from the negligent gas leak and tortious damages were direct damages flowing from the gas disaster. Such damages it was argued (by the counsel Mr. Garg and Ms. Jaising), are based on strict liability, absolute liability and punitive liability. However the Court did not accept most of the contentions; see also *MC Mehta v Union of India & Shriram Food and Fertilizer Industry* AIR 1987 SC 1965 and *Municipal Council, Ratlam v Vardhichand* AIR (1980) SC 1622 (public nuisance action for removal of human waste from a colony under criminal law).

<sup>10</sup> Water (Control and Prevention of Pollution) Act 1974; Air (Control and Prevention of Pollution) Act 1981, Environment Protection Act 1986 .

<sup>11</sup> S P Sathe, 'Judicial Activism: The Indian Experience' (2001) *Washington Journal of Law and Policy* 29, 40; Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme

In India, the oldest form of action to deal with environmental matters was a common law action, mostly through nuisance.<sup>12</sup> Research of the Supreme Court cases from 1905–1950 and from 1950–1980 reveals only a handful of tort cases dealing with private and public nuisance where damages were granted to the plaintiff.<sup>13</sup> Although common law was part of the ‘laws in force’ prior to the adoption of the Constitution and continued to be effective by virtue of Article 372(1) of the Constitution,<sup>14</sup> it has evolved by blending the common law of torts of England and adapting these to Indian conditions.<sup>15</sup> The imposition of damages for tort claims and environmental claims has however been ‘notoriously low’.<sup>16</sup> In this respect, Divan and Rosencranz state that damages were not a deterrent to the polluter.<sup>17</sup> Moreover, cases took a long time to pass through the courts and inflation of the developing economy ‘diluted the value of the damages that a successful plaintiff received.’<sup>18</sup> As a result, most actions were filed for grant of both temporary and perpetual injunctions in a case of environmental pollution.<sup>19</sup> The two remedies provided by tort law, in the form of monetary damages and injunctions, have been justified based on the theories of corrective justice and deterrence in other common law jurisdictions and provide a fertile ground for serious discussion and doctrinal change in the context of environmental torts.<sup>20</sup> Technical difficulties in bringing a private law action in India, along with other factors such as differing ideology and amendment of the right to property, have contributed further to a limited role of tort in India.

Additionally, tort actions require fault of an identifiable defendant and a causal link to be established between the harmful activity and environmental damage, which requires scientific skills and technical knowledge along with environmental legal training and education. In the cases of several unidentified defendants, an individual

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Court of India and the Limits of Judicial Power’, 2003 <[http://www.cleanairnet.org/caiasia/1412/articles69423\\_delhi\\_case.pdf](http://www.cleanairnet.org/caiasia/1412/articles69423_delhi_case.pdf)>.

<sup>12</sup> Shyam Divan and A Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (Oxford University Press, 2nd ed, 2002) 88, 89.

<sup>13</sup> Significant among them is *J C Galstun v Duniya Lal Seal* (1905) 9 CWN 612, where both an injunction and exemplary damages were granted for nuisance caused by the discharge of waste liquid and refuse into a municipal drain that caused a noxious odour and affected the health of the plaintiff and interfered with his comfort and the occupation of his property.

<sup>14</sup> Article 372(1) Constitution:

Notwithstanding the repeal by the Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India, immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority.’

Further, ‘law in force’ under this provision has been held by the Indian Supreme Court to include British Common Law practices (as applied by courts in India in the pre-Constitution era), see *Builders Supply Corporation v Union of India* AIR 1965 SC 1061; see also *Director R&D v Corp of Calcutta* AIR 1960 SC 1355.

<sup>15</sup> M Setalvad, *The Common Law of India* (1960), 53; S Desai and K Desai, *Ramaswamy Iyer’s The Law of Torts*, 8th edn (Tripathi Publications, 1987) 20, 21.

<sup>16</sup> Divan and Rosencranz, above n 12, 89.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Kenneth Abraham, ‘The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview’ (2002) 41 *Washburn Law Journal* 379–399, 388.

tort action does not necessarily work — as was reflected in the *Bichri* judgment.<sup>21</sup> Moreover, a significant factor that needs attention is that tort focuses on an individual's interest rather than the interest of the environment. This is not the case in India due to a variety of social and cultural beliefs and constitutional ideology and developments. In this sense, as some academics argue, the Indian approach to environmental protection and jurisprudence has led away from protecting private law interests that have been significant in any Anglo-American common law jurisdiction.<sup>22</sup> Because the Indian Constitution clearly provides for a 'social justice' criterion,<sup>23</sup> among others, the proprietary interests so well protected and argued for within other common law jurisdictions were not accorded importance, to such an extent that what was once a fundamental right—the right to property provision under the Constitution—was amended and accorded a restrictive meaning to provide precedence to public law concerns.<sup>24</sup> As the discussion in the later chapters will show, these developments also characterise factors that have enabled the growth of the public law rationale.<sup>25</sup> In contrast, even within India the remedies that were provided by the courts had earlier focused on the loss that the individual had incurred and did not take into consideration the damage to the environment.<sup>26</sup> Attention therefore needs to be directed at how liability tools — whether public or private — can be best used for not only an individual or a class of people, but also for the environment per se. Thus exploration and unravelling of dharmic duties in a contemporary legal context becomes important to overcome the apparent exclusive domains within which they seem to operate.

However, India's indigenous legal tradition has a unique character as it reflects interconnections between law, philosophy and religious traditions, different from the natural law or positive legal tradition in the west.<sup>27</sup> The development of an indigenous environmental jurisprudence has largely been through the constitutional and regulatory provisions under the public law regime in India. This use of multifaceted instruments of liability entailing rights, dharmic duties, and environmental regulation provides a common ground where certain characteristics of tort law and indigenous tradition overlap with objectives of environmental law and provide a rich matrix of liability instruments to unravel environmental harm. Unfortunately, the dilemma of victims and lawyers lies in the operation, demarcation, design strategies and unclear domains within which environmental liability operates. The focus of this article is on two of the unique characteristics, namely, the application and operation of tort law functions and dharmic duties for environmental protection.

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<sup>21</sup> *Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC 161, DOJ 11 July 2011 (Bichri II).

<sup>22</sup> C M Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999) 2, 3.

<sup>23</sup> Preamble to the Constitution of India.

<sup>24</sup> Article 300A provides an abrogated right to property. It was added after the 44th Amendment by taking away fundamental right to property.

<sup>25</sup> *Ibid.*

<sup>26</sup> *J C Galatun v Duniya Lal Seal* (1905) 9 CWN 612 (nuisance caused by discharge of waste liquid and refuse into a municipal drain causing a noxious odour, affecting both health and property of the plaintiff), above n 14.

<sup>27</sup> See generally, Menski, above n 7, 128; Rajeev, Dhavan, 'Dharmasastra and Modern Indian Society: A Preliminary Exploration' (1992) 34 *Journal of the Indian Law Institute* 515; SK Purohit, *Ancient Indian Legal Philosophy: Its Relevance To Contemporary Jurisprudential Thought* (Deep and Deep Publications, New Delhi, 1994).

## III ANCIENT INDIGENOUS LEGAL TRADITION AND DHARMA

The ancient Indian tradition conceived a legal order based on the dharma dating back to the time of 100CE.<sup>28</sup> Dharma stands for righteousness and includes not merely religious duties but comprises virtues, ethics and philosophy in explaining social problems, practice and directions.<sup>29</sup> Dharma is a Sanskrit word that does not have an English equivalent. It arises from the word ‘dhr’ that means to uphold, accept, sustain and uplift.<sup>30</sup> It denotes the Indian ideology that includes righteousness of thought, word and action, law of being, law of nature, individual duty, legal duty, social and moral duty, justice, civil law, code of conduct, practice, harmony with nature and living beings and the way of life, among other things.<sup>31</sup>

This legal and cultural postulate explains the respect for nature and obligates every person to abide by one’s dharma to do the right thing. The duty, thus is on every individual, but dharma ties the community together as a social cement with ‘their millennia-old [commitment] to living together in competitive co-existence in a multi-cultural super society’.<sup>32</sup> Dharma also means to secure ‘Abhyudaya’ i.e. the welfare of the people, as it represents rights, privileges and obligations of individuals. Thus the object of law was to promote the welfare of man both individually and collectively.<sup>33</sup> Dharma has therefore also been compared with modern public law, as the duty of the State is to ensure the welfare and happiness of all people.<sup>34</sup> Thus the dharma of the king—observing ‘Rajdharma’—was to oversee the welfare and happiness of his subjects.<sup>35</sup> Accordingly, in such a system, in certain situations private interests may be superseded by the larger public interest.<sup>36</sup> Academics argue that it does not fit well with the modern understanding of rights.<sup>37</sup> Even state law is subservient to dharma. Thus the Vedic way of life encompassed a reverence for natural resources necessary to be preserved, protected and used in a sustainable manner for human sustenance and humanity’s existence. Here one can probably discern the intricate connection between the web of life according to the contemporary scientific explanations.

<sup>28</sup> Menski, above n 7.

<sup>29</sup> OP Dwivedi, *Environmental Ethics: Our Dharma to the Environment* (Sanchar Publishing House, 1994) 169; Christopher K Chapple, ‘Hinduism, Jainism, and Ecology’ 1998 (10:1) *Earth Ethics* <<http://fore.research.yale.edu/religion/hinduism/>>; see also Christopher Chapple and Mary E Tucker (eds), *Hinduism and Ecology: The Intersection of Earth, Sky and Water* (Centre for Study of World Religions, 2000) Chapter 1.

<sup>30</sup> Shankara B Khandavalli and Krishna Maheshwari, *Hindu Encyclopedia, Hindupedia* <<http://www.hindupedia.com/en/Dharma>>; J D Mayne, *A Treatise on Hindu Law and Usage*, 9th edn (Madras, 1922); Werner F Menski, in *The Oxford International Encyclopaedia of Legal History*, vol 5 (Oxford University Press) 63, 226, 236.

<sup>31</sup> Khandavalli and Krishna Maheshwari, above n 32; see also the Oxford Dictionary definition that defines dharma as the eternal laws of cosmos <<http://oxforddictionaries.com/definition/dharma>>.

<sup>32</sup> DM Datta, above n 5, 35, 42.

<sup>33</sup> Ibid 40.

<sup>34</sup> Menski, above n 32, 63.

<sup>35</sup> Rama Jois, ‘Seeds of Modern Public Law in Ancient Indian Jurisprudence’ (1990) 32 *Journal of Indian Law Institute* 179, 188.

<sup>36</sup> Menski, above n 32.

<sup>37</sup> Abraham, above n 22, 63, 65.

A *Application within Environmental Context and Critical Understanding of Dharma and Legal Tradition*

Professor Derrett reiterates that ‘flexibility, diversity, adaptability and the genius for adjustment without changing ones’ entity were the hallmark of Hinduism...’<sup>38</sup> According to Singh, the traditional law was focused on how an individual conducted himself during various phases of life and how he ought to seek balance within the wider eternal and Universal Order.<sup>39</sup> Thus a person’s action, Karma, ought to be in consonance with his dharma, duty to maintain the universal Order. Where a person has acted in a manner that is ‘adharmic’ he imbalances the cosmic order and must therefore conduct himself in a manner to right it. Thus a person who would ignite a reckless fire in the forest, pollute fresh water resources by washing or defecating, by killing not of necessity for food but needlessly, or cut down a tree that was worshipped as it provided food and shade to the village community would either be held to be an outcast banished from the community or be liable to pay compensation suitable to absolve him of the ‘adharmic’ action or sin.<sup>40</sup> However, the non-actions or wrong actions in violation of one’s dharma were not state centric or laid down by the king. The king, according to legal scholars, was not a law maker but a care taker of his peoples’ dharma within specific situations.<sup>41</sup> This explanation provides a better foundation for the indigenous traditional concept of law.<sup>42</sup> One may perceive dharma and its implications to be religious but it operates in a wider context which is not simply law nor simply religion.<sup>43</sup>

None of the Hindu scriptures approves the killing of animals needlessly, except in sacrifices to the gods in special ceremonies called the ‘yagnas’ by sages and saints. However, hunting for game and dangerous animals by the kashatriya kings was not an uncommon practice. Because killing of animals was prohibited, many Hindus used to be vegetarians and most of the ‘Jains’ (another branch of religious following which developed from Hindu law) and ‘Bhuddists’ in India still practice vegetarianism.<sup>44</sup> Violation of one’s dharma or a wrong action has immediate or long term consequences. Thus the actual actions and conduct in which a person behaves entails cosmic consequences under dharmic philosophy. A person’s Karma will create its own chain of reaction, so that a person who pollutes the river or air or contaminates land might have to pay later in some form or the other as he is committing an ‘adharmic’ action — conducting himself contrary to his dharmic duty. The harmful effects may be visible within a person’s life or he may be reincarnated as a lesser living form to pay penance for atoning his sins against his dharmic duty in the previous life. The Hindu belief in reincarnation and *Karma* (action) also influences

<sup>38</sup> JDM Derrett, *A Critique Of Modern Hindu Law* (N. M. Tripathi, Bombay, 1970) 10,15.

<sup>39</sup> Chhtarapatti Singh, see infra nn 56 and 68.

<sup>40</sup> Vashistha Dharmasastra, Part I, Chap VI, para 11, Chap II, paras 22–27; See also Wendy Doniger, ‘Introduction’ in Manu and Wendy Doinger, *The Laws of Manu* (Penguin Books, London, 1991) 92.

<sup>41</sup> KV Rangaswami Aiyangar, *Rajadharma* (Wellhausen Press, 2007).

<sup>42</sup> DM Datta, *Rig Veda IV* (Translation) in H S Bhatia (ed), *Vedic and Aryan India*, (Deep & Deep Publications, 2<sup>nd</sup> ed, 2001) 35–42 and 392–94.

<sup>43</sup> Menski, above n 7, 214; see also Antony N Allott, *The Limits of Law* (Butterworth, London, 1980) 25.

<sup>44</sup> Part of the respect for valuing living creatures under the dharmic understanding is recognised as a fundamental duty under Chapter IV, Directive Principles of the State Policy in Article 51A(g) of the Constitution. Not all Hindus are vegetarians.

the view of the environment to a certain extent; the use of natural resources and humanity's place in the world.

### B *Dharmic Duty and Positive Right*

The above brief exposition provides for 'rightful and balanced' actions. It encourages the adoption of a lifestyle that is sustainable and in harmony with nature and hence imposes an obligation not to abuse the natural resources or pollute the environment to humanity's own detriment. This understanding of the protection of the environment denotes a way of life different from the concept of rights and privileges as understood today in the western world. Dharma relates to one's duty rather than a right, but duty as dharma is not equivalent to, or a co-relative of, a right in the Hohfeldian sense within the ancient Indian understanding. The duty that dharma posits within the traditional legal culture is different from the Hohfeldian jural concept of duty, rights, privileges and power. Hohfeldian rights and duties get their validity from a sovereign or higher authority.<sup>45</sup> However, dharma does not arise from law. It finds its validity in a pre-existing culture, from traditional cultural precepts being followed from times immemorial. It encompasses justice, morality, and religious precepts but all these facets are applied depending on the specificity of the individual situation. To the positive or natural lawyer it would almost be akin to a society that imparts justice without 'law'.<sup>46</sup> An analysis of legal culture based on the traditional indigenous jurisprudence provides a holistic view of the nature and underpinning of the concept of law in contrast to foundations of the idea of law within positivist or natural law theories.<sup>47</sup> Apparently to assess and conceptualise a western theory to find an instrument of 'legal liability' thus seems inappropriate or difficult within such a traditional culture that was based on values and inculcated and promoted values rather than state centric 'law'.<sup>48</sup>

Consequently, the application of British law was ill suited to the citizens, whether Hindus or Muslims, as the administrators applied them without applying the rules of 'sastric' or koranic interpretation and this resulted in conflict.<sup>49</sup> Scholars point out that these rules were administered in the 'common-law style' and were unjust to the women and 'lower caste shudra' community<sup>50</sup> and led to a 'crucial intercultural

<sup>45</sup> WN Hohfeld, *Fundamental Legal Conceptions* (Westport, 1978) 64, WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Aldershot, 2001), 12, Section 1. Hohfeldian correlative table and the stipulatory nature has been criticised by several scholars, for example see DN MacCormick, 'Rights in Legislation' in P M S Hacker and J Raz (eds), *Law, Morality and Society* (Oxford, 1977); MacCormick, 'Legal Right and Social Democrac' *Essays in Legal and Political Philosophy* (London, 1982); N E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London, 2<sup>nd</sup> ed, 2002); for a critical comment see M H Kramer, N E Simmonds and H Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford Clarendon Press, 1998) Nikolai, Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' [2005] *Murdoch University Electronic Journal of Law* 9.

<sup>46</sup> Abraham, above n 22, 37-9, 86-7.

<sup>47</sup> Chhatrapati Singh, *Law from anarchy to Utopia: an exposition of the logical, epistemological, and ontological foundations of the idea of law, by an inquiry into the nature of legal propositions and the basis of legal authority* (Oxford University Press, Delhi, 1986) ix.

<sup>48</sup> Ibid.

<sup>49</sup> Menski, above n 7, 243-24.

<sup>50</sup> Fali Nariman, counsel for UCC, in his autobiography in 2001 admits in retrospect that he was incorrect in going against the High Court order in 1989:



breakdown' of communication over the meaning of law.<sup>51</sup> Menski observes that the confusion and conflicts between common law and ancient Hindu law arose largely because of two reasons: (i) the colonial administrators were unaware of the nature of the Hindu law and the basic principle of situation specificity in Hindu law and (ii) they were not aware of the cultural and legal pluralism that existed within Hindu law.<sup>52</sup> The administrators asked the pundits or the maulvis 'questions about "law"' while the pundits responded in terms of 'dharma.' While the British wanted to know about a general rule of law, the indigenous experts provided situation specific assessments of the case in question. By the end of 1864 the Anglo-Hindu case law became a conglomerate of precedents built on shaky textual authority, now developing its own momentum.<sup>53</sup> So the legal system as it developed was a mix of neither Hindu law nor English law, but a problematic construct based on precedent and shaky textual interpretations without authority.

### C Flexibility and Application of Dharmic Considerations

However, due to the flexibility of Indian culture (Hindu culture) being based on the Universal Order and concept of dharma,<sup>54</sup> Indian culture has been inclusive and receptive and can accommodate foreign law and adapts itself by borrowing international and global concepts. This reflects the ability to imbibe new ideas and modification without changing its substantive quality and also illustrates its uniqueness.<sup>55</sup> The Indian judiciary has consciously or subconsciously retained the pre-British conceptual elements inherent in the traditional understanding of respect towards the environment despite building on the common law precepts. Various academic researchers also echo the view that ancient Indian jurisprudence is retained and reflected within the current environmental philosophy and development through public law rationale.<sup>56</sup> However, the scope of application of private law is not whittled down where public law and environmental regulations indicates gaps.

Studies by academic scholars like professor Baxi, Dhavan, Dube, Kurshid, Sudarshan, Gadbois on socio-legal processes have highlighted the reliance upon dharmic duty by the Indian Supreme Court.<sup>57</sup> Many judges while applying the current law have also

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I must confess that when I first read Justice Seth's judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution bench of the Supreme Court. I had submitted that it was illogical. But, as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action...;

in Fali S Nariman, *Before Memory Fades... An Autobiography* (Hay House India, 2010) 218; Usha Ramanathan, 'Bhopal: As the law Develops' (2010) 45 (34) *Economic & Political Weekly* 82-87.

<sup>51</sup> JDM Derrett, *Essays in classical and modern Hindu law: Current Problems and the Legacy of the Past* (E J Brill, Leiden, Netherlands) 1977.

<sup>52</sup> Menski, above n 7, 212-16.

<sup>53</sup> Menski, above n 7, 243-4.

<sup>54</sup> JDM Derrett, *Religion, law and the state in India* (Oxford University Press, Delhi, 1999) 25-26.

<sup>55</sup> Ibid.

<sup>56</sup> Jois, above n 42.

<sup>57</sup> Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company, Lucknow, 1980); U Baxi, *Courage, Craft, And Contention: The Indian Supreme Court in the Eighties* (N. M. Tripathi, Bombay, 1985); Rajeev Dhavan, *The Supreme Court of India: A Socio-legal Critique Of Its Juristic Techniques* (N M Tripathi, Bombay, 1977); R, Dhavan, *Justice On Trial: The Supreme Court Today* (A H Wheeler Publishing, Allahabad, 1980); M P Dube, *Role*

interpreted provisions keeping in mind the dharmic ideology.<sup>58</sup> Various authors have shown how the judges have become part of the ongoing and current political process and consciously or subconsciously made decisions relying upon the dharmic culture and ideology.<sup>59</sup> At times the judiciary have been labelled as overstepping its judicial functioning and having indulged in ‘lawmaking’.<sup>60</sup>

Despite the criticisms levelled at the judiciary in some instances, the judges are involved in significant economic, social and political questions and have evolved a new legal order by resurrecting the dharmic culture in certain instances. Thus it may not be incorrect to conclude that judges while indulging in ‘lawmaking’ are not just interpreting and applying the law but at times with conscious choice, fulfilling their duty — their professional dharma (or varnasra-madharmas) to bring balance to the Universal Order that may have gone haywire, especially within environmental cases. The significant revival and use of the dharmic tradition with respect to the environment is reflected in Justice Krishna Iyer’s words when he reiterates that ‘in order for law to serve life-life of the million masses — the crucifixion of the Indo-Anglo system and the resurrection of the Indian system is an imperative of independence.’<sup>61</sup>

Similarly the same sentiment of taking lessons from the indigenous legal tradition, the Rig Veda and the Manusmriti can be seen in the obiter by Justice Pasayat in *K M Chinnappa v Union of India & Ors*<sup>62</sup> where it was stated that:

Since time immemorial, natural objects like rivers enjoyed a high position in the life of the society. They were considered as Goddesses having not only the purifying capacity but also *self-purifying ability*. Fouling of the water of a river was considered a sin and it attracted punishments of different grades which included, penance, outcasting, fine, etc... [E]nvironmental pollution was controlled rigidly in the ancient time. It was not an affair limited to an individual or individuals but the society as a whole accepted its duty to protect the environment. *The ‘dharma’ of environment* was to sustain and ensure progress and welfare of all. The *inner urge* of the individuals to follow the *set norms* of the society, motivated them to allow the natural objects to remain in the natural state. Apart from this motivation, there was the fear of punishment. There were efforts not just to punish the culprit but to balance the eco-systems... The noteworthy development in this period was that each individual knew his *duty to protect* the environment and he tried to act accordingly (emphasis added).

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*of Supreme Court in Indian Constitution* (Deep and Deep Publications, New Delhi, 1987); R Dhavan, R Sudarshan and S Khurshid (eds), *Judges And The Judicial Power: Essays In Honour of Justice V R Krishna Iyer* (N M Tripathi, Bombay, 1985) cited in Abraham, above n 22, 89.

<sup>58</sup> *K M Chinnappa v Union of India & ors* (2003) 2 SC 724, Para 25; *Rural Litigation & Entitlement Kendra v State of UP* AIR 1988 SC 2187.

<sup>59</sup> Chhatrapati Singh, ‘Legal Policy for Environmental Protection’ in *Law and Environment*, P Leelakrishnan, N S Chandrasekharan and D Rajeev (eds), (Eastern Book Company, 1992) 26, 50; Upendra, Baxi, ‘Judicial discourse: Dialectics of The Face And The Mask’ (1993) 35 *Journal of Indian Law Institute* 1–12; M R Jois, above n 35; Abraham, above n 22, 88–90.

<sup>60</sup> Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company, Lucknow, 1980); Upendra Baxi, *Courage, Craft, and Contentions: the Indian Supreme Court In The Eighties* (N. M. Tripathi, Bombay, 1985); Upendra, Baxi, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ (1978–79) Vol 8 and 9 *Delhi Law Review* 91, 94.

<sup>61</sup> VR Krishna Iyer, *Indian Justice, Perspectives and Problems: Sir Asutosh Mookerjee Memorial Lectures* (Vedpal Law House, Indore, MP, 1984) 6–7.

<sup>62</sup> (2003) 2 SC 724, Para 25.

The dharmic system and religious values are influential in contemporary India to a certain extent, especially in the field of environmental law and justice as is discernible from case law, as well as in certain judicial pronouncements. However, the judges have emphasised strong values in recognising victim's rights and sustenance on natural resources by internalising the ancient traditional beliefs in nature.

Equally the courts' decisions on environmental matters also reflect a pluralistic approach and the judges have not strictly followed any western legal theory — neither the positivist law doctrine, nor natural law teachings. By employing and developing the Public Interest Litigation concept the judiciary in India have stretched the traditional legal structure as understood in the west. Environmental legal liability tools reflect a value based attitude and judges have devised various tools of liability to help achieve the environmental objectives by largely using public law instruments. Yet in certain decisions, the Supreme Court has adopted a stance that reflects not only value based indigenous beliefs but also the common law based remedy for compensation by modifying certain tort law principles, especially strict liability. For instance, in *MC Mehta v UOI* (Shriram/Oleum gas leak case)<sup>63</sup> the Court looked for common law liability, especially the rule under *Rylands v Fletcher*<sup>64</sup> and modified the strict liability principle into an absolute liability one. In this case the court also held that:

The enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken...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...The larger and more prosperous the enterprise, greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.<sup>65</sup>

Similarly, liability for environmental destruction and degradation and violation of the right to the environment under Article 21 and the duty under the Constitution was reiterated in the case of *Rural Litigation & Entitlement Kendra v State of UP*<sup>66</sup> when the Court looked for support for environmental protection and ensuing liability within the Indian scriptures. While stopping mining in the forest area in Doon Valley, the Supreme Court quoted from the Atharva Veda<sup>67</sup> to the following effect: 'Man's paradise is on earth; This living world is the beloved place of all; It has the blessings of Nature's bounties; Live in a lovely spirit.'

It was pointed out that it was in these forests in the Himalayas thousands of years ago that our saints did penance and lived. In ancient times, the trees were worshipped as gods and prayers for the upkeep of forests were offered to the Divine. With the developments in science and the outburst of population, the degradation of forests

<sup>63</sup> AIR 1987 SC 1086.

<sup>64</sup> (1868) LR 2 HL 330.

<sup>65</sup> *M C Mehta v UOI* AIR 1987 SC 1086, per J P N Bhagwati, 1091.

<sup>66</sup> AIR 1988 SC 2187.

<sup>67</sup> Atharva Veda 5.03.6 as quoted in *RLEK v State of Uttar Pradesh* AIR 1985 SC 651 (Doon Valley litigation).

started. The earth's crust was washed away and places like Cherapunji in Assam — which used to receive an average rainfall of 500 inches in one year — occasionally started facing drought. The Court ordered to halt the illegal operations and declared for the first time that the right to life included within its ambit the right to a healthy environment.<sup>68</sup>

Further, two contemporary examples of the social environmental movement can be seen from the conservation of forest lands by the indigenous communities in North East India and Western Ghats by declaration of certain biodiversity rich areas as sacred groves.<sup>69</sup> A second example is the conservation of forests in the state of Uttar Pradesh by forest dwellers and people working and living off the forest through the “Chipko movement” (literally embracing trees and shielding them from being cut for commercial use) in the Himalayan region of the state.<sup>70</sup> According to social activist Sunderlal Bhaguna, one of the leaders of the Chipko movement, the solution of over-felling and such current problems of people being deprived of their livelihoods ‘rested in the re-establishment of a harmonious relationship between man and nature.’ For the above two examples, amongst other cases,<sup>71</sup> one can discern a mix of legal tradition and a view of ‘sustainable development’ found in the developed countries, the modern ecological thinking of international environmental law and Hindu concepts, especially from the dharmic tradition. Environmental legal liability within the Indian context displays a multifaceted approach, which is not dissimilar to that adopted in common law countries and civil law jurisdictions.

<sup>68</sup> For a comment on consideration of Indian indigenous values within environmental decisions, see generally Shyam Divan and Armin Rosencranz, *Environmental Law And Policy In India: Cases, Materials and Statutes* (Oxford University Press, 2002) Chapters 1; C M Abraham, above n 22, 89; Jain, above n 8; Jois, above n 41.

<sup>69</sup> G Oviedo, S Jeanrenaud and M Otegui, *Protecting Sacred Natural Sites of Indigenous and Traditional Peoples: an IUCN Perspective* (Gland, Switzerland, 2005); K C Malhotra, Y Gokhale, S Chatterjee & S Srivastava, *Cultural and Ecological Dimensions Of Sacred Groves in India* (Indian National Science Academy, New Delhi & Indira Gandhi Rashtriya Manav Sangrahalaya, Bhopal, 2001).

<sup>70</sup> ‘We the Peoples: 50 Communities’, International Institute for Sustainable Development on Chipko Movement in India <<http://www.iisd.org/50comm/default.htm>>.

<sup>71</sup> See, eg, *Sachidanand Pandey v State of West Bengal* AIR 1987 SC 1109; *Ratlam Municipality v Vardhichand* AIR 1980 SC 1622; *State of Bihar v Murad Ali Khan*, AIR 1989 SC 1; *Tarun Bharat Sangh Alwar v Union of India* AIR 1992 SC 514; *State of Himachal Pradesh v Ganesh Wood Products* (1995) 3 SCC 363 (hereinafter Ganesh Wood Products); *Subash Kumar v State of Bihar* (1991) 1 SCC 598; AIR 1991 SC 420; *Bombay Dyeing and Mfg Co Ltd* AIR 2006 SC 1489; *Ahmadabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121; *State of Himachal Pradesh v Umed Ram Sharma* AIR 1986 SC 847 (the Court includes the right to good roads as a fundamental right under Article 21); *MC Mehta v Union of India and Others* (1997) 2 SCC 411 at 20; *M C Mehta v Kamal Nath and Ors* (1997) 1 SCC 388; *TN Godavarman Thirumulpad v Union of India and Ors* AIR 2005 SC 4256; *Vellore Citizens' Welfare Forum v Union of India and Ors* AIR 1996 SC 2715; *Karnataka Industrial Areas Development Board v Sri C Kenchappa and Others* AIR 2006 SC 2038; *AP Pollution Control Board v Prof MV Nayudu (Retd) and Ors* (1996) 5 SCC 718; *ND Jayal and Anr v Union of India and Ors* (2004) 9 SCC 362; *Research Foundation for Science, Technology and Natural Resources Policy v Union of India and Anr* (2005) 13 SCC 186; *Milk Producers Association, Orissa and Others v State of Orissa and Others* AIR 2006 SC 3508; see also *Indian Council for Enviro-Legal Action v Union of India* Supreme Court judgment, unreported, 18 July 2011 (Bichri II).

## IV APPLICATION OF THE CONCEPT OF JUSTICE AND FUNCTIONS OF TORT LIABILITY

Despite the recognition of the indigenous legal tradition, the Indian environmental jurisprudence has its own distinct features. One cannot disassociate with how the official law is applied or that which is pervasive through the current Indian legal framework. Even the common law of tort that was underdeveloped for solving environmental disputes has acquired a distinct characteristic feature of its own, in the form that strict liability principles have been changed through the court decisions into absolute liability ones.<sup>72</sup> However, it has not progressed as rapidly in contrast to the civil liability principles used in England and elsewhere. Thus the hard law in India in the Austinian sense has evolved in the British common law tradition including tortious liability, and evidently overshadows the traditional indigenous legal system and exhibits features of the western legal understanding of the theories of law and its objectives. It has evolved as having acquired western features for assertion of proprietary and property rights over use of natural resources, land and property. The interesting turnabout to the right to property after the 44<sup>th</sup> amendment however provides a unique twist to understanding of tortious principles in respect of right to property.<sup>73</sup>

However, one can argue that the manner in which the pursuit of social justice ideology permeated all public interest issues after 1977, based on a Constitutional rationale, influenced the evolution of interpersonal relations that tort law harnesses. As laws are designed and enacted to reach a policy objective, they must function to achieve the desired goal. They are also culture specific. Hence any legal liability regime may have the following features: that of a formalist<sup>74</sup>, conventionalist<sup>75</sup> or instrumentalist<sup>76</sup> explanation of law and its characteristics. Formalist rules will include rules that a legal command should be complied with and must be public; conventionalist rules have a basis in social convention and provide a clear basis as to circumstances where state coercion will or will not be applicable,<sup>77</sup> and instrumentalists proceed on the basis of examination of legal liability as a tool to achieve a certain objective.<sup>78</sup> Thus the nature and characteristics of tort law that have been employed to justify liability for environmental wrongs have variously derived from explanations for corrective justice, reparative justice, distributive justice and economic considerations within the contemporary western world and common law jurisdictions.

<sup>72</sup> See *M C Mehata v Union of India* AIR 1987 SC 1087 (Shriram Gas leak case where the Court modified the strict liability principle into an absolute liability one for inherently dangerous enterprises, barring the exceptions available under *Rylands v Flethcher* (1878) LR 68).

<sup>73</sup> Sushant Sailan, 'History of the Removal of the Fundamental Right to Property', (2002) *Centre for Civil Society*, 231–255 <<http://www.ccsindia.org/ccindia/interns2002/25.pdf>>.

<sup>74</sup> Formalist rules will include rules that a legal command should be complied with and must be public; Cf. J Rawls, *A Theory of Justice* (Oxford University Press, Oxford, 1973) 237–239.

<sup>75</sup> Leslie Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35.

<sup>76</sup> Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in An International Context* (Kluwer Law International, 2001) 68–154.

<sup>77</sup> Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 100–108; H L A Hart, Joseph Raz and Penelope A Bulloch (eds), *The Concept of Law* (Oxford University Press, 2012).

<sup>78</sup> Bergkamp, above n 76, 69-71, 151-4.

A *Corrective Justice*

Amongst other objectives, one of the major objectives of a liability system is to achieve corrective justice. In Aristotelian terms, a person who gains at the expense of another must compensate the loser.<sup>79</sup> Thus a person who has pursued a personal objective harming another should be liable to recompense the other. Corrective justice focuses on the interaction between persons and a moral obligation on the harm doer to compensate the victim in order to restore each person's status quo ante.<sup>80</sup> According to Gordley, corrective justice preserves the distribution of wealth and therefore 'a person who has voluntarily harmed another, even if he has acquired nothing, has gained in the sense that he has pursued his own objectives at another's expense. He must pay for any loss he has caused.'<sup>81</sup> Similarly, according to Wright, as tort cases are based on a defendant's harmful interaction with the plaintiff, the claim in tort falls under the domain of corrective justice.<sup>82</sup> However, the definition of justice requires an institutional framework within which it is supposed to function — it is subjective and forms the ideal to be achieved in any society. Further it is like an ideal commodity that is desired by people within a society but is subject to the vagaries of the system and to the 'law of diminishing returns'.<sup>83</sup> Professor Coleman explains that corrective justice elements are contained within a civil liability regime if one considers the 'relational and annulment thesis'.<sup>84</sup> The relational element provides the defendant the reasons for action while the annulment thesis requires that wrongful losses be repaired. Both these combined elements account for corrective justice as it applies to tort. Thus the duty of the wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible.<sup>85</sup> However this account of civil liability and corrective justice does not account for all the rules within civil liability, it rejects exclusive efficiency-based approaches to liability, and presupposes rights that could trigger a claim to compensation on being infringed rather than providing a definition for a right to rectification. Professor Bergkamp views Coleman's approach as providing a place for both justice and economics within civil liability.<sup>86</sup>

From an environmental perspective corrective justice may not be fully able to solve all environmental problems, as it cannot give account for public interest objectives of environmental law. These are better addressed through distributional aspects of public law. Thus tort law needs to address not merely individual considerations but also the public interest. Strict liability under tort law can be defended on grounds of distributive justice. Scholten's 'risk-and-benefit-linkage'<sup>87</sup> theory, Keating with his

<sup>79</sup> J Gordley, 'Tort Law in the Aristotelian Tradition' in Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997) 157, 158; E J Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 *Columbia Law Review* 472.

<sup>80</sup> EJ Weinrib, 'Understanding Tort Law' 2323 *Valparaiso University Law Review* 485.

<sup>81</sup> J Gordley, above n 79, 157, 158.

<sup>82</sup> RW Wright, 'Right Justice and Tort Law' in Owen, above n 79, 182.

<sup>83</sup> RA Epstein, *Simple Rules for a Complex World* (Harvard University Press, Cambridge, 1995) 38.

<sup>84</sup> Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 318–324.

<sup>85</sup> Ibid 324.

<sup>86</sup> Bergkamp, above n 76, 113; see also G J Postema, 'Risks Wrongs and Responsibility: Coleman's Liberal Theory of Commutative Justice', (1993) 103 *Yale Law Journal* 889. .

<sup>87</sup> P Scholten, *Schadevergoeding buiten overeenkomst en onrechtmatige daad* (UvA, Amsterdam, 1899), cited by Bergkamp, above n 76, 126 as J M van Dunné, 'Environmental Liability: Continental Style' in J M van Dunné (ed) 'Environmental Contracts and Covenants: New

‘fairness theory for distributive justice and strict liability’<sup>88</sup> and Esser arguing on the Aristotelian distinction between corrective justice and distributive justice provide a philosophical basis for strict liability and a public interest model of tort.<sup>89</sup>

Further, the rapid growth of insurance has also increased the distributive aspect of tort law. As loss allocation plays a significant role then the major issues that need consideration logically is that liability be imposed on that party which is best placed to bear the loss. In the UK, one could see cases where courts placed emphasis on the capacity of the party to bear loss and those who could take out insurance.<sup>90</sup> However this consideration of taking insurance may not be the deciding factor anymore when solutions to environmental problems are being sought as a merely distributive approach severs the relationship between the parties and violates the moral foundations of personal responsibility.<sup>91</sup> Yet one can argue that the relationship between insurance and tort does not dispense with all features of corrective justice in that it retains a degree of individual accountability.<sup>92</sup>

### B *Distributive Justice*

In India as elsewhere, a practical example of where tort law has been developed is in the area of industrial accidents and workmen’s compensation reflecting distribution of losses in tune with the changing nature of industrial and technological evolution. The rapidly changing economic, social and political considerations within India is such that the focus of tort, in an environmental context should be directed to the issue of ‘who should bear the loss’ and as case law suggests the courts have rightly in a number of cases ordered the polluter to pay invoking the elements of loss distribution as well as corrective justice. Yet the fact that in theory tort law accommodates the distributional aspects it does not necessarily replace the statutory and regulatory public law response already within place. While examining environmental liability, one comes up repeatedly with economic analysis or cost-benefit equation. Justifications for environmental liability, apart from the traditional ones have been sought through the cost internalisation theory through the polluter-pays principle. In contrast to the lawyers, the economists urge that the courts should devise solutions that are efficient in economic terms and hence the role of tort is to provide a framework that is market driven even for protection of certain rights, i.e. environmental rights. Hence with ‘wealth maximisation’ as one objective, resources are allocated between individuals through voluntary transactions to achieve efficiency.

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Instruments for a Realistic Environmental Policy? Proceedings of the International Conference of the Institute of Environmental Damages’ (Erasmus University, 1993) 233–253.

<sup>88</sup> GC Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents: Olin Working Paper No 99–21* (University of Southern California Law School, Los Angeles, 1999) 28, 61.

<sup>89</sup> Mark Wilde, *Civil Liability for Environmental Damage*, (Kluwer Law International, 2002) 123, 128.

<sup>90</sup> See e.g. *Nettleship v Weston* [1971] 3 All E.R. 581; *Lamb v Cambden LBC* [1981] QB 625; *Spartan Steel v Martin* [1973] QB 27; *RH Willis and Son v British Car Auctions Ltd* [1987] 2 All E. R. 392; cf *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555; see also RFV Heuston, R A Buckley & Sir John William Salmond, *Salmond and Heuston on the Law of torts* (Sweet & Maxwell, 20<sup>th</sup> ed, 1992) 28.

<sup>91</sup> I England, *The Philosophy of Tort Law* (Dartmouth, 1993) 13.

<sup>92</sup> Wilde, above n 89, 129.

Accordingly, Posner defines 'wealth maximisation policy' as one where 'the aggregate value of all goods and services is maximised whether economic or non-economic (family, leisure, freedom from pain and suffering).'<sup>93</sup> In this system however, individuals motivated with greed and self-interest end up imposing a cost on non-participants thus creating 'externalities', i.e. pollution.<sup>94</sup> Along with 'mis-management, fraud, [corruption], mistake and monopoly, pollution too reflects a failure of the self-regulatory tools of a market economy and therefore must be controlled through public regulation.'<sup>95</sup> Different solutions to tide over this problem have been proposed, for example by imposing a 'Pigouvian tax'<sup>96</sup> i.e. punishment for those who fail to take into account 'externalities' by imposing a 'punitive tax', or by following the 'Coasian method'<sup>97</sup> with imposition of social cost by least interference from the law 'a world of zero transaction costs'. With the impracticality of its application within the environmental area and to the actual world, Coase explained that in the real world 'zero transaction costs' do not exist, rather with positive transaction costs 'the law plays a critical role in determining allocation and use of resources'.<sup>98</sup> As to the functioning of tort law within this sphere, economic scholars point out that tort law should improve the bargaining position of the parties involved. Injunctive relief then becomes handy and thus can be used to channel transactions between the parties in the market.<sup>99</sup>

### C *Economic Considerations and Balancing of Interests by the Court*

Consequently a theory of balancing the economic interests and public interest over clean environment and water can be discerned from the Indian Supreme Court's decision in the Dheradun Quarrying case.<sup>100</sup> This case concerned abatement of pollution by limestone quarries by a number of private operators in the Dheradun Valley in the Mussoorie Hills of the Shivalik range in the Himalayas. The incessant and increasing amount of limestone quarrying had caused an imbalance in ecological system that was causing a huge water shortage during the summer months for the residents in and around the mines. The Court required the Government of Uttar Pradesh to be party to the litigation as a protector of the environment in discharge of its statutory and constitutional obligation. It ordered several mines to be closed but was mindful of the fact it would be impractical to stop all mining activity as it was an essential and necessary economic activity and was required for the defence of the country and safeguarding of the foreign exchange. The affected residents who were facing acute water shortage were not granted any damages for that was not the way the case came up to the Court, rather a letter was treated as a writ petition under

<sup>93</sup> RA Posner, 'Wealth Maximisation and Tort Law: A Philosophical Inquiry' in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997).

<sup>94</sup> RA Posner, *Economic Analysis of Law* (Little Brown and Co, 3<sup>rd</sup> ed, 1986) 343.

<sup>95</sup> Posner, above n 93, 88.

<sup>96</sup> Arthur C Pigou, *The Economics of Welfare* (Macmillan, 4<sup>th</sup> ed, 1932).

<sup>97</sup> RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

<sup>98</sup> RH Coase, 'Notes On The Problem Of Social Cost' in R H Coase, *The Firm, The Market And The Law* (University of Chicago Press, 1990).

<sup>99</sup> WM Landes and RA Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 31.

<sup>100</sup> *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* AIR 1985 SC 652; AIR 1985 SC 1259, AIR 1987 SC 359; AIR 1987 SC 2426; AIR 1988 SC 2187 (Dheradun Quarrying Case).



Article 32 of the Constitution seeking an appropriate remedy — in this case as it happened to be of injunctive relief.

However, economic considerations, the private right to trade and business guaranteed under Article 19 of the COI and the private right to property has in a number of cases held a lower priority with the Supreme Court<sup>101</sup> and the various High Courts<sup>102</sup> in India after the celebrated case of *Ratlam Municipality*.<sup>103</sup> Abraham<sup>104</sup> points out that the *Ratlam* and *MC Mehta* cases indicate a distinct evolution of a solution to India's environmental problems through a constitutional mandate and an evolution of a public law of torts similar to that in civil law jurisdictions, especially within the French jurisprudence.<sup>105</sup>

Unlike tort cases in the US or the UK for violation of a private right due to pollution, most environmental cases that have come up to the Indian Supreme Court have been framed under a writ petition for violation of and vindication of fundamental rights (such as right to life under Article 21 amongst others) and the public interest over environment.<sup>106</sup> However, the economic considerations and policy factors that explain tort law decisions and those which affect the Indian courts decisions reflect certain similarities but apparently the justifications for application of tort principles and rationalisation of cost benefit analysis is modified within the Indian environmental jurisprudence to suit the nature of the legal action brought to the court. The significant feature that needs to be noted is that in most environmental cases the Indian courts have granted injunctions in order to stop the polluting activity rather than award damages, as is the case elsewhere.

This would indicate that merely 'efficiency within the market is not the sole purpose and objective of law' and the Indian judiciary has been mindful of a higher purpose of 'fairness and justice.'<sup>107</sup> Law is a human construct designed to accomplish certain goals and solve disputes.<sup>108</sup> Karl Llewellyn explains that law's main objective is to resolve both actual and potential disputes, settle them and prevent further disputes from happening.<sup>109</sup> It serves to restore peace and obtain a resolution that is bearable to the parties. Also, legal requirements must ultimately justify themselves in functional

<sup>101</sup> See, eg, *MC Mehta v Union Of India* AIR (1987) 4 SCC 463; *MC Mehta v Union of India* AIR (1987) 1 SCC 395.

<sup>102</sup> *Krishna Gopal v State of Madhya Pradesh* 1986 Cr LJ 396; *PC Cherian v State of Kerala* 1981 KLT 113.

<sup>103</sup> *Municipal Council, Ratlam v Vardichand* AIR 1980 SC 1622; (1980) 4 SCC 162.

<sup>104</sup> Abraham, above n 22, 42.

<sup>105</sup> IP Massey, *Administrative Law* (Eastern Book Co, Lucknow, 2<sup>nd</sup> ed, 1985) 343, 344.

<sup>106</sup> For a detailed discussion on writ procedure for environmental claims, see Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (Oxford University Press, 2002) 122, 130.

<sup>107</sup> Goodhart explains that efficiency is not the sole purpose and objective of law, the operations of a market ought to be restricted in some manner in pursuit of a higher objective that of fairness and justice, see C A E Goodhart, 'Economics and the Law: Too Much One Way traffic?' (1997) 60 *Modern Law Review* 1, 13.

<sup>108</sup> Guido Calabresi, 'Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.' (1975) 43 *University of Chicago Law Review* 69, 105.

<sup>109</sup> Karl N Llewellyn, 'The Bramble Bush: On Our Law and its Study', (Oceana, Dobbs Ferry, 1960) 12 cited in Lucas Bergkamp, *Environment and Liability* (Kluwer Law International, 2001) 67.

terms.<sup>110</sup> To achieve either the external or internal goals that are set by a society, the instrument of liability is used. Hence liability also has external goals other than those that a liability system seeks to achieve. Environmental liability is therefore justified by the polluter pays principle, which in turn is a version of the cost internalisation theory.

#### D *Cost Internalisation*

Cost internalisation theory as applied to the environmental context requires that ‘externalised’ costs be imposed on the polluter for causing damage. Economists regard pollution as an ‘externality’: a cost that can be pushed out or unfairly imposed on others.<sup>111</sup> When the externalities are not internalised, it results in a poor state of environment and welfare and leads to market failure. To overcome this situation, a government could probably take an initiative to ‘internalise’ this harm by asking polluters to control their emissions or pay for the harm that they cause<sup>112</sup> — thus ‘internalising’ the cost as they are in the best position to do so. Thus where an industrial enterprise is engaged in an activity that impacts the environment while producing a product or doing an activity then by internalising the cost of pollution or other harmful effect the manufacturer will demand a price that is higher and in turn will decrease the demand in the market for that product and cause lesser damage to the environment. Although cost internalisation has some plausible arguments in theory, in practice, especially in India — as is the case elsewhere — it is difficult to apply and use in reality. Legal and economic scholars and critics<sup>113</sup> have argued that the related difficulties with this theory are that it raises questions about the parameters of cost and environmental damage, recognition of legal entitlements to natural resources.

#### E *Cost Internalisation Application in India*

The Indian Supreme Court has applied this principle of cost internalisation on the polluter, albeit determining the liability of the polluter without stating clearly the economic rationalisation. In the *Span Resorts Case*<sup>114</sup> the Court imposed the cost of restoring the damage done to the area next to the Beas River for developing a resort in violation of environmental regulations. To date there are over two dozen reported decisions of the Supreme Court under the name *MC Mehta v Union of India & Ors* — Mr Mehta who has been the petitioner in all these cases is a practicing advocate and has worked tirelessly for the last quarter of the century for the environmental cause. The first case,<sup>115</sup> decided in 1986 was filed as a writ petition under Article 32 of the

<sup>110</sup> Ibid.

<sup>111</sup> MR Chertow and DC Esty (eds), ‘Thinking ecologically: an introduction’ in MR Chertow and DC Esty (eds), *Thinking Ecologically: The Next Generation of Environmental Policy* (Yale University Press, New Haven, 1997) 1–16, in Bergkamp, above n 76, 73.

<sup>112</sup> Chertow and Esty, above n 111, 7.

<sup>113</sup> See, eg, various arguments present by Guido Calabresi, ‘Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.’ (1975) 43 *University of Chicago Law Review* 69, 105; With M Landes and R A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 31; Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 197–211, and EJ Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485.

<sup>114</sup> *MC Mehta v Kamal Nath* (2002) 3 SCC 653.

<sup>115</sup> *MC Mehta & Ors v Union of India* (1987) 1 SCC 395.

COI. The petitioner sought orders from the Supreme Court to restrain the reopening of a chemical industrial plant of a fertilizer corporation in Delhi that was ordered to be closed due a major oleum gas leakage from one of its units. The Constitution bench of the Supreme Court applied the doctrine of ‘strict liability’ but replaced it with the principle of ‘absolute liability’ to stifle any exceptions to the rule in *Rylands v Fletcher* by the American defendant company, Union Carbide Inc.

Justice PN Bhagwati, considering the strict liability principles and basing his exposition on tort law theory, modified it for the situation stating:

The rule in *Rylands v. Fletcher* applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. This rule[,] evolved in the 19th century at a time when all these developments of science and technology had not taken place[,] cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the *needs of the present day economy and social structure...*

[T]he Court need not feel inhibited by this rule... *Law has to grow* in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country... The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Although this Court should be prepared to receive light *from whatever source it comes*, but it *has to build up its own jurisprudence*, evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. If it is found that *it is necessary to construct a new principle of law* to deal with an unusual situation which has arisen and which is likely to arise in future... (emphasis added).<sup>116</sup>

In this case the Court gave a multiple number of orders and in a separate application considered the question for compensation to a larger bench of five Judges to lay down the law on, i.e.:

What is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in *Rylands v. Fletcher* apply or is there any other principle on which the liability can be determined.<sup>117</sup>

It is submitted that here the Court indulged in an exercise of examining liability for industrial accidents from an economic perspective and ended up having the polluter either internalise the cost or pay compensation to restore the damage that had occurred by its activity. In later cases, especially in a related judgment with respect to the Bhopal case, Justice Bhagwati’s exposition was treated to be obiter and the principle of ‘absolute liability’ and the development of tortious liability took a backseat as the Supreme Court in other cases started giving more directions to the executive and the government, thereby doing the ‘lawmaking’ function and entrenching into the domain of the legislature. As legal scholars point out, even in the environmental field, as with human rights and fundamental rights, the Supreme Court took upon itself to create

<sup>116</sup> *MC Mehta* (1987) 1 SCC 395, Para 5, 6(i–ii).

<sup>117</sup> *MC Mehta* (1987) 1 SCC 395, Para 7(i).

law where none existed<sup>118</sup> or where the legislation had gaps rather than clarifying or laying down a coherent theory for liability and its justifications the Supreme Court adopted an activist role that has had its share of criticism.

However, as Goodhart<sup>119</sup> and Sagoff<sup>120</sup> state, environmental law is simply not about internalising costs and correcting market failures by eliminating externalities; rather it reflects public values and is the product of citizens articulating a vision of desirable society, neither is it wealth maximisation.<sup>121</sup> This seems to be the higher objective that a liability system ought to achieve and on one account the Indian Supreme Court faced with a herculean task to solve the nation's environmental problems has not lost sight of the 'justice' requirement of the objective of law as opposed to merely economic efficiency. Objectives of law such as morality and fairness cannot be included in a cost benefit analysis and that is where economists have had their share of criticism.<sup>122</sup> Professor Dworkin argues that individual wealth cannot be equated with the society's wellbeing, thus any gains which an individual achieves by reallocation of resources in a private transaction may be far less than the amount of damage that has been caused to the society at large.<sup>123</sup>

Largely, the objectives of morality and fairness that form the basis of justice considerations are derived within the Indian environmental jurisprudence through application of dharmic considerations, self control and karmic consequences of violating ones 'swadharma' (duty to the self). The dharmic rules embody a respect for the environment and other living beings. From the perspective of dharma what one extracts and digs from the earth for one's own benefit, one ought to put back the same amount so as to maintain the balance of nature. Violation of this dharmic duty may result in penal consequences, civil penalties or social consequences under the dharmic code. Unfortunately this dharmic duty is not translated nor recognised to its fullest extent as it ought in the contemporary legal sense and therefore does not have current legal ramifications. This divide between cultural and legal 'ought' makes the indigenous legal tradition disassociated from the existing legal norms and rules. However, the argument of morality and fairness, the corrective and the reparative justice function that tort law harbors overlaps with similar functions under the dharmic duty of moral punishment, correction, compensation and repairing harm.

## V CONCLUSION

Legal scholars identify various aims and functions that the law of tort performs in a common law system. Glanville Williams in *The Aims of the Law of Tort* (1951)<sup>124</sup> describes them as: appeasement, justice, deterrence and compensation. Ronald Coase,

<sup>118</sup> Baxi, above n 60, 91, 94; Dhavan, above n 67 (i).

<sup>119</sup> Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge University Press, Cambridge, 1988).

<sup>120</sup> CAE Goodhart, 'Economics and the Law: Too Much One Way traffic?' (1997) 60 *Modern Law Review* 1, 13, 12-13.

<sup>121</sup> RA Posner, 'Essay on Utilitarianism, Economics and Social Theory' in R A Posner, *The Economics of Justice* (Harvard University Press, 1983) 16-17 and 74-75.

<sup>122</sup> Ronald, Dworkin, 'Is Wealth a value?' (1980) 9 *Journal of Legal Studies* 191.

<sup>123</sup> Ibid.

<sup>124</sup> G Williams, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137; Perry, Ronen 'The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory' (2006) 73 *Tennessee Law Review* 177.

in the late 1950s in *The Problem of Social Cost* (1960)<sup>125</sup>, added one more dimension — that of incentives and deterrence, and identified the aim of tort as being the efficient distribution of risk. Coase submitted in his article that the aim of tort should be to reflect as closely as possible liability where transaction costs should be minimised. Because of the diverse standpoints reflecting various theories of the objectives of the law there have been a number of proposals to view the objectives of tort as multi-faceted.

Thus autonomy, moral responsibility and loss allocation are all facets in which tort law function — neither strict liability nor (the?) insurance aspect can be separated from tort law. Therefore a more holistic or pluralistic approach may at least encompass all factors and provide a better view of the functioning of tort law over purely Kantian or monistic theories. Even if the mixed objective or pluralistic explanation lacks the purity of a monistic theory as Weinrib maintains, the pluralistic or mixed objective explanation provides at least a theory of ‘complementarity’.<sup>126</sup> Thus conflicting principles which in isolation appear as non-reconcilable may, upon a collective view, provide a unified whole.<sup>127</sup>

Englard explains that two or more things may appear opposite but in certain cases the opposing principles may form a harmonious totality and this feature occurs recurrently through philosophy and religion.<sup>128</sup> This approach may also be reflected in the decisions of the courts when one considers the solutions provided comprising competing objectives. This approach is then equally applicable to environmental problems because here one can view both the overlap between private interests, for example between a landowner and the public interest of victims affected by pollution.

One can detect the application of both distributive and corrective justice features in some of the common law rules, such as determination of ‘character of neighbourhood’ within nuisance, as the threshold of damage can then be interpreted as an example of the pluralistic approach. In *St Helen’s Smelting*,<sup>129</sup> the Court allowed certain activities to continue keeping in mind that it was an industrial town. However it found the defendant liable when the damage exceeded the threshold limit and thus one can see the application of the corrective justice principle.<sup>130</sup> The pluralistic approach can also be seen to apply for injunctive relief as there the courts can influence the manner of operation of an industrial plant and order the polluter to take appropriate action. Both the orders, one of stopping the activity and the second to take rehabilitative measures, encompass the corrective and distributional aspects.<sup>131</sup> Where the polluter is also asked to pay damages and compensation and take remedial measures, injunctions and remedial measures also encourage the operators to adapt to newer and refine methods of plant operation and also internalise the costs for research in the hunt for cleaner and

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<sup>125</sup> Coase, above n 97, 95–156.

<sup>126</sup> Richard A. Epstein, ‘A Theory of Strict Liability’, (1973) 2 *Journal of Legal Studies* 151.

<sup>127</sup> Englard, above n 91, 185.

<sup>128</sup> Ibid 190.

<sup>129</sup> *St Helen’s Smelting v Tipping* (1865) 11 HLC 462.

<sup>130</sup> Wilde, above n 89, 132.

<sup>131</sup> JPS McLaren, ‘Nuisance Actions and the Environmental Battle’ (1972) 10 (3) *Osgoode Hall Law Journal* 505, 555–557.

greener technologies. One can see clearly the corrective and the economic considerations.<sup>132</sup>

In the *Shriram Gas Leak Case*<sup>133</sup> the Indian Supreme Court adopted a pluralistic approach. The Court was of the view that the defendant company could and should bear the costs associated with implementing additional measures for the safety of the workers and nearby residents. Justice P N Bhagwati, modifying the strict liability principles to absolute liability, held that 'if any harm results on account of such activity the enterprise must be *absolutely liable to compensate* for such harm *irrespective* of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part'.<sup>134</sup> One can discern the application of not only corrective but also distributional aspects of tort law in this case. The polluter pays principle as clarified here was not accepted immediately but found application in 1996 in the *MC Mehta Groundwater* case.<sup>135</sup> The rules of liability in the *Shriram Gas Leak* case were discussed, but the Court then observed that

[t]he question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the 'Polluter Pays' Principle... Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry.<sup>136</sup>

In *Vellore v State of AP*<sup>137</sup>, Justice Kuldip Singh states 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 the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.<sup>138</sup>

Although the *Bichhri* case arose out of the escape of toxic substances in the groundwater and was concerned with tort law, the *Vellore* case dealt with untreated effluents and was more on town planning and municipal government inaction. Still to provide a solution the court, rolled together the polluter pays principle with the absolute liability standard applying a pluralistic approach to resolution of the problem facing it. A similar approach was adopted in the US case by the District Court of Oregon.<sup>139</sup>

<sup>132</sup> *MC Mehta* (1987) 1 SCC 395 (*Shriram gas leak* case): the Supreme Court of India adopted this approach, in ordering the plant to stop operations, adopt cleaner technology for the gas operations and provide compensation to the victims by constituting an ad hoc fund.

<sup>133</sup> *MC Mehta* (1987) 1 SCC 395

<sup>134</sup> AIR 1987 SC 1086 (1987) 1 SCC 395, Paras 5, 6 (i-ii), 7 (i).

<sup>135</sup> The *Bichhri* case (1996) 3 SCC 212 AIR 1996 SC 1446.

<sup>136</sup> AIR 1996 SC 1446, 1466.

<sup>137</sup> AIR 1988 SC 130.

<sup>138</sup> AIR 1996 SC 2715, 2721, Para 11.

<sup>139</sup> *Right L Renken v Harvey Aluminium Inc* 226 F Supp 169 (United States District Court of Oregon, 1963), damage was caused to orchard owners from the defendant's aluminium reduction plant that used fluorides.

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Reich<sup>140</sup> and Macpherson<sup>141</sup> argue that it may be possible in theory to use the law of tort as a means of protecting such interests of an individual against the State, where notions of proprietary interests have been expanded and there is a community interest in the environment. In this scenario not only the community ought to have a recognisable interest in the environment but also the notion of property needs to be expanded. Macpherson, like Singh, argues that property should vest in rights and duties associated with the use of resources rather than the resource itself.<sup>142</sup>

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<sup>140</sup> CA Reich, 'The New Property' (1964) 73 (5) *Yale Law Journal* 733.

<sup>141</sup> CB Macpherson, 'Human rights as Property Rights' (1977) 24 *Dissent* 72.

<sup>142</sup> *Ibid.*