

# POST-MODERN CONSTITUTIONALISM IN ASIA: PERSPECTIVES FROM THE INDIAN EXPERIENCE

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*This paper is based on comparative constitutional law, with significant emphasis on the judicial decisions and laws formulated by the legislature in India. It discusses the path-breaking developments in the Indian legal system which strike at the root of the primitive notion that traditional ethnology and democracy are integrally antithetical to each other. The fact that the Indian Constitution provides for group as well as individual rights is highlighted as a revolutionary feature of India's democracy which according to many legal scholars defies the orthodox notion of western constitutionalism. The paper then proceeds to evaluate the developments in constitutional law in India from three perspectives. Firstly, it appreciates the pragmatic approach adopted by the Constituent Assembly during the framing of the Constitution wherein the makers anticipated the post-modern approach of the current law makers. Secondly, the judicial activism of the Supreme Court is discussed which empowers the judges to engage in comparative law and develop new and original constitutional principles such as the 'basic structure doctrine' so as to expand the protective umbrella of the Indian Constitution for its citizens. Lastly, the paper discusses the practice of internalising international principles and control measures into our body of national legislations and institutions, particularly in the field of environmental law.\*\**

## I. COMPARATIVE LAW IN ASIA AND POST-MODERN LEGAL STUDIES

In the first decade of the third millennium, Asian constitutionalism has shown a growing interest for comparative studies, within and outside Asia, in order to face the institutional challenges implied by globalisation and by the frequent exchange of legal instruments in the international arena.<sup>1</sup> In fact, all over the world, comparative constitutional law is increasingly used

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\*\* Abstract provided by the Board of Editors.

<sup>1</sup> For a debate on recent developments of Asian constitutionalism in comparative perspective see, *Ex Multis*, Roundtable on Asian Constitutions in Comparative Perspective in National Taiwan University Law Review, 4.1., 2009, 185 ss.; Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asia Constitutionalism: Features in Comparison* (ASLI Working Paper, Paper No. 006, August 2009).

not only in the constitution-making process or in the everyday work of the Legislative Assemblies, but also in the Constitutional (or Supreme) Courts, where foreign cases and doctrines are frequently used, more for their practical strength than in the light of theoretical or ideological choices. This ‘circulation’ of constitutional instruments and doctrines corresponds to a ‘post-modern’ approach to constitutional law which no longer strictly adheres to the traditional ‘ideal-types’ (including the ‘Asian values’ doctrine as opposed to the democratic model) but is open both to the incorporation of new principles (for instance, the development of environmental law) or the revitalisation of ancient rights and traditions (tribal customs, but also autochthonous legal doctrines) in the constitutional order.

In this paper, I will not deal with the theoretical debate on post-modernism in comparative law, but just try to corroborate, by offering some hints on a specific constitutional system, the increasingly widespread opinion that “for historical reasons Asia, African and other non-Western legal systems are inherently more attuned than the Western legal system to the intellectual and practical challenges of comparative law”.<sup>2</sup> I have elsewhere emphasized the need to reassess the Indian constitutional system in a comparative perspective,<sup>3</sup> but I was stimulated by the interesting works of Werner Menski on the role of Hindu law in contemporary India to look at it from a post-modern perspective.<sup>4</sup> According to Menski, “it is an observable fact that Indian law has developed over the past few decades, away from the outwardly postcolonial and partly aggressively modernist presuppositions of the 1940s and 1950s, towards an embarrassed self-critical assessment of the present”,<sup>5</sup> through a resurgence of Hindu law (especially concerning family law and the personal status); this requires a “new attempt at understanding how the ancient cultural - and thus predominantly socio-religious - traditions of South Asia still manifest themselves today as centrally important legal ‘bricks’ for the reconstruction of postmodern Hindu law and the definition of postmodern Indian laws”.<sup>6</sup> From a constitutional law perspective I am more interested in the developments of the Indian legal system as a ‘mixed system’<sup>7</sup> and to trace back some post-modern elements

<sup>2</sup> David Nelken, *Comparative Law and Comparative Legal Studies* in ESIN ÖRÜCÜ & DAVID NELKEN, *COMPARATIVE LAW: A HANDBOOK* 8 (2007) quoting Werner Menski, *Beyond West* in ESIN ÖRÜCÜ & DAVID NELKEN, *COMPARATIVE LAW: A HANDBOOK* (2007).

<sup>3</sup> Domenico Amirante, *Nation Building Through Constitutionalism: Lessons from the Indian Experience*, HKLJ, Vol. 42 Part 1 (2012).

<sup>4</sup> WERNER MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* (2003); See also Werner Menski, *From Dharma to Law and Back? Postmodern Hindu Law in a Global World* (Working Paper N.20, South Asia Institute, University of Heidelberg, (2004)); Werner Menski, *Postmodern Hindu Law*, available at <http://www.casas.org.uk/papers/pdfpapers/pomolaw.pdf> (Last visited on August 17, 2013).

<sup>5</sup> *Id.*, 2.

<sup>6</sup> *Id.*, 3.

<sup>7</sup> Esin Örucü, *What is a Mixed Legal System: Exclusion or Expansion?*, *Electronic Journal of Comparative Law*, 12.1, May 2008, available at <http://www.ejcl.org/121/art121-15.pdf> (Last visited on August 19, 2013).

visible from the beginning of the post-colonial constitutional order and, more evidently, in some recent developments of Indian public law.

## II. INDIAN 'MODERNITY' AND THE POST-MODERN ELEMENTS IN THE INDIAN CONSTITUTIONAL SYSTEM

There is sufficient consensus among scholars of various disciplines on the fact that the access of India to modernity has followed a very peculiar path, resulting in an original blend of tradition and innovation and challenging the mainstream assumption which considers traditional culture and democracy to be substantially incompatible. According to Partha Chatterjee, Indians in different fields have made many attempts "to construct a modernity that is different ... indeed, we might say that this is precisely the cultural project of nationalism: to produce a distinctly national modernity".<sup>8</sup> In Sunil Khilnani's words, the journey of India towards democracy shows "a rapid acceleration and intensification in the long-running encounter between a civilization intricately designed with the specific purpose of perpetuating itself as a society, a community with a shared social orders, ... and, set against it, the imperative of modern commercial society".<sup>9</sup> This encounter has generated many original processes and solutions, contributing to the consolidation, for more than six decades, of the "world's largest democracy".<sup>10</sup> From the point of view of political theory, for instance, Maya Chadda asserts that a very innovative feature of India's democracy is that groups based on caste, religion and ethnicity "have expanded popular participation in the democratic process by mobilizing people on the basis of these loyalties", and, in this way, "they have redefined democracy".<sup>11</sup> In the same direction Christophe Jaffrelot, commenting on the rise of the Dalit parties in Indian elections, affirms that "India is inventing a unique route towards democracy ... it is probably the first country in which a formal, institutional democracy has been gaining social substance through a quiet transfer of power".<sup>12</sup>

From an institutional point of view today's India is considered by Stepan, Linz and Yadav as a model for an innovative concept of State, which can be termed as the State-Nation (as opposed to the traditional European

<sup>8</sup> Partha Chatterjee, *Talking About our Modernity in Two Languages* in PARTHA CHATTERJEE, A POSSIBLE INDIA 278-279 (1997).

<sup>9</sup> SUNIL KHLNANI, THE IDEA OF INDIA 5 (1998).

<sup>10</sup> For an account on India's 'contested modernities', see STUART CORDBRIDGE & JOHN HARRISS, REINVENTING INDIA, LIBERALIZATION, HINDU NATIONALISM AND POPULAR DEMOCRACY (2000).

<sup>11</sup> MAYA CHADDA, BUILDING DEMOCRACY IN SOUTH ASIA: INDIA, NEPAL, PAKISTAN 11 (2000).

<sup>12</sup> Christophe Jaffrelot, *Caste and the Rise of Marginalized Groups* in THE STATE OF INDIA'S DEMOCRACY 81 (2007).

Nation-State), based on “shared political community amidst deep cultural diversity”.<sup>13</sup> For Indian constitutional lawyers such as M.P. Singh and S. Deva, the peculiar character of the Indian polity is reflected in the Constitution of 1950.<sup>14</sup> For these authors, the Indian Constitution is only formally representative of the Euro-American liberal model but essentially:

“It is founded on the age old Indian traditions built up in the course of its over four thousand years of history and on the experiences gained by the people of India in the course of colonial rule in modern time ... though its form may resemble the constitutional documents produced by the colonial rulers for governing the country, its spirit is native”.<sup>15</sup>

Elsewhere, I have proposed to define Indian constitutionalism as ‘unconventional’ because it contains many unorthodox institutes defying conventional definitions of western constitutionalism, as well illustrated by the debates on the controversial nature of Indian federalism or on the Union’s system of government.<sup>16</sup> In this perspective, many interesting hints for comparative scholars are offered by the relatively yet to be unexplored experience of the Indian constitutional system, presenting many features that can be associated to post-modern law, even if they are not labelled as such in the Indian context or by Indian doctrine.

In the following pages, I will evocate the contribution to the debate on post-modern law offered by the Indian constitutional developments from three angles: the original methodology of constitution-making in the Indian Constituent Assembly (somehow anticipatory of a post-modern approach), the jurisprudential aspect of the Supreme Court (making large use of both comparative law and new constitutional principles from the international experience to forge original theories like the ‘basic structure doctrine’) and the development of environmental law as a post-modern discipline (where international principles and standards of control have been interpreted to create new institutional instruments). According to such experiences, it is possible to suggest that the Indian constitutional system represents an original Asian model of post-modern constitutionalism and that detailed research in this field would be very useful for a comparative understanding of the role of constitutional law in the contemporary globalised world.

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<sup>13</sup> ALFRED STEPAN, JUAN J. LINZ & YOGENDRA YADAV, *DEMOCRACIES IN MULTINATIONAL SOCIETIES: INDIA AND OTHER POLITIES* 39 (2011).

<sup>14</sup> Mahendra P. Singh & Surya Deva, *The Constitution of India: Symbol of Unity in Diversity* in *JAHRBUCH DES OFFENTLICHEN RECHTS DER GEGENWART* 649,686 (2005).

<sup>15</sup> *Id.*

<sup>16</sup> Amirante, *supra* note 3.

### III. CONSTITUTION MAKING IN INDIA: ANTICIPATORY POST-MODERNISM

In my view, the Constitution of India must be studied and regarded not just as a post-colonial text but also in the broader perspective of the democratic post-war Constitutionalism, which is based on a new conception of the individual who is no longer seen as a mere holder of rights and pretensions against the State, but is always integrated in social groups. The Indian Constitution, more than its European counterparts, insists on the social dimensions of individuals, through the recognition and the protections of social groups, from the intermediate corps and the associations to the minorities.<sup>17</sup> Not just in the part on fundamental rights but also generally in the entire text of this document, it is possible to identify a tension between individual rights and group rights. For example, Neera Chandhoke, while commenting on the ‘cultural rights’ as included in Articles 29 and 30, acknowledges that such constitutional provisions recognize “that different groups have different cultures, that these linguistic and religious cultures are valuable to their members, and that members of distinct cultures need to be given explicit rights to protect their culture”. But she also critically notes that “the right to culture is an individual right, i.e. individuals are granted the right to their culture”.<sup>18</sup> From a different perspective, the insertion of such provisions in the charter of fundamental rights in the Constitution (Articles 12 to 35), can be considered an element of anticipation of the constitutional policies of multicultural States, implemented by many western countries in the last decades of the nineteenth century. For Rajeev Bhargava, a distinctive feature of the Indian constitution is ‘communitarian egalitarianism’, capable of forging “a relation of mutual respect among communities”.<sup>19</sup> Bhargava considers communitarian egalitarianism as opposed to western individualistic egalitarianism by stating that while “in individualist egalitarianism differences are due to individual choice or to a culturally neutral, socially generated circumstance that must be eliminated in order to achieve an egalitarian order”, in communitarian egalitarianism “differences are a result of irreducible diverse cultural backgrounds and need to be properly recognized and affirmed rather than jettisoned from the egalitarian network”.<sup>20</sup>

Keeping in mind such outputs of the Indian Constitution and adopting a comparative perspective, it is possible to detect some post-modern features in the methodology used by the Constitutional Assembly. First of all it must be stressed that the general attitude of the original framers was neither doctrinal nor ideological but in fact, pragmatic; by refusing to follow one

<sup>17</sup> See generally VN SHUKLA, *CONSTITUTION OF INDIA* 238 (MP Singh ed., 2011).

<sup>18</sup> Neera Chandhoke, *Individual and Group Rights, A View from India* in *INDIA’S LIVING CONSTITUTION* 209 (2005).

<sup>19</sup> Rajeev Bhargava, *Introduction Outline of a Political Theory of the Indian Constitution* in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 20 (2008).

<sup>20</sup> *Id.*, 20-21.

particular model (i.e. the British, the American or the Soviet) the founding fathers decided to choose one by one the constitutional devices appropriate to face specific Indian problems, regardless of the prescribed dogmas of western or socialist constitutionalism. As I have already noted, the words of Bhimrao R. Ambedkar, Chairman of the Drafting Committee, illustrate the basic attitude of the Assembly to employ constitutionalism not in order to adhere to a pre-defined model but to draw lessons from other Constitutions in order to avoid blunders and errors. Introducing the Draft Constitution, in February 1948, Ambedkar stressed that “the only new things ... in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the trend of the country”.<sup>21</sup> In the same speech he also affirmed that “there is nothing to be ashamed in borrowing ... nobody holds any patent rights in the fundamental ideas of a constitution”. From this perspective Granville Austin, in his renowned study of the Indian Constitution, invites to consider the skilfulness with which the Constituent Assembly “selected the provisions it borrowed and the quality of its modifications, for in each lay the possibility of creativeness and originality, success and failure. And, it has turned out, the Assembly successfully played the alchemist, turning foreign metal into Indian coin”.<sup>22</sup>

In this approach of the Constituent Assembly, we can identify a post-modern disposition (be it intentional or fortuitous) consisting in the deliberate attitude to mix instruments taken from different constitutional experiences, thus tailoring new constitutional solutions according to the relatively traditional ‘clothes’ of the mainstream western constitutionalism of the time. Such methodology was allowed and favoured by the prevailing role played by lawyers in the Constituent Assembly. As indicated by Austin, twelve out of the twenty ‘most influential’ members of the Assembly were lawyers or had degrees in law, and were trained by western law.<sup>23</sup> Moreover an important feature of the Drafting Committee (the group of men who really wrote the Constitution) was “that it consisted mainly of lawyers and not politicians ... the only member of the Committee who was a part and parcel of the Congress organization was K.M. Munshi”.<sup>24</sup> More generally for the Indian elite, according to Satish Saberwal, in the first half of the nineteenth century “learning western law proved to be a dual use, indeed a triple use resource”.<sup>25</sup> *Firstly* legal skills in western law would give access to very lucrative professions; *secondly*, “the western language of law, it transpired, provided an effective medium with which to

<sup>21</sup> B.R. Ambedkar, Member, Constituent Assembly, Introducing the Draft Constitution (February 1948) as cited in B. SHIVA RAO, *THE FRAMING OF INDIA’S CONSTITUTION: A STUDY*, VOLUME V 116 (2004).

<sup>22</sup> GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 321(1972).

<sup>23</sup> *Id.*, 19.

<sup>24</sup> SHIBANIKINKAR CHAUBE, *CONSTITUENT ASSEMBLY OF INDIA: SPRINGBOARD OF REVOLUTION* 105- 106 (1973).

<sup>25</sup> Satish Saberwal, *Introduction: Civilization, Constitution, Democracy* in *INDIA’S LIVING CONSTITUTION* (2005).

engage colonial rulers”;<sup>26</sup> *thirdly*, expertise in western law would facilitate their political career, thus determining a large number of lawyers in local assemblies under the British Raj and, consequently, in the legislative bodies of the new Republic of India. The continuity of the pre and post-independence elite thus plays a very important role in the use of the western legal concepts in the new Indian Constitution.

Concerning the attitude of mixing different concepts of western constitutionalism we can quote a few examples, starting with two structural features like the peculiar ‘centralised’ or ‘centripetal’ federalism, and the ‘pluralist’ Westminster type of government. As I have underlined elsewhere<sup>27</sup> Indian federalism has received many labels and definitions, from “quasi – federation” to “unitary state with subsidiary federal principles” (in the classical definition by Wheare),<sup>28</sup> to “centralized federalism”,<sup>29</sup> all of them showing some discomfort with the traditional criteria of classification of federal states. In my opinion it is “a federal State with centripetal tendencies”, because it allows for multiple possibilities of the federal system of functioning alternatively as a more decentralized or centralized system, according to the evolution of historical conditions. The choice of a parliamentary system of government for a federal State has also been sharply criticized by the advocates of dual federalism based on the American presidential model. This perspective, often reducing the scope of comparison with common law federal system (USA, versus Commonwealth States like Canada or Australia), suffers serious limitations if we consider that Indian federalism shares many features with cooperative federal system from non common law countries like Germany, as already noted by Austin.<sup>30</sup>

Concerning the type of Government, the system designed by the framers could be defined as a ‘pluralist Westminster’. In fact, confirming its pragmatic attitude, the Indian Constituent Assembly adopted, with some arrangements, the Westminster system that India had already experimented with in the last period of the British Raj, under the Government of India Act, 1935.<sup>31</sup> The main feature of this system is a strong cabinet government, assigning a prominent role to the Prime Minister, legitimated by the popular vote attained by his party (or, later, by the coalition supporting him). A significant divergence from the British system is the important role of the President as head of the executive: the President is certainly only the formal head of the government (as per Article 74), but he holds, on the one hand, considerable powers concern-

<sup>26</sup> *Id.*

<sup>27</sup> Domenico Amirante, *India. Si governano così*, Bologna: Il Mulino 63 (2007).

<sup>28</sup> Michael B. Stein, *Federal Political Systems and Federal Societies*, World Politics, Vol. 20, No. 4 (Jul., 1968) 721.

<sup>29</sup> Douglas V. Verney, *From Quasi – Federation to Quasi – Confederacy? The Transformation of India’s Party System* in *Publius*, 33 (4), 155 (2003).

<sup>30</sup> AUSTIN, *supra* note 22, 187.

<sup>31</sup> Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, *The American Political Science Review*, Vol. 90, No. 2 (Jun., 1996), 259.

ing the appointment of the Prime Minister and his cabinet, and, on the other, important prerogatives as head of the Federal Union. These presidential powers make the Indian system of government closer to European continental democracies than to the British system.

In the perspective of post-modern law the most interesting part of the Constitution of 1950 is the Indian bill of rights assigning, as I have already noted, high relevance to group rights and institutional devices to recognize and protect minorities. Here again, it is important to underline the original Indian approach to the problems of diversity in society, by briefly recalling the debate in the Constituent Assembly. In the Assembly, a series of elements like the presence of minorities, the method of unanimity chosen for deliberations, and the general atmosphere of the debates oriented the choices of the framers towards a systematic care of minority rights and different forms of representation of the minorities. It was clear from the start that the target of unity had to be reached not through the elimination of diversity (like in the American ‘melting pot’ model) but through the protection and the advancement of minorities, seen not as external elements of the system (like in the ‘mosaic’ theory) but as the constituent elements of it. Keeping this starting point in mind, the framers of the Indian Constitution “designed a structure that protected cultural diversity, but in giving content to this idea they differentiated between four kinds of communities - communities based on religion, language, caste and tribe”.<sup>32</sup> The most important debate in the Assembly was centred on the attitude of the State towards religion, and particularly on the choice of secularism, as the starting point for a multicultural policy.<sup>33</sup> In fact, even if the word ‘secular state’ was introduced in the Constitution only in 1976, through the 42<sup>nd</sup> amendment modifying the Preamble, the secular nature of the Indian state was strongly affirmed by the Constituent Assembly. Within the Assembly the discussion was very rich and interesting, as a result of the presence of many different orientations, but started from a common standpoint: after partition the path to be followed by the new Indian state was a secular one. As Nehru strongly highlighted, India was to be “a national state which includes people of all religions and shades of opinion and is essentially secular as a state”.<sup>34</sup> But Indian secularism is quite different in its nature from western secularism, which is based on hostility towards religion and on the construction of a ‘wall’ between state and religion.<sup>35</sup> Some critics may call it ‘ambiguous’ acknowledging that the Constitution “made some allowance for the role played by religion, especially Hinduism, in Indian life” and “also gave statutory recognition to minorities, thereby implicitly accepting

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<sup>32</sup> Gurpreet Mahajan, *Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State* in MINORITIES IN ASIA 295 (Kymlicka & Bogang He eds., 2005).

<sup>33</sup> 9 CONSTITUTIONAL ASSEMBLY DEBATES 19 (1949) (per Brajeshwar Prasad).

<sup>34</sup> Quoted in DONALD E. SMITH, NEHRU AND DEMOCRACY 147 (1958).

<sup>35</sup> See Partha Chatterjee, *Secularism and Toleration*, 1769 ECONOMIC AND POLITICAL WEEKLY Vol. 29 (July 9, 1994).

the existence of a majority”.<sup>36</sup> From a different position, others suggest that secularism “is not an exotic concept planted in India from the west ... it grew out of its past history of a wide and general movement in thoughts and feelings which emerges gradually from the intermingling of different groups and communities”.<sup>37</sup> From a legal point of view, the compromise attained by the Constituent Assembly led to a balanced approach, rejecting on one hand a political recognition for religious groups (as a reaction to the divided system of election under the British Raj), but granting, on the other hand, the right of expression and a certain autonomy to religious minorities.

The main features of Indian constitutional secularism are well illustrated by the clear definition of Dhavan and Nariman based on three elements:

“The principle of religious freedom, which expansively protects all aspects of a religion ... the principles of depoliticization and celebratory neutrality, which prevent the State from being taken over by any one community but permit it to assist all faiths and celebrate their existence as part of the pagantry of India ... the principle of social welfare and reform which requires religions to yield to regulatory and reformative regulations and cleanse their inegalitarian, gender unjust, and other constitutionally unacceptable prescriptions”.<sup>38</sup>

The attempt at reconciling the contradictions of a multicultural society and demonstrating the possibility to combine a secular state with a religious society, far from being contradictory, represents, in my view, a very important and original contribution to the diffusion of democracy in a multicultural world and a distinctive post-modern feature of Indian Constitution requiring more attention in a comparative perspective, following the path indicated by Gary Jeffrey Jacobsohn in his study on India’s secularism in the comparative constitutional context.<sup>39</sup>

As I have elsewhere underlined, more than sixty years of institutional experience have showed that the doctrinal ‘low profile’ of the Indian Constitution has granted excellent practical results, against all the pessimistic predictions of many western scholars, expressed through the disapproving label of ‘constitutional patchwork’. More recently, several comparative studies are

<sup>36</sup> James Chiriyankandath, *Constitutional Predilections*, SEMINAR, No.484, December 2 (1999).

<sup>37</sup> B.L. FADIA, INDIAN GOVERNMENT AND POLITICS 106 (2005).

<sup>38</sup> Rajeev Dhavan & Fali S. Nariman, *The Supreme Court And Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 275 (B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran eds., 2000).

<sup>39</sup> GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003).

showing scepticism about a complete homogenisation of law and human rights in the globalised world, considering the ‘hybridization’ of legal institutions as a more realistic perspective for sharing values between different cultures.<sup>40</sup> From this standpoint the feedback of studying the Indian constitutional system, including its contradictions and unanswered questions, can be extremely productive not only for Asian but also for European legal and political scholars, keeping in mind the advice of Khilnani, that “India’s present may contain more than a premonitory hint of the West’s own political future”.<sup>41</sup>

#### IV. THE BASIC STRUCTURE DOCTRINE: A CONTRIBUTION OF THE SUPREME COURT TO CONSTITUTIONAL LAW

The Indian Supreme Court is one of the most overburdened apex courts of the world, with its 61,850 cases disposed in the 2008-2009 term and 72,621 in 2009-2010.<sup>42</sup> It is also undoubtedly the most studied Indian institution in comparative law, especially by the western doctrine.<sup>43</sup> In its turn, the Supreme Court is making large use of comparative law by frequently quoting, without the typical reticence of western Constitutional and Supreme Courts, legal doctrine, foreign precedents and international positive or judge-made law. In my view, this attitude, largely unexplored by the comparative legal doctrine (especially for India), shows a post-modern approach to constitutionalism, open to a dialogue with legal concepts and norms coming from outside the national order, but compatible with the basic principles of the Indian Constitution. Far from indicating a ‘passive’ or subaltern approach of the Court, this openness has produced many innovative results, often widening the scope of constitutional protection of the citizens in India.

An interesting example is the impressive development of a remedy like the Public Interest Litigation (applied notably to environmental law cases, but also to other fields, i.e. corruption), caused by the relaxation of the

<sup>40</sup> See also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000).

<sup>41</sup> KHILNANI, *supra* note 9, 8.

<sup>42</sup> Supreme Court of India, *Summary: Types of Matters in Supreme Court of India*, available at <http://supremecourtsofindia.nic.in/outtoday/summary.pdf> (Last visited on August 17, 2013).

<sup>43</sup> The Supreme Court of India is often treated in casebooks such as WALTER F. MURPHY & JOSEPH TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* (1977); VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2006); *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (Norman Dorsen ed., 2010). See *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* (Jeffrey Goldsworth ed., 2006) (For a detailed comparison of the interpretive methods of the Supreme Court of India with other Constitutional or Supreme Courts); *c.f.*, Burt Neuborne, *The Supreme Court of India*, *International Journal of Constitutional Law* (2003); Domenico Amirante, *Giustizia Costituzionale e Affermazione Della Democrazia Nell'Unione Indiana* in *SISTEMI E MODELLI DI GIUSTIZIA COSTITUZIONALE* 757-784 (2009) (From European point of view).

rules of standing in constitutional writ litigation, that has determined “a significant departure from traditional judicial proceedings”.<sup>44</sup> This innovative trend that resulted in the expansion of the scope of judicial protection of citizens in many sensitive areas illustrates the important role of the Indian judiciary in facing the problems of the postmodern society. According to Surya Deva, “the public interest litigation - in which the focus is not on vindicating private rights but on matters of general public interest - extends the reach of judicial systems to disadvantaged sections of society ... it also facilitates an effective realization of collective, diffused, rights, for which individual litigation is neither practicable nor an efficient method”.<sup>45</sup>

An innovative and quite distinctive theory elaborated by the Indian Supreme Court, that is worth reporting here as an example of postmodern trends in contemporary Indian constitutional law, is the doctrine of the basic structure of the Constitution (or basic structure doctrine) enlarging the power of the Supreme Court to scrutinize the constitutional amendments far beyond the letter of the Constitution, with reference to its basic unwritten principles.<sup>46</sup> This represents a new kind of constitutional judicial review not only for its scope (the scrutiny of constitutional amendments being not exclusive to the Indian experience) but for the judicial construction of the doctrine and its extensive application. In fact the basic structure doctrine has been extended, as rightly noticed by S. Krishnaswamy, “far beyond the domain of rights to include the scrutiny of constitutional amendments, executive proclamations of national and state emergencies, executive policy framing processes, and legislative inaction affecting core interest of citizen”.<sup>47</sup>

The basic structure doctrine is based on the famous *Kesavananda Bharati v. State of Kerala* (‘Kesavananda Bharati case’)<sup>48</sup> (1973) in which a very thin majority of seven to six judges overruled three constitutional amendments (the 24<sup>th</sup>, the 25<sup>th</sup> and the 29<sup>th</sup> amendment)<sup>49</sup> passed by a Parliament loyal to the majority led by an authoritative Indira Gandhi, considering them unconstitutional on the basis that they were causing ‘damage’ to the basic structure of the Constitution. Though it was not the first judgment declaring the existence of implied limits on the amending power of the Parliament, already anticipated by

<sup>44</sup> A. H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 158 (B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran eds., 2000).

<sup>45</sup> Surya Deva, *Public Interest Litigation in India: A Critical Review*, Civil Justice Quarterly 1, 19-20 (2000).

<sup>46</sup> SHUKLA, *supra* note 17, 1002.

<sup>47</sup> SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* XV (2009).

<sup>48</sup> (1973) 4 SCC 225; AIR 1973 SC 1461.

<sup>49</sup> Particularly important is the 24<sup>th</sup> amendment aimed at restoring to Parliament an unrestricted power of constitutional amendment.

*Golak Nath v. State of Punjab* ('Golak Nath case') in 1967,<sup>50</sup> the Kesavananda Bharati case represents the affirmation of a general power of the Supreme Court to scrutinize any constitutional amendment to verify if it 'damages' the foundations of the Indian Constitution.

The basic structure doctrine, as a consequence of its merely judicial origin, is one of the most discussed and contested remedies displayed by the Indian Supreme Court and has stimulated an everlasting debate on 'judicial activism'. It is impossible here to summarize this ongoing quarrel, so I will just mention two of the more detailed arguments against and in favour of the basic structure doctrine and conclude by quoting an interesting study that tries to locate the Supreme Court doctrine in a post-modern perspective.

From a critical angle, S.P. Sathe, in his works on judicial activism in India,<sup>51</sup> blames the Supreme Court for expanding judicial review well beyond the constitutional boundaries, mostly by employing 'new' techniques of adjudication forged autonomously, but not indicated by the Constitution or the legislation. In particular, Sathe analyses the shift of the Court from a positivist to a structuralist interpretation, based not on formal constitutional rules but on a teleological construction intended to achieve specific purposes, and thus operating a conversion from a rule-oriented to a result-oriented approach. According to this author, in this model "the Constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it".<sup>52</sup> The Court is subsequently accused of usurping the powers of the Legislature and the Executive to assume openly a law-making role.<sup>53</sup>

From an opposite perspective, Krishnaswamy assumes that the basic structure doctrine is legitimate not only from a legal but also from a moral and sociological point of view, because "the formulation and practice of the basic structure doctrine mediates between two important political values: namely, democracy and constitutionalism", and adds that "while there have been many important and useful theoretical efforts at reconciling these values, there is no constitutional jurisdiction where this reconciliation has been carried out as richly and with as much sophistication as in India".<sup>54</sup> For this author, in Kesavananda Bharati case, the Court, affirming that the spirit of the Indian Constitution includes implied limits to the power of amendment, has developed a 'grand historical narrative' based on the consideration of "the historical

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<sup>50</sup> *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (In this case, the Court affirmed that the power of amendment of the Indian Parliament does not cover the abrogation of Fundamental Rights guaranteed by the Constitution).

<sup>51</sup> S.P. SATHE, JUDICIAL ACTIVISM IN INDIA (2002) and S.P. Sathe, *India: From Positivism to Structuralism* in INTERPRETING CONSTITUTIONS. A COMPARATIVE STUDY 215, 265 (Jeffrey Goldsworth ed., 2006).

<sup>52</sup> *Id.*, Sathe, 226.

<sup>53</sup> *Id.*, 243.

<sup>54</sup> KRISHNASWAMY, *supra* note 47, XXXIII.

context and motivations of the nationalist freedom movement to identify the purposes and aspirations that they ascribed to the Constitution”.<sup>55</sup> Thus, the judicial review of constitutional amendments does not represent an illegitimate addition to the Constitution but an interpretation of what is already intended in the text so that “the argument that the Supreme Court amended the Constitution to introduce the basic structure doctrine rests on a fundamental mistake about the nature of constitutional interpretation and an inadequate understanding of the distinction between interpretation and amendment as modes of constitutional change”.<sup>56</sup>

This discourse on constitutional change is also used in a recent assessment of the basic structure doctrine considered from a post-modern perspective. In a recent article, A. Burman starts by affirming that the basic structure doctrine is “nothing but a restatement of the constitutional set-up already existing: a reaffirmation of those features of our constitution which are largely outside the scope of constitutional activity”, recognizing that here the judges “were guided not by precedent ... but by the deep traditional values embedded in them”.<sup>57</sup> However, for him the Kesavananda Bharati ratio “is not an expression of a foundationalist doctrine but the assertion of the institutional power” of the Supreme Court, because “the judges merely exercised and asserted their position of dominance to ensure that the judiciary remains the final and sole authority to interpret the Constitution”.<sup>58</sup> In this perspective, while the basic structure “may be a grand foundationalist doctrine ... the reason and the processes that formed it are very post-modern” and “what it has achieved in doing is making Constitutional provision more dynamic, more open to differing interpretations with a change in time and of course ensuring that the task of such interpretation rests with the Supreme Court”.<sup>59</sup>

## V. THE POST-MODERN CHARACTER OF ENVIRONMENTAL LAW: THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN INDIA

If we consider post-modern law (as opposed to the positive modern law) as a conceptual approach open to legal pluralism and inclined to regulate legal problems in terms of principles more than by single rules, then environmental law can be regarded as a symbolic post-modern legal discipline. In fact, one of the fundamental contributions of environmental law to legal theory concerns a typical area of the post-modernist thought that is the

<sup>55</sup> *Id.*, 29.

<sup>56</sup> *Id.*, 189.

<sup>57</sup> Anirudh Burman, *Locating Post-Modern Constitutionalism In India: The Basic Structure Doctrine*, 18,19, available at <http://ssrn.com/abstract=1006621> (Last Visited on August 17, 2013).

<sup>58</sup> *Id.*, 20.

<sup>59</sup> *Id.*, 20, 21.

relationship between science and law in the contemporary society.<sup>60</sup> In the first stage of development of environmental law, the use of science and technical evidence often sheltered decisions behind a reference to scientific objectivity, defined by R. Romi as a ‘false objectivity’.<sup>61</sup> To the contrary, the development of mature environmental law has revealed that environmental rules must rest on an interdisciplinary comparison capable of considering and integrating the diverse elements (scientific, political, administrative), concurring to solve environmental matters in a conceptual framework considering a plurality of possible answers (or truths). In this perspective, a fundamental aspect is the development of environmental law as a ‘law of principles’, well illustrated, for example, by the creation (in international law, then more systematically in European Community law) of the ‘triad’ of environmental management principles: the polluter-pays principle, the principle of prevention and rectification at source and the precautionary principle. In their historical evolution, these principles articulate the stages of the evolution of the relation between law and science in environmental matters.<sup>62</sup>

The first principle to be consolidated, the polluter-pays, requires science to intervene when the environment has been damaged, by means of cures aimed at the restoration of the equilibrium, thus giving rise to the lawsuit for environmental damage, and more generally to the creation of environmental administrative enforcement agencies.<sup>63</sup> The principle of prevention, on the other hand, represents a step forward since it identifies the impact of human activities on the environment, not as episodic, but as a constant condition of individual and societal action.<sup>64</sup> Environmental problems should thus be dealt with in advance, by prevention, with specific procedures such as, for instance, environmental impact assessment. Even this second approach is based on trust in technical-scientific evidence as an instrument for the resolution of environmental problems.<sup>65</sup> The precautionary principle intervenes at a subsequent stage, and is essentially based on the lack of faith in objective science on the part of law and politics. In this phase, therefore, one becomes aware of the incapacity of science to always supply solutions to environmental problems, and the consequent insufficiency of the curative and preventive models. Thus, in my opinion, the precautionary principle plays an emergency role, requiring the public actor faced with situations of necessity, to make choices in any event,

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<sup>60</sup> On this subject, see Domenico Amirante, *Codification and Technical Rules In Environmental Law- Reflections on The French Experience* in SCIENTIFIC EVIDENCE IN EUROPEAN ENVIRONMENTAL RULE- MAKING: THE CASE OF THE LANDFILL AND END-OF-LIFE VEHICLES DIRECTIVES 99, 110 (2003).

<sup>61</sup> Raphael Romi, *Droit Et Administration De L'environnement*, No. 23, Paris : Montchrestien, 13 (2001).

<sup>62</sup> See NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES (2002) (For a rich theoretical and analytical presentation of the environmental principles).

<sup>63</sup> DIVAN & ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 584 (2002).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

even if not supported by scientific certainty. This is an important element of the precautionary principle: the expansion of political and administrative discretion with regard to choices having a technical and scientific content. The precautionary principle brings out the changed legitimisation between science and politics, placing the responsible political and administrative subjects at the forefront of difficult decisions.

In environmental law, such principles perform at least three important functions. The first is that of directing the legislator, well illustrated, for example, by the guiding role of the precautionary principle in electronic smog legislation, where decision makers were faced with lingering uncertainties regarding the harmfulness of electro-magnetic pollution. The decision to keep the protection of the environment and of health at a high level here is clearly adopted on the basis of the precautionary principle. The second role played by general principles is supplying the regulators and the courts with valid interpretive keys in relation to technical-scientific questions. From this point of view the relevant function performed in environmental law by some general clauses should be emphasized. For example the 'best available technology' standard permits to follow the scientific progress without 'crystallizing' the rule at a determinate historical period, allowing evolution on the basis of the development of technology and science. Finally, environmental principles can perform the function of a benchmark for the assessment of administrative action. In this case, the European principles of environmental management (notably the preventive and precautionary principles) can be considered as interpretive parameters in the evaluation of administrative action.

Evidently, the precautionary principle is the most recent post-modern development among the environmental management principles and the way it has been developed in India, as a pillar of environmental law, shows another important contribution of India to post-modernism in law. Lacking a textual constitutional basis, the principle has been affirmed predominantly by the Indian judiciary and particularly by the Supreme Court. A milestone for the affirmation of the precautionary principle in India is the *Vellore Citizens' Welfare Forum v. Union of India*,<sup>66</sup> where the Supreme Court introduced the principle in Indian law as an international customary principle, considering it as an essential feature of sustainable development and ordered that compensation be paid to victims of water pollution caused by some tanneries. In this decision, the Court openly identified the precautionary principle as part of Indian domestic law (linking it also to the right to life affirmed in Article 21 of the Constitution). In the same decision the Court also applied the 'shift in burden of proof' typical of the precautionary principle. In fact, in this case "the Court observed that the new concept which places the burden of proof on the developer or the industrialist who is proposing to alter the status quo

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<sup>66</sup> (1996) 5 SCC 647: AIR 1996 SC 2715.

has become a part of environmental law in India”.<sup>67</sup> In the same decision, the Court also observed that “environmental measures- by the State government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation” and that “where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.<sup>68</sup>

The ratio of this case has been applied to other similar situations,<sup>69</sup> but the most interesting decision is probably the *A.P. Pollution Control Board v. M.V. Nayudu*<sup>70</sup> ‘M.V. Nayudu case’ because of the rich and systematic argumentation of the Court. In this decision, the Court started recognizing that “the difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon” and affirms that “uncertainty becomes a problem when scientific knowledge is institutionalized in policy making or used as a basis for decision-making by agencies and courts”. Quoting a series of international doctrinal studies, the Court observes that “the inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes”, and that “clinical tests are performed, particularly where toxins are involved, on animals and not on humans”, concluding that “the timing between exposure and observable effect creates intolerable delays before regulation occurs”.<sup>71</sup> Then the Court explains that “it is the above uncertainty of science in the environmental context that has led International Conferences to formulate new legal theories and rules of evidence” and thus starts quoting the main international documents affirming the precautionary principle, on which it will rely.<sup>72</sup> The judgments of the Indian Supreme Court applying the precautionary principle have significant impact both on the environmental legislation and on the organization of the judicial system itself. Concerning the first aspect, it has been rightly noticed that such judgment are “a pointer for Pollution Control Board to grant consent for setting up industrial units on the basis of the precautionary principle” and that the same principle “underlies the provisions of environmental legislations which relate to grant of consent by the Pollution Control Board for setting up of industrial units”.<sup>73</sup> Regarding the organization of the judiciary, it is important to note that the recent creation of the National Green Tribunal of India (NGT, 2010), which I have defined as a judge-driven reform, has its main factor in the judiciary itself, and particularly in the Supreme Court’s urge on the relevance of a system

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<sup>67</sup> GURDIP SINGH, ENVIRONMENTAL LAW IN INDIA 49 (2011).

<sup>68</sup> A.K. TIWARY, ENVIRONMENTAL LAWS IN INDIA 217 (2006).

<sup>69</sup> M.C. Mehta v. Union of India, (1997) 2 SCC 411 (In this case, the Supreme Court ordered some polluting tanneries in Calcutta to relocate in an industrial complex far from the city).

<sup>70</sup> (1999) 2 SCC 718; AIR 1999 SC 812.

<sup>71</sup> Here the Court quotes Alyson C. Flournay, *Scientific Uncertainty In Protective Environmental Decision Making*, Harvard Environmental Law Review 327 (1991).

<sup>72</sup> (1999) 2 SCC 718; AIR 1999 SC 812.

<sup>73</sup> SINGH, *supra* note 67, 49.

of specialized environmental courts.<sup>74</sup> In fact in the above quoted M.V. Nayudu case the Supreme Court had stated that:

“It appears to us from what has been stated earlier that things are not quite satisfactory and that 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 Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies could certainly undermine the very purpose of those legislations”.<sup>75</sup>

The peculiar composition of the National Green Tribunal, assigning to technical experts a substantial role on a 50% basis, reflects the Supreme Court’s doctrine on the precautionary principle, and results in the creation of a quite innovative judicial body, having clear post-modern resonances.<sup>76</sup>

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<sup>74</sup> See Domenico Amirante, *Environmental Courts In Comparative Perspective: Preliminary Reflections On The National Green Tribunal Of India*, Pace Environmental Law Review, 2012 (forthcoming).

<sup>75</sup> A.P. Pollution Control Board v. M.V. Nayudu, (1999) 2 SCC 718: AIR 1999 SC 812.

<sup>76</sup> Gitaniali Nain Gil, *A Green Tribunal for India*, Journal of Environmental Law, 474 (2011) (For developing countries, another important aspect to underline is “that scientific expertise on the Tribunal itself produces an equality of arms and prevents powerful, corporate interests from outgunning claimants in producing expertise which claimants cannot match in what is often public interest litigation”).

