ACCESS TO ENVIRONMENTAL JUSTICE IN INDIA WITH SPECIAL REFERENCE TO NATIONAL GREEN TRIBUNAL: A STEP IN THE RIGHT DIRECTION*

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Abstract: Access to environmental justice is a key component to ensure just and equitable outcomes for sustainable development. This paper aims to assess the present judicial structures that offer access to environmental justice in India. The initiative, presented below has wider international purchase as it is a case study of a growing judicial development.

India's policies and laws have sought to become comprehensive and stringent particularly as a consequence of the Bhopal tragedy in 1984. The 'command and control approach' is supplemented by new regulatory techniques such as environment impact assessments and public hearings. However, contradictions and gaps in institutional mechanisms have resulted in ineffective implementation of legislation. Factors such as slack performance by enforcement authorities, multi-layered corruption, political interference and personal gain are the root causes for this failure.

As a consequence, the role of India's judiciary in securing the enforcement of rights through Public Interest Litigation [PIL] outside statute law but within the constitutional mandate has promoted new and unique environmental jurisprudence. PIL is an innovative and powerful judicial tool making human rights meaningful and effective. PIL has revolutionised the judicial procedure by introducing three procedural innovations: namely, expanded standing, non-adversarial procedure and attenuation of rights from remedies as a result of expanded frontiers of fundamental rights, particularly the right to life under Article 21 of the Constitution of India.

The right to a healthy environment finds its genesis through the right to life. The state is under a duty to enforce this constitutional right by devising and implementing a coherent and coordinated programme for the well-being of the citizenry. Failure on the part of state have prompted the judges to issue short interim directions entitled 'continuing mandamus '. The proactive judiciary has also declared and promoted the principles of sustainable development, the precautionary and the polluter pays principles.

However, concerns such as the rapidly increasing number of petitions, expensive and delayed disposal of petitions, complex technical and scientific issues, inconsistent approach by the courts based upon individual judicial preferences, unrealistic directions and the issue of creeping jurisdiction have created doubts about the current effectiveness of PIL in environmental matters.

In seeking a balanced judicial forum that advances a distinctively green jurisprudence, the Parliament of India enacted the National Green Tribunal Act 2010. The National Green Tribunal [NGT] is one element of a reformist approach to environmental governance. The Tribunal aims to adjudicate environmental protection and forest conservation cases in an effective and expeditious manner. This includes enforcement of any legal right relating to the environment together with available relief and compensation for damages to persons and property. The NGT started functioning from 4th July 2011. The Principal Bench is based at New Delhi with circuit benches at Chennai, Bhopal, Pune and Kolkata so that it can reach remoter parts of India. The principal bench and the regional benches are active. India has joined a handful of forward looking countries including Australia and New Zealand to have a dedicated green court. The creation of NGT is an important initiative.

NGT's potential is being realised in terms of type and volume of cases coming before it. The 'multi-faceted and multi-skilled' NGT with a wide jurisdiction is gradually earning the reputation of being a 'fast-track court'. It aims to strike a right balance between environment and development. The nature of cases

which have come before the NGT include environmental clearances for developmental projects including dams, steel plants, hydro- electric projects and thermal power plants; coastal zone regulations; encroachments on the floodplains; issues relating to pollution and imposition of environmental fines. The principles of inter-generational equity, precautionary and polluter pays principle, public trust doctrine underpinning the international environmental law have been foundational norms in deciding the matters before the NGT.

The institutional redesigning of this judicial structure is unlikely to be the panacea for all environmental ills but it can provide a lead in terms of new forms of environmental dispute resolution. This positive initiative must be seen within the broader context of balancing competing values of environment protection and sustainability on one hand and resource driven growth on the other.

Keywords: Access to justice; India; National Green Tribunal; Public Interest Litigation; Sustainable Development

INTRODUCTION

This paper focuses on judicial remedies in India that enhance environmental justice. It reviews international commitments applicable to India and thereafter briefly notes both the importance and limitations of Public Interest Litigation. Finally, the establishment, powers, procedures and activities of the newly established National Green Tribunal are presented.

Access to justice, a pillar of democratic governance, promotes just and equitable outcomes thereby supporting the rule of law. Courts allow people to hold government agencies, companies and individuals accountable for the violation of their fundamental rights as enshrined in the constitution of India.

The United Nations Development Programme defines access to justice as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."[1]

In relation to environmental matters access to justice extends not only judicial and administrative procedures and remedies but also includes access to information and participation in decision making. These 'access rights' stem from international obligations which seek to make environmental justice both 'sustainable and green'. [2]

The importance of judicial institutions [courts and specialist tribunals to adjudicate environmental disputes] is widely acknowledged in international instruments. The World Charter for Nature provides "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation." [3]

Additionally, the World Commission on Environment and Development Expert Group on Environmental Law adopted legal principles for environmental protection and sustainable development ensuring "due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by trans-boundary interference with their use of a natural resource or the environment." [4]

Principle 10 of the Rio Declaration, 1992, strengthened access rights by stating "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided by states in environmental matters." The Aarhus Convention,[5] which advances Principle 10 of the Rio Declaration, mandates binding environmental obligations and thereby enhances access to justice. Article 1 reads '' each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention,

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[1] Jayasundere, R. (2012). Access to Justice Assessments In The Asia Pacific: A Review of Experiences and Tools From The Region. Bangkok, Thailand: UNDP, 11.

[2] Pring, G. and Pring C. (2009). Greening Justice: Creating and Improving Environmental Courts and Tribunals. Washington DC: Access Initiative, 6

[3] Article 23 World Charter for Nature 1982

[4] Article 20 Our Common Future, Annexe 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law

[5] The UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.'' The Convention introduced environmental processes that emphasise governmental accountability, transparency and responsiveness. Kofi Annan, former Secretary General of the United Nations, referred to the Convention as "the most ambitious venture in environmental democracy under the auspices of the United Nations and a remarkable step forward in the development of international law."[6]

Article 9 of the Aarhus Convention lays out detailed procedures for effective judicial mechanisms and the protection of legitimate interests. This includes an expeditious review procedure established by law that is free of charge or inexpensive; the requirement of standing in terms of 'sufficient interest' including NGO's; challenging acts of private persons and public authorities; adequate and effective remedies, including injunctive relief; reasoned decisions that are publicly accessible; and appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.[7]

The role of the judiciary in environmental enforcement and compliance is critical. Yet judges face difficulties as a result of lack of scientific knowledge and inadequate exposure and training in these matters. There is now incremental support for judicial capacity building at national, regional and global levels. [8] For example, the Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002 stated '' We emphasize that the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised, We are strongly of the view that there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law, including multilateral environmental agreements (MEAs), especially through the judicial process.''[9]

The United Nations Environment Programme [UNEP] has played a pivotal function by highlighting the role of the judiciary in the promotion of environmental law at the national level. The initiative is based on the idea that ''the role of the Judiciary is fundamental in the promotion of compliance with and enforcement of international and national environmental law. It aims at promoting judiciary networking, sharing of legal information, and harmonisation of the approach to the implementation of global and regional instruments. Courts of Law of many countries have demonstrated sensitivity to promoting the rule of law in the field of sustainable development through their judgements and pronouncements, e.g. through applying international environmental law principles such as the polluter pays principle, the precautionary principle and the principle of intergenerational equity.''[10]

Similarly, the Asian Development Bank [ADB] has undertaken considerable work in building judicial capacity from 2002 onwards. This includes publishing a compendium on Capacity Building for Environmental Law in the Asian and Pacific Region, launching of the Asian Environmental Compliance and Enforcement Network [AECEN] and organizing symposiums and conferences. In 2010, the ADB organized the Asian Judges Symposium on Environmental Decision-Making, the Rule of Law, and Environmental Justice emphasising '' improving environmental and natural resource decision making and adjudication within regional judiciaries, without assuming that any particular form or structure is the best way to achieve effective environmental decision-making and adjudication in different country contexts; highlighting environmental specialization within general courts, as well as exploring work done by specialist environmental courts, boards, and tribunals. Importantly, without drivers for increasing the demand for effective environmental judicial decision-making from the judiciary, environmental

[6] http://aarhusclearinghouse.unece.org/about/

[7] Sands, P. (2003). Principles of International Environmental Law (2nd ed.). Cambridge: Cambridge University Press

[8] Robinson, N.A. (2012). Ensuring Access to Justice Through Environmental Courts. 29 Pace Envtl.L.Rev 374

[9] http://www.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx

[10] http://www.unep.org/delc/judgesprogramme/tabid/78617/Default.aspx; also see http://www.iucn.org/about/work/programmes/environmental_law/?9282/Advancing-Connectivity-Conservation-through-Law

judicial specializations could go unused.'' [11]Subsequently, in 2012 the ADB organized the South Asia Conference on Environmental Justice at Bhurban, Pakistan. The Bhurban Declaration 2012 included a promise for an educated judiciary, specialized courts, countries to improve the development, implementation, enforcement of, and compliance with environmental laws, as well as to make an action plan to achieve the same; strengthen the existing specialized environmental tribunals, as well as train judges and lawyers on environmental law; and a vow to establish green benches in courts for dispensation of environmental justice and to make necessary amendments or adjustments to the legal and regulatory structures to foster environmental justice in South Asia.[12]

Within this context, the role of the Indian judiciary assumes enhanced importance. Consequently the Indian judiciary positively contributes and promotes environmental law and sustainable development by examining power structures in a manner that protects human rights and individual dignity, alleviating poverty, and ensuring that the present generation enjoys quality of life without compromising the rights of future generations.[13]

THE INDIAN JUDICIARY: PUBLIC INTEREST LITIGATION [SCOPE AND LIMITATION IN ENVIRONMENTAL MATTERS]

India's policies and laws have sought to become both comprehensive and stringent particularly as a consequence of the Bhopal industrial tragedy in 1984.[14] However, contradictions and gaps in institutional mechanisms have resulted in the ineffective implementation of environmental legislation. Factors such as negligent or under-performance by enforcement authorities, multi-layered corruption, political interference or indifference and personal gain are root causes for this failure.[15]

As a consequence, the role of India's judiciary in securing the enforcement of rights outside statute law but within the constitutional mandate promoted Public Interest Litigation, [PIL] during the 1980's.[16] Traditional common law remedies experienced a major addition: PIL. It is a broad based, people orientated approach that promotes access to justice through judge- made processes and remedies.[17] This development envisaged that those citizens traditionally excluded from the courts by virtue of their poverty, ignorance, isolation, fear or caste would be able to enforce their fundamental human rights through law either personally or via a court recognised 'friend'.

The use of PIL in the interpretation of three constitutional provisions, namely, Articles 48A, 51A (g) and 21 of the Constitution of India have produced a major shift in the environmental landscape of India. Article 48A, directive principle of state policy, mandates the state to protect and improve the environment and safeguard the forests and wildlife of the country. The policy prescription has assumed the legal status of imposing an obligation not only on the government but also the courts to protect the environment.[18] Article 51A (g) imposes a fundamental duty on every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have a compassion for living creatures. The social obligation under Article 51A(g) has broadened the scope of 'citizen' to permit public spirited citizens, interested institutions and non-governmental organisations [NGO's] to file and advance PILs for environmental protection.

Article 21 being a fundamental right guarantees the right to life. The meshing of human rights and environmental protection finds its justification in Article 21 of the Constitution of India which states: "No person shall be deprived of his life or personal liberty except according to the procedure established by law." The Supreme Court held that life does not simply means physical existence but extends to

[11] Asian Development Bank, (2012). Environmental Governance and the Courts in Asia . Law and Policy Reform, Brief 1, 1

[12] http://www.adb.org/publications/south-asia-conference-environmental-justice

[13] See, Subhash Kumar v State of Bihar (1991) 1 SCC 598; Indian Council for Enviro-Legal Action v Union of India (1996) 3 SCC 212; Narmada Bachao Andolan v Union of India (2000) 10 SCC 664; Karnataka Industrial Areas Development Board v C Kenchappa AIR 2006 SC 2038; M C Mehta v Kamal Nath (1997) 1 SCC 388

[14] Divan, S and Rosencranz, A. (2001). Environmental Law and Policy in India. New Delhi: OUP, 2

[15] Ibid at 3

[16] Gill, G.N. (2012) Human Rights and the Environment in India: Access through Public Interest Litigation. Environmental Law Review, 14, 201, doi 10.1350/enlr.2012.14.3.158

[17] Ibid at 202; also see Sathe, S.P. (2002). Judicial Activism in India Transgressing Borders and Enforcing Limits. New Delhi: OUP, 210

[18] T Damodar Rao v The Special Officer, Municipal Corporation of Hyderabad AIR 1987 AP 171, 181

include quality of life. In Francis Coralie v Delhi,[19] Justice Bhagwati stated: "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms."[20]

In Virender Gaur v State of Haryana[21] the court recognised that a healthy environment is one free from environmental pollution and stated:

"Article 21 protects the right to life as a fundamental right. Enjoyment of life… including the right to live with human dignity encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air and water pollution, etc… should be regarded as amounting to a violation of Article 21. Therefore, a hygienic environment is an integral facet of the right to a healthy life and it would be impossible to live with human dignity without a human and healthy environment….. There is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard a proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man made and the natural environment."[22]

Importantly, the apex court has given effect to Articles 48A, 51A (g) and 21 by citing them as complementary to each other and in appropriate cases have issued necessary directions in environmental cases. A duty cast on the state under Article 48A is to be read as conferring a corresponding right on the citizens under Article 51A(g) [though couched in the language as 'duty'] and, therefore, the right under Article 21 at least must be read to include the same within its ambit.[23] In Intellectual Forum, Tirupathi v State of A.P.[24] the Supreme Court observed ''the environmental protection and conservation of natural resources has been given a status of a fundamental right and brought under Article 21 of the Constitution of India. This apart, Articles 48A and 51A (g) are not only fundamental in the governance of the country but also it shall be the duty of the state to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution including Article 21''.

Access to justice through PIL was significantly improved by court procedures devised to help those seeking environmental justice who otherwise under established procedures would be unable to approach the court. In Mumbai Kamgar Sabha v Abulbhai Faizullabhai[25] the court observed "... procedural prescriptions are handmaidens, not mistresses, of justice and failure of fair play is the spirit in which courts must view (procession) deviances."

Locus standi has been modified in two ways, namely through representative and citizen standing. Representative standing allows any person, acting bona fide, to advance claims against violations of human rights of victims who because of their poverty, disability or socially or economically disadvantaged position could not approach the Court for judicial enforcement of their fundamental rights. NGO's and environmental activists working on behalf of the poor and tribal people have entered the courts by exercising this procedure. The citizen standing provides a platform to seek redress for a public grievance: this affects society as a whole rather than an individual grievance.[26]

Appointment of independent expert committees providing scientific expertise to the help judges make informed decisions on environmental matters is another procedural devise in PIL.[27] In A.P.Pollution Control Board v Prof M.V.Nayudu,[28] the court recognized the importance of these expert committees to advise the court on a course of action while probing the scientific questions. The Supreme Court stated '' in a large number of matters coming up before this court either under Articles 32, 136 or before the High Courts under Article 226, complex issues relating to the environment and pollution, science and technology have been arising and in some cases, this Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest, environmental protection, elimination of pollution and sustained development. In some cases, this Court has been referring matters to professional or expert bodies and the monitoring of the case is progressed before the

[19] AIR 1981 SC 746
[20] Ibid at 753
[21] (1995) 2 SCC 577
[22] Ibid at 580-581
[23] M C Mehta v Union of India (1998) 9 SCC 589; Jaswal, P.S. and Jaswal, N. (2009). Environmental Law. Faridabad (Haryana): Allahabad Law Agency, 59
[24] (2004) 3 SCC 549
[25] AIR 1976 SC 1455
[26] See Gill, above n. 16, 205-206
[27] S. Jagannath v Union of India 1997 (2)SCC87; RLEK V State of Uttar Pradesh AIR 1985 SC 652; M C Mehta v Union of India Order dated 7 January 1998
[28] AIR 1999 SC 812

professional authority''. However, concerns and objections have been raised by affected parties to the opinions given by these expert committees in terms of scientific contradictions, evidentiary value and the statutory obligation of the executive being diluted by creation of such committees. [29]

Continuing Mandamus is another procedural process used by the Court to implement and monitor its PIL directions. The court usually passes short directions, the non-compliance of which amounts to contempt of court or fines. [30]

Although the relaxed procedural requirements in PIL have advantages for securing environmental justice they are not without external criticism. The critics see the courts adopting responsibilities traditionally exercised by Parliament and the executive. The widespread jurisprudential question concerning the appropriateness of judicial law making is no better illustrated than in India where the Supreme Court through PIL has been accused of being a hyper active law-making body. [31]

The relaxation of the 'standing rule' has opened the Court to the possibility of 'forum shopping' whereby justice according to law is more personality driven than being institutionalised adjudication. Such judges have become known as 'green judges', 'pro poor', or 'progressive' whilst others seeking media coverage encourage PIL litigation cases in their courtrooms. These judges encourage the cult of individualism that, in turn, reduces the predictability factor associated with the doctrine of precedent. Judgements should be based neither upon the whim of the individual nor the pre-selection of a supportive judge.[32]

Trial time in India challenges and possibly surpasses Jardine v Jardine in Dicken's 'Bleak House'. If justice delayed constitutes justice denied then India's justice quota continues to be severely constrained. Delay is not a recent phenomenon and can be traced back to the time of the Raj. It is a result of court clogging, adjournments, missing papers, absent witnesses and conscious delaying tactics by both lawyers and the parties. [33] The Law Commission of India in its 77th Report stated that "delay is a product of too much business for too few judges and the demand simply exceeds the supply of resources." [34] The Indian legal profession operates on the principle that litigation is its prime purpose and largest income generator. An over-supply of advocates has resulted in fierce competition for clients particularly at the lower or more traditional sector of the legal services market. Consequently, offering clients services such as planning, negotiation, settlement or arbitration neither produce fees that equate with court appearances nor reflect legal training nor the perceived role of the advocate. Court appearances can be the basis of billing the clients and thereby encourage time extensions through adjournments, filing of applications, revisions, reviews and appeals. An already litigious public is encouraged to continue through the courts by a well organised Bar. Over thirty years ago the Supreme Court Judge, D. A. Desai wrote that "The members [advocates] may organise in groups to protect their interest, to advance their position and to secure benefits for the group. This appears to be the only role the legal profession is fulfilling."[35]

Within such a restrictive structure PIL could have only a limited impact. Indeed, in 2009 when the Green Tribunal Bill was debated in Parliament figures provided in the Lok Sabha by Shri Jairam Ramesh, Minister of State of the Ministry of Environment and Forests, declared that some 5,600 environmental cases were back logged, awaiting disposal in the High Courts of India.[36] PIL, important though it was, suffered serious limitations as a

[29] Sahu, G. (2008) . Implications of Indian Supreme Courts Innovation for Environmental Jurisprudence. Law, Environment and Development Journal. 4/1, 12-13; see Gill, G.N. (2013). Environmental Protection and Developmental Interests: A Case Study of the River Yamuna and the Commonwealth Games, Delhi, 2010. International Journal of Law in the Built Environment, Volume 6 Issue ½ Special Issue: Environmental Law

[30] See Divan, above n.14 at 146-147

[31] Baxi, U. (1983). How Not To Judge The Judges: Notes Towards Evaluation of the Judicial Role. JILI, 25,211; Narmada Bachao Andolan v Union of India (2000) 10 SCC 664

[32] Rajamani, L. (2007). Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability. Journal of Environmental Law, 19(3) 290; Srikrishna, B.N. (2005) Judicial Activism-Judges as Social Engineers, Skinning a Cat. SCCJ,8, 3

[33] Moog, R. (1992). Delays in Indian Courts. Justice System Journal, 16,19-36.; See also, Galanter, M. (1989) Law and Society in Modern India. New Delhi: OUP

[34] Law Commission of India 77th Report (1978). Delay and Arrears in Trial Courts

[35] Desai, D.A. (1981). Role and Structure of the Legal Profession. Journal of the Bar Council of India, 8, 112.

[36] Lok Sabha Debates http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=1803

consequence of the legal environment in which it operated. Innovation and change were needed. It occurred through the establishment of the National Green Tribunal.

THE NEW FORUM- THE NATIONAL GREEN TRIBUNAL [EMERGENCE, SCOPE AND WORKING]

In addition to the above-mentioned problems of delay and back logging in PIL, the establishment of National Green Tribunal was a result of the recommendations of the Law Commission of India. The Law Commission of India in its One Hundred and Eighty Sixth Report on 'Proposal to Constitute Environment Courts' (2003) strongly advocated the establishment of 'Environment Courts' keeping in mind the following considerations:[37]

(a) The uncertainties of scientific conclusions and the need to provide, not only expert advice from the Bar but also a system of independent expert advice to the Bench itself;

(b) The present inadequacy of the knowledge of Judges on the scientific and technical aspects of environmental issues, such as, whether the levels of pollution in a local area are within permissible limits or whether higher standards of permissible limits of pollution require to be set up;

(c) The need to maintain a proper balance between sustainable development and control/regulation of pollution by industries;

(d) The need to strike a balance between closure of polluting industries and reducing or avoiding unemployment or loss of livelihood;

(e) The need to make a final appellate view at the level of each State on decisions regarding 'environmental impact assessment';

(f) The need to develop a jurisprudence in this branch of law which is also in accord with scientific, technological developments and international treaties, conventions or decisions; and

(g) To achieve the objectives of Art. 21, 47, 48A and 51A (g) of the Constitution of India by means of a fair, fast and satisfactory judicial procedure.

The Law Commission of India was influenced by decisions of the Supreme Court of India that in dicta advocated the establishment of environment courts. In the judgment of the Supreme Court of India in A.P. Pollution Control Board vs. M.V. Nayudu[38] the Court referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists and technically qualified persons, as part of the judicial process and that the Law Commission could therefore examine the matter.

In M.C. Mehta vs. Union of India[39] the Supreme Court opined '' we would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up environment courts on a regional basis with one professional judge and two experts, keeping in view the expertise required for such adjudication. There would be a right to appeal to this court from the decision of the environment court''.[40]

Another influential judgment was the Indian Council for Enviro-Legal Action vs. Union of India[41] where the Supreme Court observed that '' the suggestion for the establishment of environment courts is a commendable one. The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of Water Act, Air Act and Environment Act never reach their conclusion either because of the workload in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water, Air or Environment Acts are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All these point to the need for creating environment courts which alone should be empowered to deal with all matters, civil and criminal, relating to the environment. These courts should be manned by legally trained persons/ judicial officers and should be allowed to adopt summary procedures. This issue, no doubt, requires to be studied and examined in depth from all angles before taking any action.''[42]

The Indian Parliament passed the National Green Tribunal Act in June 2010.[43] It provides for the

[37] Law Commission of India (2003) One Hundred and Eight Sixth Report, 8-9

[38] 1999(2) SCC 718 and 2001(2)SCC 62

[39] AIR 1987 SC 965

[40] Ibid at 982

[41] 1996(3) SCC 212

[42] Ibid at 252

[43] The National Green Tribunal Act, 2010. The Gazette of India Extraordinary (No. 19 0f 2010); see Gill, G.N. (2010). A Green Tribunal for India. Journal of Environmental Law Volume 22, No.3, 461-474

establishment of a National Green Tribunal [NGT]. The Tribunal decides cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to the environment and gives relief and compensation for damages to persons and property.

The NGT was established on 18th October 2010 and became operational on 5th May 2011 with New Delhi selected as the site for the principal bench[44] although Bhopal was mooted earlier in recognition of the environmental industrial disaster of 1984. The principal bench exercises jurisdiction in the states of Uttar Pradesh, Uttarakhand, Punjab, Haryana, Himachal Pradesh, National Capital Territory of Delhi and Union Territory of Delhi. Subsequently, regional benches were established in Bhopal, being the Central Zone. It covers Madhya Pradesh, Rajasthan and Chattisgarh. Pune is the Western Zone base and it covers Maharashtra, Gujarat, Goa with Union Territories of Daman and Diu and Dadar and Nagar Haveli. The Southern Zone is located in Chennai and serves Kerala, Tamil Nadu, Andhra Pradesh, Karnataka, Union Territories of Puducherry and Lakshadweep. The fifth area, the Eastern Zone, is based in Kolkata and is responsible for West Bengal, Orissa, Bihar, Jharkhand and the seven sister States of the North-Eastern region, Sikkim, Andaman and the Nicobar Islands.[45] The principal and regional benches are in operation although Delhi has proved to date to be the busiest.

In order to become more accessible especially in the remote areas of India, the NGT follows the circuit procedure of 'courts going to people and not people coming to the courts'. Shimla has received circuit benches from Delhi[46] as has Jodhpur from the Central Zone.[47]

Important features of the NGT include:

Composition

The NGT is a specialized body where the decision-makers hold relevant qualifications and appropriate work experience both in law and technically. Thereby the scientific experts are able to offer the court the skills for multi-disciplinary decision making.

The judicial members, including the Chairperson are or were previously a judge of the Supreme Court of India or Chief Justice of a High Court or the judge of a High Court.[48] The technical experts include persons from life sciences, physical sciences, engineering or technology with a fifteen year experience in the relevant field or administrative experience including five years practical experience in a reputed national level institution or central or state government in environmental matters.[49]

In addition, the NGT consists of a full time Chairperson, not less than ten but subject to a maximum of twenty full time judicial and expert members.[50] The benefit of this multi-faceted and multi-skilled body encourages a coherent and effective institutional mechanism to adjudicate complex laws and principles in a uniform and consistent manner whilst simultaneously re-shaping the approach to solve the environmental problem at its source rather being limited to pre-determined remedies**.**

Presently, the principal and regional benches are comprised of a total of five judicial and ten technical experts including the Chairperson.[51] As each of the existing benches of the Tribunal receives at least 25 cases of violation every day,[52] it is suggested that there is a need to increase the judicial bench complement in order to ensure effective and expeditious disposal of environmental cases.

The expertise of the NGT benches is reflected in the enhanced quality of the Tribunal's decisions. They not only decide matters based on scientific evidence but also make positive, policy suggestions to improve environmental management. For instance, in Krishi Vigyan Arogya Sanstha v. Ministry of Environment and Forests[53] the Tribunal issued directions to be considered in matters relating to the grant of an environmental clearance for coal based thermal power projects. These include instituting a scientific study dealing with nuclear radiation with reference to coal ash generated by thermal power projects. The Tribunal reviewed the cumulative effect of a number of thermal power projects located in the area on

[44] Ministry of Environment and Forests Notification 5th May 2011 S.O.1003 E

[45] Ministry of Environment and Forests Notification 17th August 2011 S.O.1908 E

[46] NGT/PB/157/2013/331 dated December 20, 2013 [office order]

[47] NGT/PB/266/2013/281 dated December 2, 2013 [office order]

[48] See s 5(1) 0f the NGT Act 2010. At present, Honourable Mr Justice Swatanter Kumar is the Chairperson of the NGT. Upon being appointed as Chairperson, NGT, Justice Kumar resigned as a Judge of the Supreme Court of India on 20.12.2012.

[49] S 5(2)

[50] S 4(1)

[51] http://greentribunal.gov.in/

[52] Shaji, K.A. (2013) . More awareness needed on green tribunal. The Times of India, June 23

[53] Order dated 20th September 2011,

human habitation and environment and ecology grounds. It prescribed national standards as to permissible levels of nuclear radiation in residential, industrial and ecologically sensitive areas of India and synchronized the commissioning of the thermal power project with that of a sewage waste water treatment plant. The treated water was proposed to be used for the operation of the project, failing which no consent to operate was to be issued by the pollution control boards. Further, all future projects required the project proponent to furnish details of possible nuclear radio activity and the levels of the coal proposed to be used for the thermal power plant. The decision, thus, demonstrates that any procedural lapses such as collection and evaluation of basic scientific data for the grant of environmental clearance that may lead to threats to the environment, ecology and conservation of natural resources will be taken seriously by the presiding NGT.

Jurisdiction

The NGT has wide jurisdiction in relation to environmental matters. According to the precedents that govern statutory interpretation the preamble section to the National Green Tribunal Act is the first indicator of legislative intent and provides guidance on legislative interpretation to the remaining statutory provisions.

The Tribunal has both original and appellate jurisdiction under the National Green Tribunal Act 2010. The original jurisdiction[54] is exercised in civil cases in relation to a substantial question relating to the environment. This includes enforcement of any legal right relating to the environment and such questions that arise out of the implementation of the enactments specified in Schedule 1 of the Act.[55] The content of an original application should first be a civil case and secondly relate to a substantial question concerning the environment.

The wording 'all civil cases' involves all legal proceedings except criminal cases which are governed by the provisions of Criminal Procedure Code. In M.P. Pollution Control Board v. Commissioner Municipal Corporation Bhopal[56] the Tribunal observed "once the legislature restricts the jurisdiction of the tribunal only to civil cases, then that jurisdiction is incapable of being expanded to the cases which are patently and substantially criminal in nature and are controlled or have been instituted under the provisions of Cr. P.C., like filing of a criminal complaint of an offence, specifically triable by a magistrate in accordance with law. This Tribunal is a creation of a statute and thus, its jurisdiction will have to be construed with reference to the language of its provisions".[57]

The legal meaning of 'substantial question on the environment' is unsettled. Nevertheless it has a bearing on the case and its issues relating to the environment**.** Section 2(m) of the National Green Tribunal Act classifies 'substantial question on environment' under two heads: firstly, where there is a direct violation of a statutory duty or environmental obligation which is likely to affect the community or the gravity of damage to the environment or property is substantial or the damage to public health is broadly measurable; secondly, where the environmental consequences relate to a specific activity or a point source of pollution.

The case of Gram Panchayat Totu (Majthai) v. State of Himachal Pradesh[58]is illustrative of a 'substantial question of law'. An original application was filed by Gram Panchayat Totu (Majthai) through its representatives and two residents against the proposed construction of municipal solid waste (MSW) plant at the village called Bharyal on the ground that the mandatory rules and permissions from authorities had not been obtained and the proposed site of the MSW plant was in close proximity to human habitation and as such posed health problems for the villagers of Totu Gram Panchayat. The NGT entertained the application stating that "the guidelines and the siting criteria, required to be followed for locating MSW facilities, and Land Fill site have not been sacrosantly followed, under the MSW Rules 2000. The rules stipulate that prior environmental clearance is required to be obtained as per the provisions of Environment Impact Assessment notification but the same has not been obtained from the State Environmental Impact Assessment Authority. The project proponent i.e. Municipal Council, Shimla has failed to follow the statutory norms. The Municipal Council, Shimla, is directed to ensure that necessary preventive and control measures are adopted/implemented to avoid any adverse impact on the environment especially on the ground water and surface water bodies, keeping in mind the provisions of Article 21 of the Constitution of India, which

[54] Section 14(1)

[55] The enactments in Schedule 1 include The Water Act 1974; The Water Cess Act 1977;The Forests (Conservation)Act 1980; The Air Act 1981; The Environment Protection Act 1986; The Public Liability Insurance Act 1981 and The Biological Diversity Act 2002

[56] Order dated 8th August 2013

[57] Ibid para 7

[58] Order dated 11th October 2011

mandates enjoyment of pollution free air and water to its citizens''.[59]

Similarly, in D B Nevatia *v.* State of Maharashtra[60] the NGT issued directions to the Ministry of Road Transport and Highways to produce and notify source specific standards for sirens and multi-tone vehicles. Constant use of sirens and multi-tone horns being above the noise standard under the provisions of the Noise Pollution (Regulation and Control) Rules 2000 causes immense hardship to common people and also has serious effects on health.

The Tribunal under section 16 of the National Green Tribunal Act 2010 has appellate jurisdiction regarding the orders or decisions under the enactments specified in Schedule I. Any person aggrieved has the right to appeal against such a decision or direction. It is important to note that the person aggrieved in environmental matters has been given a liberal construction and flexible interpretation. In Vimal Bhai *v.* Ministry of Environment and Forests[61] the NGT bench comprising of Justices Ramulu and Agarwal stated "any person whether he is a resident of that particular area or not whether he is aggrieved and/or injured or not, can approach this tribunal. In such situations, it is of course necessary to review the credentials of applicants/appellants as to their true intentions and motives.''[62] The NGT ruling came as a result of a challenge by three environmentalists concerning the grant of an environmental clearance for the construction of a dam for hydroelectric power across the river Alakhnanda in Chamoli district of Uttarkhand.

The bench, in its liberal interpretation was guided by two reasons: first, the inability of persons living in the area or vicinity of the proposed project to understand the intrinsic scientific details and the effects of the ultimate project and any disaster it may cause and thus the right to any citizen to approach the tribunal regardless of whether he is directly affected by a developmental project or whether a resident of affected area or not; second, the subservience of statutory provisions of National Green Tribunal Act 2010 to the Constitutional mandate of Article 51A (g) providing a fundamental duty of every citizen to protect and improve the natural environment. The 'aggrieved person' as stated in Sections 16 and 18(2) of the National Green Tribunal Act 2010, cannot be placed above 'every citizen' as appears in Article 51A of the Constitution of India. Thus, any person can approach the Tribunal and complain of environmental threats as a consequence of the activities of the State or any organization or individual under original and appellate jurisdiction.

In addition, the NGT has strictly construed the time-limitation clauses in entertaining both the original and appellate jurisdiction. The Tribunal cannot entertain the original application if it is not filed within a period of six months from the date on which the cause of action for such dispute first arose[63] or appeal if it is not filed within thirty days from the date on which the order or decision or direction was communicated to the appellant.[64] However, in both cases, where there is a sufficient cause the Tribunal may allow a further period but not exceeding sixty days. In Paryavarana Sanrakshan Sangarsh Samiti Lippa *v.* Union of India[65] the Tribunal explained the scope of limitation with special emphasis on condonation of delay and sufficient cause. To quote "the provision has been contemplated with the pious objective and in order to enable the courts to do substantial justice to the parties by disposing of matters on merits. The expression 'sufficient cause' used by the legislature is adequately elastic to enable the court to apply the law in a meaningful manner which sub-serves the ends of justice. There cannot be a straightjacket formula for accepting or rejecting explanations furnished for the delay caused in taking steps. The tribunal on the question of limitation should not be hyper-technical."[66] The NGT in this case condoned the period of limitation of thirty days as there appeared to be a sufficient cause in filing an appeal against an order granting forest clearance for the construction of a hydro-electric project in the state of Himachal Pradesh. The NGT found sufficient cause for entertaining an appeal as the appellants lived in the interior of the Himachal Pradesh. They had travel and communication difficulties regarding access to other parts of the country due to the remoteness of the area and high costs of travel. The NGT was aware of the deteriorating situation in the monsoon season often resulting in landslides in the hilly areas of Himachal Pradesh.

Fundamental Principles

The NGT is mandated to pass orders or decisions or awards in conformity with the principles of sustainable development, precautionary and polluter pays.[67]

[59] Ibid paras 24 and 27
[60] Order dated 09th January 2013
[61] Order dated 14th December, 2011
[62] Ibid page 11
[63] s 14(3)
[64] s 16
[65] Order dated 15th December, 2011
[66] Ibid paras 14 and 16
[67] s 20

In Jeet Singh Kanwar *v.* Union of India[68] the issue before the NGT was the application of the precautionary principle and sustainable development to the grant of environmental clearance to the proposal for the installation and operation of a coal based thermal power plant in the State of Chattisgarh. Explaining the scope of sustainable development, the Tribunal observed "the concept is an exercise of balancing the industrial activity with environment protection. The balancing act requires proper evaluation of both the aspects, namely, degree of environmental degradation which may occur due to the industrial activity and degree of economic growth to be achieved. It is well settled that the person who wants to change the status quo has to discharge burden of proof to establish that the proposed development is of sustainable nature".[69]

Sustainable development, thus, aims to strike a balance between development and environment protection to facilitate economic growth as well to secure adequate adherence to the cause of environment. The principle of sustainable development takes within its ambit the precautionary principle. The precautionary principle requires the authority to examine probability of environmental degradation that may occur and result into damage. It involves taking preventive measures which would ensure no irretrievable damage to the environment is caused.

Applying the facts of Kanwar's case, the Tribunal was of the opinion that it was necessary to examine the validity of the project as the installation of the proposed thermal plant based on consumption of coal as fuel would cause additional pollution to the surrounding areas. Such a possibility called for caution and the application of the precautionary principle. Thus, the Tribunal decided that the environmental clearance was improperly granted as there was failure to apply the principles of sustainable development and precaution in order to avoid future disaster or irreversible environmental degradation.

These principles were again applied in Janajagrithi Samiti *v.* Union of India.[70] The NGT directed the Karanataka Power Transmission Corporation Limited not to fell trees nor to destroy the bio-diversity in the 8.3 kilometer stretch belonging to Baller reserve forest of Western Ghats in Chikmagalur District in order to erect 400 KV double circuit transmission lines. The Tribunal considered irreparable loss would occur within the rich and rare bio-diversity of the Western Ghats and cause restrictions in habitat connectivity and the corridor values of the forest.

The fine but challenging balance between economic development on one hand and protection of the environment by the application of the fundamental principles is also illustrated by the case of B B Nalwade *v.* Ministry of Environment and Forests.[71] The Tribunal upheld the grant of environmental clearance for a coal based thermal power plant on the grounds that all necessary scientific studies and statistical information were taken into account regarding the viability of the project and its impact on the environment. Precautionary measures were undertaken while granting the environmental clearance. Accordingly the NGT observed "production of electricity is very essential for industrial growth apart from domestic need. In the light of the existing power scenario in the country, the project under consideration when operated within the eco-legal frame work may contribute significantly to sustainable industrial development in the area under consideration. Therefore, the project under consideration does not violate the principle of sustainable development".[72]

These judgments reflect the commitment of the NGT to seek a symbiotic relationship between development and the environment. Adopting a pragmatic approach encourages two commonly perceived competing value systems to operate harmoniously, supported by the application of the doctrine of sustainable development.

Procedural Requirements

The NGT's rationale and judgments are guided by the principles of natural justice [PNJs].[73] The PNJs principles include the opportunity to be heard and the rule against bias and speaking orders. They seek to prevent miscarriages of justice and ensure administrative accountability. The violation of PNJs has the effect of vitiating the administrative or quasi-judicial action, thereby affecting the rights of third parties. The Tribunal is often faced with issues wherein the statutory authority arrives at a decision without providing the opportunity to be heard thereby adversely affecting the rights of the people. The case of M/s. Om Shakthi Engineering Works *v.* The Chairman Tamil Nadu Pollution Control Board[74] illustrates the point. The pollution board ordered the closure of the appellant's engineering workshop on the ground of noise pollution and also directed the

[68] Order dated 16th April 2013
[69] Ibid para 25
[70] Order dated 07th March 2012
[71] Order dated 29th November, 2011
[72] Ibid para 14
[73] s 19(1)
[74] Order dated 10th April, 2012

electricity authority to disconnect the electricity supply. The appellant was not served with notice nor offered a hearing by the pollution board. The NGT cancelled the closure order and restored the electricity supply as the action of pollution board violated the PNJs and reflected arbitrariness and unreasonableness.

The Tribunal has the power to issue cost orders [75]as it considers necessary, including where the claim is not maintainable or is false or vexatious.[76] In B. Prajapathi *v.* Ministry of Environment and Forests[77] the NGT imposed a cost of Rs.50,000/- [£5,000] against the appellant who engaged in litigation that was motivated by frivolous considerations and amounted to the abuse of the tribunal process. The Tribunal observed "the Tribunal is expected to ensure effective environmental management and conservation, give relief and compensation for damages to persons and property and connected matters, and at the same time ensure sustainable development. In this regard, the jurisdiction of the tribunal should not be invoked for frivolous litigation that unnecessarily consumed the time of the tribunal without serving the purpose for which the tribunal was constituted".[78]

Further, any person aggrieved by an order or decision of the Tribunal can file an appeal to the Supreme Court within ninety days from the date of communication of the order. The Supreme Court may condone the time limitation provided it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.[79]

Finally, no civil court has jurisdiction to entertain an appeal in respect of any matter, which the Tribunal is empowered to determine under its appellate jurisdiction.[80]

CONCLUSION

Never has the importance of the protection of the environment been greater than today. Equally, vocal is the debate and discussion of how to achieve and maintain the balance between development and the environment. This apparent dichotomy is writ large in the social and economic activities of a fast developing nation such as India. In seeking to resolve this challenge the creativity of the judiciary has played a major role and continues to do so. In addition, it is anticipated the National Green Tribunal will continue to make a significant contribution to encouraging a symbiotic relationship between development and the environment

In particular, it is clear that the tribunal is even handed when reviewing conflicting interests. It seeks to support development within the context of sustainability. It determinedly enforces international principles and those of good governance and transparency by demanding that industries and state agencies strictly follow established regulatory procedures and do not damage the environment to the extent that it does not support people's existence.

However, the on-going concern of court list crowding which was a reason for the establishment of the NGT may yet threaten and jeopardise the effective work of the tribunal. In Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India[81] the Supreme Court stated '' keeping in view the provisions and scheme of the NGT, it can be safely concluded that the environmental issues should be instituted and litigated before the NGT. Thus, in unambiguous terms , we direct that all matters instituted after coming into force of the NGT Act and which are covered under the provisions of NGT Act shall stand transferred and can be instituted before NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.''[82] With limited professional personnel and only five benches the issue of court clogging may re-emerge in the NGT.

Nevertheless, the decisions of the NGT[83] demonstrate both the effectiveness of administrative tribunals and the added value provided by scientific expertise. Such involvement moves judicial activity onto a new level. Essentially, the NGT can also produce proactive, environmental policies rather than being reliant exclusively on reactive judicial remedies. This innovative development enhances the already important work being undertaken by the National Green Tribunal.

[75] s 23(1)
[76] s 23(2)
[77] 20th January, 2012
[78] Ibid para 7
[79] s 22
[80] s 29

[81] Writ Petition(C) No. 50 of 1998; Order dated August 9 2012
[82] Ibid para 38
[83] The author is currently analysing the judgments of the NGT as work in progress