ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

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Abstract: Sustainable development, a notion of obligation to future generation which was first used in Brundtland Commission in 1987 which states that development which is taking place to meet the demands of present generation without compromising or affecting the needs of future generations. This very process of sustainable development is one of the most important concerns to globalised and developing nations like India which is still confronted with many social, economic and especially environmental challenges such as Global Warming, Health issue, Toxins release, Water Crisis and Pollution. This paper through a doctrinal research tries to analyze the above mentioned environmental concerns and tries to suggest the probable solution for various problem that stands as obstacle in the way of sustainable development and access to justice.

The Indian legislator has played a vital role in conserving environment and empowering the sustainable development and also enacted many laws and provisions such as Article 48A, Article 51-A (g) of the Indian constitution, and Acts like Easements Act 1882 which talks about the riparian owners right and unreasonable pollution of water, Fisheries Act, 1897 which penalized the killing of fish by water poisoning and by using explosives and other laws which follow the suits are The Factories Act, 1948, The River Boards Act, 1956 but most important of all these developments was the bringing into force of Environmental protection Act 1986, New Company Act, 2013 which deals with various aspects of social responsibility, development and moved forward for the preservation of environment. The Supreme Court of India in its effort devised two principles they are 'Polluter Pays' Principle which states that the polluter has to bear the cost of all remedial and clean up measures also the amount payable as compensation to pollution victims and 'Precautionary Principle' which requires the government authorities to anticipate, prevents, and attacks the causes of environmental pollution. The National Green Tribunal (NGT) 2010 was established with the view of speedy trials with respect to environmental matters and enforcement of legal rights relating to environment in this regard paper tries to analyze the process of functioning of NGT and tries to put forth a few suggestions to promote the better functioning of these tribunals by invoking the concept of public participation. However in spite of the constant efforts by Indian legislature and judiciary the existence of various environmental issues clearly indicates that there is a need for further effective implementation and enforcement of the existing laws and provisions which can only be attained through an active public participation in environmental decision making and resolving the environmental issues.

The concept of public participation is one of the most important pillars of 'Aarhus convention' which was signed on 25th July in the Danish city of Aarhus which grants the public rights regarding access to information, public participation and access to justice in governmental decision making processes contained in Article 4, 5, 6, 7, 8 and 9 of the convention which is related to matters concerning the local, national and trans-boundary environment. It abridges the gap between public and public authorities. Access to environmental information is the necessary starting point for any public involvement in decision making process. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. It promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.

The aim of this paper is to accentuate certain aspects of access to justice. To some extent this paper also concerns the role of the court in relation to the environmental area. It also compares the procedural aspects of the NGT with that of environmental court of Sweden. Further the paper intents to deal with the principle 17 of Rio declaration which states Environmental Impact Assessment. The objective of the paper is to seek right of the public both in present and future generation to know and to live in the healthy environment.

Keywords: Aarhus Convention, Access to justice, Decision Making and Public Participation.

INTRODUCTION

We have a dream – a world without poverty – a world that is equitable – a world that respects human rights – a world with increased and improved ethical behaviour regarding poverty and natural resources - a world that is environmentally, socially and economically sustainable, where the challenges such as climate change, loss of biodiversity and social inequity have been successfully addressed. This is an achievable dream, but the current system is deeply flawed and our current pathway will not realise it.[1]

Sustainable development has been an enormously influential concept in environmental law since at least the early 1980s. The World Commission on Environment and Development published the seminal work on sustainable development, *Our Common future*[2] more commonly known as the Brundtland report in 1987.[3] The Brundtland Report has been built on at an international level, most prominently by the United Nations convention on environment and development (the famous Rio earth Conference) in 1992, and more recently by the 2002 world summit on sustainable development in Johannesburg.[4] Over the past few years innumerable definitions of sustainable development have been proposed. But one can identify a clear trend in them. At the beginning, the sustainability was interpreted as a requirement to preserve intact the environment as we find it today in all its forms. The most widely quoted definition of sustainable development comes from the Brundtland report, according to which sustainable development is development that meets the needs of the present without compromising the ability of future generation to meet their own needs.[5] This definition of Brundtland commission is built upon two foundations. The first is the objective concept of 'Human needs like food , clothing, shelter, clean water, and all other essentials which contribute to the quality of life', while the other is a normative concept that emphasizes a balance of equity, environment, and growth by contemplating the fully apparent non-renewal capacity of our environment. [6] Despite a heavy reliance on the Brundtland definition, throughout the 1990s sustainable development was largely defined as a trade off between economic development and environmental protection.

The UN Environmental program's Helmsman Topfer has said, "To fight poverty is also to fight environmental problems in the world." Indeed poverty is often associated with gross pollution and poor environmental health. It need not be that way. Good governance- a caring government that is not corrupt- can accomplish much, even with few resources. [7]There is an incumbent duty on the part of the present generation to preserve the environment from deterioration, ensuring a fair measure of resources provided by the environment for future generations. The logic behind this doctrine of intergenerational equity is to ensure that, for the benefit of the present generation, the survival of future generations is not jeopardized. All that the ethics of intergenerational equity demand is a care for the future.[8]

Recognizing that adequate protection of the environment is essential for the human being and the enjoyment of basic human rights including right to life. This paper affirms the need to protect, preserve and improve the state of environment and to ensure sustainable development by providing access to information, public participation, decision making and access to justice in environmental matters.

DEVELOPMENT AS A CHALLENGE TO AN ENVIRONMENT

Unbridled use of science and unprecedented use of technology have given birth to too many problems including the problem of eco-imbalances and environmental degradation. With the advancement of science and technology, this problem has assumed threatening dimensions. This problem has not only caused damage to flora and fauna but threatened the very existence of mankind.[9]

Industrialization

[1] Environment and development challenges : The Imperative to Act. http://www.unep.org/pdf/pressreleases/Blue_Planet_synthesis_paper.pdf Last visited 19.11.2013 at 11:25.

[2] Also known as the Brundtland Report, from the United Nations World Commission on Environment and Development was published in 1987

[3] World commission on environment and development, Our common future (oxford University Press, 1987) (The Brundtland Report).

[4] www.un.org/events /wssd/

[5] Jane Holder and Maria Lee, Environmental protection, law and policy, 2nd ed. Cambridge University press, 2009 pg 217.

[6] See R.N Batta and J.P Bhatti, environmental policy challenges of the new millennium in S. Radha and Amar Singh sankhyan (eds), Environmental Challenges of the 21st century, Delhi: deep & deep publication, 2004, p.4.

[7] Marquitta k. Hill, understating environmental pollution, 2nd ed. Cambridge University Press, 2005

[8] P.B Sahasranaman (2009), *Handbook of Environmental law*, oxford university press, , pg 23.

[9] Prof. Satish c. Shastri, (2012) *Environmental Law*, 4th ed. Eastern book company, Lucknow.

"The 'environment' is where we live; and development is what we all do in attempting to improve our lot within that abode. The two are inseparable."[10] Poverty[11] is an anathema to development. The phantom of poverty looming large over vast landscapes of underdeveloped and developing countries, including India, poses a unique challenge to economic development. One mantra to escape from this quagmire seems to be a positive approach towards industrialization. Hence, the biggest challenge before the underdeveloped and developing nation today is to peddle acceleration in industrialization, viewed as instrumental in reducing poverty and ignorance. However, industrialization, if is pursued without any consideration can lead to indiscriminate exploitation of nature.[12]

Humanity's behaviour remains utterly inappropriate for dealing with the potentially lethal fallout from a combination of increasingly rapid technological evolution matched with very slow ethical-social evolution. The human ability to do has vastly outstripped the ability to understand. As a result civilization is faced with a perfect storm of problems driven by overpopulation, overconsumption by the rich, the use of environmentally malign technologies, and gross inequalities. They include loss of the biodiversity that runs human life-support systems, climate disruption, global toxification, alteration of critical biogeochemical cycles, increasing probability of vast epidemics, and the specter of a civilization-destroying nuclear war. These biophysical problems are interacting tightly with human governance systems, institutions, and civil societies that are now inadequate to deal with them.[13] Industrialization in spite of providing the solution to various existing economic problems such as poverty is not only continuing to stand as an obstacle in the path of sustainable development. But also act as a "Hazardous air pollutants" (HAPs)[14] commonly called toxic air pollutants to environment and causes Air pollution, a contamination of air, by the presence of suspended particulate matter (SPM). The air pollutants are mixtures of soot, oxides of sulphur and other mineral particles that produce the fly ash. Due to presence of contamination in the air, the quality of air deteriorates which causes Global warming, Direct harm on human Health, Effects on vegetation and animal life, effects the monuments and buildings, acid rain and ecological harms.[15]

In India main air pollutant is the emission from the motor vehicles and the UK is the country where 85 percent of the carbon monoxide and 45 percent of the oxides of nitrogen present in the atmosphere is due to motor vehicles. There are many air pollutants but mainly there are four that have been globally accepted as primary air pollutants. They are: (1) oxide of sulphur, (2) oxides of nitrogen, (3) oxides of carbon and (4) hydrocarbons.[16] In spite of polluting air, industrialization somehow affects the purity of the water causing water pollution ultimately affecting the ecological balance and violating the human rights just for the sake of development which is a development but without sustainability. So to curb this menace various acts like The Air (Prevention and Control of Pollution) Act[17] and Water (Prevention and Control of Pollution) Act[18] came into existence is explained in detail in this paper under the heading Legal Framework.

Trade and Environment

Trade controls are, however, often used by one state against another when the imports of goods is banned or restricted, often on ostensibly environmental grounds. This may happen either if there is an absence of agreed international rules or if the importing state goes beyond the restrictions allowed for under existing international rules. Trade control process may be concerned with the polluting impact on a neighbouring state, or the way in which a national or global resource is exploited.[19] The regulation of International trade rests primarily with bodies connected to the World Trade Organisation (WTO). The WTO has a committee on trade and environment which identifies the relationship between trade measures and environmental measures

[10] An Overview, Environment for Development, Our Common Future. http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf Last Visited 19.11.2013 at 12:02.

[11] Poverty contributes equally to both-population growth and environment pollution.

[12] P.B Sahasranaman, (2009) *Handbook of Environmental law*, oxford university press, New Delhi, pg 22.

[13] Environment and development challenges: The Imperative to Act. http://www.unep.org/pdf/pressreleases/Blue_Planet_synthesis_paper.pdf Last visited 19.11.2013 at 11:36.

[14] Marquitta k. Hill, (2005) *Understating environmental pollution*, 2nd ed. Cambridge University Press, pg 125.

[15] Shormila Mukherji,(2004) *Fragile Environment*, Manak publication Pvt. Ltd. New Delhi.

[16] P.B Sahasranaman, Handbook of Environmental law, oxford university press, New Delhi, 2009 pg 117

[17] 1981

[18] 1974

[19] Stuart Bell, Donald McGillivray and OLE W. Pedersen, (2012) *Environmental Law* , 8th ed. Oxford University Press

in order to promote sustainable development.[20] Decisions by the appellate body of the WTO which is effectively becoming an international court of sustainable development, because it is taking the lead in deciding, under the WTO regime where the balance between global trade freedom and environmental protection lies and plays an important role.

Climate Change

Climate change refers to the fluctuation in temperature, precipitation, wind and other elements of the earth's climate system over time. The phenomenon has also been labelled 'global warming' as one of the main aspects of climate change is the heating up of the earth. Many scientist and policy makers see this global warming as a threat to the environmental and its inhabitants. The cause of climate change can be observed by the contribution of Working Group I to the fourth Assessment Report of The Intergovernmental Panel on Climate Change (IPCC) which states that 'Warming of the climate change is unequivocal, as is now evident from the observation of increases in global average air and ocean temperature, widespread melting of snow and ice, and rising global average sea level.[21] Furthermore, the report makes it evident that such changes are due to increased emission. In an attempt to reverse the trend of states turning their attention away from international environmental law and policy towards domestic economic growth United Nations Environment Programme (UNEP) launched its Green Economy agenda in 2008. UNEP defines a green economy as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities.[22]

LEGAL FRAMEWORK

The law and legislation in particular has some role to play in the preparation, prevention and mitigation of environmental disaster. It is crucial that any legal system is transparent and easily intelligible to ordinary citizens if there is to be successful access to justice.

Legislature

India has a history of enforcing various laws committee Reports[23] protecting the environment even before the convening of the Stockholm Conference, the benchmark often taken as the starting point of global developments in protecting the environment, both legally and otherwise.[24] The Indian Penal Code, which penalizes for causing defilement of water of a public spring or reservoir with imprisonment or fine; Easement Act[25] which talks about the riparian owners' right and unreasonable pollution of Water by upstream users; Fisheries Act[26] which penalizes the killing of fish by water poisoning and by using explosive etc are a few examples. The Bengal Smoke Nuisance Act[27], the Indian Motor Vehicle Act[28] is others in the category. Other laws which follow the suit are The Factories Act[29], The River Boards Act[30], The Indian Forests Act[31], The Forest Conservation Act[32] and Wildlife Protection Act[33] [34]. There are various other legal Paradigms to regulate water pollution, air pollution, radioactive wastes and infinite number of such problems even during the time of the British, there were several laws.[35] But these early legislative efforts were piecemeal and grossly inadequate.[36] Most important of all these developments was the bringing of Environment Protection Act[37] conferring broad powers to the central government enabling them to take all such measures for the purpose of protecting and improving the quality of the environment and to prevent environmental pollution.[38] The Environment

[20] (1994) Decision on Trade and Environment, see www.wto.org/english/tratop_e/envir_e/issu5_e.htm. Last Visited 20.11.2013 at 13:10

[21] Contribution of Working Group II to the Fourth Assessment Report of the IPCC, Climate change impacts, Adaption and vulnerability.

[22] Stuart Bell, Donald McGillivray and OLE W. Pedersen, Environmental Law, 8th ed. Oxford University Press pg 170.

[23] Tiwari Committee Report, 1980.

[24] O. V. Nandimath, (2009) *Handbook of Environmental Decision Making in India*, An EIA Model, Oxford University Press, New Delhi Pg 65

[25] 1882

[26] 1897

[27] 1905

[28] 1988

[29] 1948

[30] 1956

[31] 1927

[32] 1980

[33] 1972

[34] K. Ramakrishna, The Emergence of Environmental Law in the Developing Countries: A Case Study of India , 12 Ecology Law Quarterly, 1985, pg 907

[35] Shore Nuisance (Bombay and Kolaba) Act 1853, Elephant Preservation Act 1879, Wild Birds Protection Act 1887,Hailey National Park Act, 1936 etc.

[36] Sarath Chandaran, (2002). *Human Rights and Environment protection*, Cochin University Law University Review, pp. 175-6.

[37] 1986

[38] An Introduction to the Environment (Protection) Act, 1986, http://www.advocatekhoj.com/blogs/index.php?bid=5

Protection Act was passed with a foreign background and to fulfil constitutional obligation as provided under Art. 48A.

The UN Declaration has resulted in the 42nd Amendment to the constitution and the enactment of various laws. By amending the Indian constitution for the 42nd time in 1976, the government had imposed an obligation to protect the natural environment upon both the state as well as the citizens of India. The constitution through various Articles lays down the principle for environmental protection like Article 48A[39], inserted in Directive Principles of state policy (DPSP) Part 1V of the Constitution, Article 51A (g)[40] inserted in the Fundamental Duties (FDs). But there is no enforceability of these Articles as such.

Judiciary

Judicial recognition of environmental rights was achieved in India through the device of Public Interest Litigation (PIL).[41] Judiciary elevated environmental protection to the rank of a fundamental right by bringing it within the ambit of Article 21.[42] The Supreme Court of India played a substantive role in emphasizing the need to protect the environment. By referring to the Stockholm Declaration[43]and Rio Declaration[44] the Supreme Court in many cases[45] stated the importance of various principles. These are the followings:

The Polluter Pays Principle

The basis of the polluter pays principle is that those responsible for pollution meet the costs of its consequences. This also states that the polluter has to bear the cost of all remedial or clean up measures and also the amount payable as compensation to the victim of pollution.[46] But does this make any more sense to bear the cost of cleaning the environment and making up for the damaged environment by taking up an economic activity in an is an environmentally sensitive zone? The answer is certainly not! To mitigate such critical problems of the future, Environmental Impact Assessment (EIA)[47] stands as a tool of environmental decision making. EIA Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of competent national authority.[48]

The Precautionary Principle

This principle requires the government authorities to anticipate, prevent, and attack the causes of environmental pollution. The basis of this principle is that science cannot predict absolutely how, when, or why adverse impacts will occur, or what their effect may be on humans or ecosystem. This principle also imposes the onus of proof on the industrialist to show his or her action was environmentally benign.[49]

The Preventative Principle[50]

The preventative principle is often linked to the precautionary principle. This principle promotes the prevention of environmental harm as an alternative to remedying harm already caused. A good example of the preventative principle is the use of the Best Available Technique (BAT) to prevent pollution under the integrated pollution prevention and control regime.

The Integrated Principle[51]

This principle seeks to apply environmental consideration across all policy areas. The aim is to

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[39] Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

[40] To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures

[41] Public-Interest Litigation is litigation for the protection of the public interest. In Indian law, Article 32 of the Indian constitution contains a tool which directly joints the public with judiciary.

[42] In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652, declared that the right of the people to live in a healthy environment should be safeguarded.

[43] 1972

[44] 1992

[45] *M.C. Mehta v. Union of India* (Delhi Stone Crushing Case), 1992(3) SCC 257; *Virender Gaur v. State of Haryana* 1995 (2) SCC 577;

[46] See generally *Indian council for enviro-legal action v. Union of India* (Bichhri Case), AIR 1996 SC 1446; *Vellore citizens' welfare Forum v. union of India*, AIR 1996 SC 2715; *S. Jagannath v. Union of India* (Shrimp Culture Case), AIR 1997 SC 811

[47] 17th Principle of Rio declaration 1992.

[48] REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (Rio de Janeiro, 3-14 June 1992)

[49] *Vellore citizens' welfare Forum v. union of India*, AIR 1996 SC 2715; *S. Jagannath v. Union of India* (Shrimp Culture Case), AIR 1997 SC 811

[50] 1992 Rio Declaration on the Environment and Development, Principle 2

[51] Treaty on the Functioning of European Union, Article 11

avoid otherwise contradictory policy objectives that result from a failure to take into account environmental protection or resource conservation goal. An example would be the failure to consider the environmental consequences of liberalizing air travel or road building programmes designed to meet priority transport objectives.[52]

At the international level Article 38 (i) (d)[53] of the statute of the International Court of Justice (ICJ)[54] has also recognised judicial decisions one of the sources of international environmental law. The ICJ has decided many important cases involving environmental issues and put the environment on firm footing. Some of them are United Kingdom v. Albania[55], Lake Lanoux case[56], Belgium v. Spain[57], Australia v. France[58], Aerial Herbicide case[59] and Pulp Mills case[60]. These judicial pronouncements have recognised and explained various sources and principles of environmental law. As a result of large number environmental cases, ICJ have created the Chamber for Environmental Matters in July 1993.[61]

ACCESS TO JUSTICE

Justice is a dynamic concept with a complex of merits; it ought to fluctuate with the changes of cultural, social and historic condition. A combination of value in all aspects of a society constitutes a general benchmark of justice, and guides the mainstream of society in justice consideration from time to time.[62] When justice is used in the context of environment following are the obligations and requirements to 'Access the justice in Environmental Matters'.

[52] Stuart Bell, Donald McGillivray and OLE W. Pedersen, Environmental Law, 8th ed. Oxford University Press pg 58.

[53] Subject to the provisions of Art. 59 – Judicial decisions and teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law.

[54] ICJ is the principle judicial organ of United Nations established in June 1945 by the charter of the United Nations.

[55] 1949 ICJ 4.

[56] 1957 24 ILR 101.

[57] 1970 ICJ Rep 3.

[58] 1974 ICJ Rep 253.

[59] See, *Aerial Herbicide Spraying, Ecuador v. Colombia*, 1.4.2008 (ICJ).

[60] *Argentina v. Uruguay* (Pulp Mills on the River Uruguay), 4.5.2006 (ICJ).

[61] Prof. Satish c. Shastri, Environmental Law, 4th ed. Eastern book company, Lucknow 2012. pp 404-406.

[62] Jonas Ebbesson and Phoebe Okowa, Environmental Law and Justice in context, Cambridge University Press,2009.

Public Participation

Public participation is a process which is open to public scrutiny and responsive to public concerns is more likely to reflect diverse views, address key facts and issues, and ensure an outcome that is satisfactory both to the proponent and to the community. Recent decades have seen the emergence of a very widespread consensus that 'Public Participation' is a crucial element of good and democratically legitimate environmental decision making. There have been significant moves towards increasing both the quantity and quality of public participation. The importance of Public Participation is recognised principle 10 of Rio Declaration. Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.[63] At the national level, each individual shall have access to information concerning the environment that is held by public authorities and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided. There are various benefits of public participation recognised[64] as follows:

Improving the quality of decision

The preamble[65] to the Aarhus convention emphasizes the role that public participation has to play in improving environmental decisions.

Environmental problem solving

One of the ways in which competing values can be resolved is through techniques of deliberation –that is, 'bottom-up' discussions in which all sides of an issue are debated in an attempt to reach a consensus on an issue.

Promoting environmental citizenship

Environmental citizenship is loosely based upon the notion that individuals should take some responsibility for their own interaction with the environment. In promoting such citizenship, participation in environmental matters is critical.

Improving procedural legitimacy

Increased involvement in decisions, access to good quality environmental information, and ex post review mechanisms through such things as judicial

[63] International, Regional, National and Local level.

[64] Maria Lee and Carolyn Abbot ((2003) 66MLR 80) identifies a number of benefits of public participation.

[65] It states that 'improved access and public participation in decision making enhance the quality and the implementation of decisions'.

review increases the accountability of the decision-maker and makes the process more legitimate in the eyes of public.

These basic principles have been developed at an international level, as evidenced by the *Aarhus Convention*[66] in its three 'pillars' of promoting public participation. (a) Firstly, improved access to environmental information (Art. 4 and 5) (b) Public Participation in environmental decision making (Art. 6,7 and 8) (c) Access to justice in Environmental Matters (Art. 9)

First pillar of Aarhus Convention is i.e. Access to environmental information is the necessary starting point for nay public involvement in decisions. It is also a crucial element of a democratic society, a precondition of basic rights to vote or to free speech, and certainly of any form of participation in decision making.

Second pillar which is the most important among other pillars of Aarhus Convention provides for public participation at three stages: 'decisions on specific activities' (Art. 6); 'plans, programmes and policies relating to environment' (Art. 7); and 'the preparations of executive regulations and/or generally applicable legally binding normative instruments' (Art. 9).[67] It promotes establishment of a transparent and fair framework for decisions, within which the public will participate in the preparation of plans and programmes relating to the environment.

The final aspect of facilitating public participation in environmental law is ensuring that there is adequate access to a means of enforcing environmental law or in seeking redress in resolving environmental disputes which is referred as 'Access to Justice in Environmental Matters'[68] under Aarhus Convention. This gives the public the right to challenge decisions by means of an independent review by a court of law or other independent body. Thus the focus of this section is mainly on procedural matters-that is, a right to bring a 'Judicial review', and having the means to do so and the structural and institutional issue-that is, the establishment of Environmental court rather than the quality of substantive decisions provided by the legal system.

The process of judicial review is one way of making public bodies accountable to the courts and ensuring that they only act within the powers given to them by parliament. Accordingly, judicial review addresses the legality, and not the merits, of a decision. The legality of a decision comprises two different aspects. Procedural legality ensures that people have a right to a fair hearing and that there should be no bias or perception of bias in a decision making process. In circumstances under which there is procedural illegality, a court will overturn the decision, but send the issue back to the original decision –maker to be redetermined.[69]

'Are the Judiciary Environmentally Myopic?'[70]

It is questionable whether ordinary courts are equipped for dealing with highly technological or scientific data that may come forth in an environmental dispute. In the UK, the main proponent of a specialist court was Sir Harry Woolf who suggested the creation of a special tribunal with general responsibility for overseeing and enforcing environmental law which should have discretion to determine its own simple and user-friendly procedures, power to appoint specialist members, inquisitorial-type-fact-finding powers, an informal and multidisciplinary approach, power to make ancillary enforcement decisions- for example, on compensation, punishment, and public law remedies and so on.[71] There were also some other learned Judges[72] and advocates[73] who proposed an environmental courts and Tribunals. For that matter Sweden is highly acclaimed for setting up an effective environmental court. Since 1999, Sweden has had a 'Universally' applicable Environmental

[66] The Aarhus Convention grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and transboundary environment. It focuses on interactions between the public and public authorities. It was signed on 25 June 1998 in the Danish city of Aarhus.

[67] Article 9(2) of Aarhus Convention provides that anyone who has a sufficient interest shall be able to challenge the substantive or procedural legality of any decision, act or omission.

[68] This notion of procedural fairness has been adopted in *Edwards v. Environmental Agency* [2007] Env LR 9.

[69] For a good discussion of this in relation to climate change see C. Hilson (2010) 'Climate Change litigation in the UK: an explanatory approach (or bringing grievances back in)' in F. Fracchie and M. Occhiena (eds.), *Climate Change: la Riposta del diritto, Naples: Editoriale Scientifica*, pp. 421-36

[70] Lord Woolf, 'Are the Judiciary Environmentally Myopic?', *Journal of Planning and Environmental Law*, 1992, vol. 4, no. 1 pp. 1.

[71] Other two suggestions were discretion issues about standing, representation, and costs and the other one is an appeal structure with an appeal on a point of law to the court of appeal.

[72] P. McAuslan (1991) JEL 195.

[73] R. Carnwath (1992) 4 JPL 799.

Code,[74] which replaced some fifteen older pieces of legislation, and harmonised the general rules and principles in this field. In addition, this legislation also introduced new concepts, principles and procedures. Some part of the code applies to all activities and measures, whereas others concerns only special areas. The main core is administrative law, that is, rules that express the demands that environmental authorities can make upon persons intending to undertake any activity or measure that entails a risk for man or environment. The environmental code sets out well established environmental principles, such as the precautionary principle, the polluter pays principle, the principles of best available technology and the substitution principle. It consists of one professional judge, one environmental technician and two expert members. On the other side there is relatively long history of criticism of the existing arrangements for access to justice in environmental matters in the UK.

In India an environmental court was envisaged by the Supreme Court of India as far as in 1986. Bhagwati, in the case of M.C. Mehta v. Union of India and Shriram Foods and Fertilizers[75] said 'we would 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 environmental courts[76] on a regional basis, with one professional judge and two experts drawn from the ecological sciences Research Group, keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right to this court from the decisions of the environment courts. Green Courts suggested by the Law Commission in its 186th Report[77] was also very comprehensive and had capacity to reduce the burden on the High Courts and Supreme Court. There are other countries such as Australia[78], United States of America[79], New Zealand[80], Pakistan[81] and Bangladesh[82] where there is a development in Access to Justice by setting up the environmental court effectively.

It is not just 'Green Bench' but a view, to understand the environment, the science and the law that is required to deal with environmental cases. Proper judicial system for the resolution of environmental disputes provide an appropriate avenue to vindicate the importance of the environment, as they can be better equipped to apply the green view, with experts in science and law at their disposal

CONCLUSION[83]

In this article, I have discussed certain procedural issues that are vital if a broad access to justice is to be achieved in more than merely the formal sense. The following conclusion can be drawn: (a) The System: Too many routes of appeal will have a constraining effect on the possibilities open to challenging environmental decisions. It also creates divergences in case law. The complexity of environmental law suggests that the deciding bodies[84] must be well equipped with both the lawyers and technicians. (b) Scope of Review: The prospect of success for members of the public in challenging an administrative decision is evidently greater if the possibility exists of a full trial, invoking all interests. Another vital factor lies in the appellate body being able to replace the authority decision with a new one thereby being able effectively control the environmental legislation. (c) Scope of Decision: In order to enhance the acceptance of decisions, the aim should be to include the full interest of the public concerned at the earliest possible time in decision making procedures. (c) Actors: An important factor from the justice perspective is that individuals who are concerned by an environmental decision should have the possibility open to them to challenge it, irrespective of what kind of activity it concerns. The delimitation of the class of 'public concerned' should be wide.

These examples show what is perhaps self-evident, that there is an unbroken and uninterrupted need to keep alive the discussion on access to justice!

[74] Government Bill 1997/98:45. The Environmental code is published in English on the Sweden Ministry of the Environment's website, www.regeringen.se/english/publication/2000:61/

[75] 1986(2)SCC 175 (at page 202)

[7676] National Environmental Appellate Authority

[77] Submitted in 2003

[78] Land and Environment Court Act1979 (NSW).

[79] Carnegie Commission of Science and Technology (1993).

[80] Resource Management Act, 1996

[81] Pakistan Environment Protection Act 1997.

[82] Forest Act 1927.

[83] Jan Darpo, *Environmental Justicethrough environmental courts?*

[84] Tribunals and Courts.