

Establishment of Green Courts in India and Their Role in Discharging Climate Justice—A Jurisprudential Analysis

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The theoretical base of the advocacy for green courts as a forum of social transformation by doing environmental and climate justice can be found from the arguments proposed by the supporters of specialized courts debate. Specialized forums, it is contended, are able to evolve superior procedural norms and develop better quality of jurisprudence through expert judges who have greater exposure to a homogeneous legal policy regime. They bring uniformity, consistency, and predictability in decision-making which enhances public confidence and helps in development of a rich body of environmental justice jurisprudence. Incidental benefits include time and cost savings as the requirement of massive documentation for understanding technical points of law in the special field is averted and streamlined procedures make litigation easier and quicker. Though there are pitfalls, like tunnel vision and capture by interest groups, yet, in view of the practical necessity, specialization appears to be an inevitable phenomenon and the field of environmental law has produced two excellent examples of successful forums in Australia and New Zealand. Environmental courts and tribunals (ECT) are being rapidly growing throughout the world and are becoming important phenomena of 21st century environmental law. As of January, 2016, the numbers of specialist courts (ECT) have grown to 1,200 in 44 countries. The amazing growth of ECT worldwide is quite interesting as there are no international treaties or convention specifically requiring the states to create special environmental courts. Principle 10 of the Rio-Declaration is often quoted as the basis of creation of environmental courts, which in fact talks about “effective access to justice and administrative proceeding” and nowhere puts obligations to the members to constitute environmental courts. Australia and New Zealand had already taken a lead in creating environmental courts in their jurisdiction respectively but establishment of environmental court called as green tribunal has lacked far behind due to many reasons and no doubt one of the prominent reasons out of so many was the reluctance on the part of the government, despite the fact that Supreme Court plays proactive role in establishing environmental courts by giving decisions in one or the other case. The present paper highlights the origin of environmental courts named as green tribunals in India and their role as dispenser of justice to the victims of pollution and to the environment itself and also highlights its flaws and good points (Sharma, 2008, p. 50)¹.

Keywords: environmental courts, climate justice, environmental degradation, human rights, rule of law

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¹ Raghav Sharma, “Green Courts in India: Strengthening Environmental Governance?”, 4/1 Law, Environment and Development Journal (2008), p. 50, available at <http://www.lead-journal.org/content/08050.pdf>.

Introduction

Environmental crisis is the proven fact of present time; every state irrespective of his size or wealth is facing the same problem and is on the verge of collapsing because of this common tragedy of environmental degradation or climate change. The global humanitarian report in the year 2009 emphasized upon the need to focus on potential risk of environmental degradation on human health and survival.²

Most of the adverse effects of environmental degradation or climate change are experienced by poor and low income communities around the world who have higher level of vulnerability on their health, wealth other factors and much lower level of capacity available with them for coping with these environmental changes³.

While the adverse effects of climate change are not limited to people of developing countries or to least developed nations only though they are at greater risk but low income people anywhere in the world are also at stake. Increasing storms activity, temperature rising and drought, or water crisis are experienced by every country of the world and by every person of the world at large⁴.

India, being the developing country, is also facing the same problem of environmental crisis and climate change and is more prone to the adverse impacts of climate change. Realizing these impacts of climate change, government of India undertook various steps in the form of bringing legislations and policies at central and state level to curb the problem and to do justice to their citizens. India also participated in Stockholm Conference that took place in Stockholm and signed the treaty where “Stockholm Declaration” was announced. In the Declaration, 26 principles were formulated which were in the form of guiding principles for the signatory states to take steps in their jurisdiction to curb the causes of environmental degradation⁵. The Stockholm Declaration is considered as Magna Carta in the history of environmental protection and fulfilling the goal of sustainable development; the declaration besides 26 preambles also consists of seven universal truths. It also adopted certain important decisions & resolutions and recommendations to deal with the problem and one of the recommendations out of them was to take immediate steps and formulate action plan to deal with environmental degradation and climate change. And thus, this conference and its resolutions adopted by the general assembly paved the way for the constitutional amendments in Indian Constitution by expressly inserting Article 48-A and 51A(g) in the directive principles of state policy⁶. A significant outcome of this conference was that a series of legislative steps were taken by the parliament of India by passing laws in the form of Water (prevention and control of pollution)⁷ Act 1974, the Air (prevention and control of pollution) Act 1981⁸, and the Environment Protection Act 1986⁹, Forest Act 1980¹⁰, and many more.

On the other side, the judiciary was also consciously playing active role in providing justice to the victim of environmental degradation and Supreme Court has widened the meaning of “right to life” under Article 21 of the

² See the Global Humanitarian Forum, available at <http://www.ghf-ge.org>.

³ Id.

⁴ Id.

⁵ See UN Conference on Human Environment and Development which adopted on June, 1972.

⁶ The 42nd Constitutional Amendment Act, 1976.

⁷ Act No. 24 of 1974.

⁸ Act No. 3 of 1961.

⁹ Act No. 7 of 1986.

¹⁰ Act No. 3 of 1980.

Indian Constitution by including in “The right to live in clean environment”¹¹. Justice P. N. Bhagwati explaining the scope of life in “Maneka Gandhi’s case”¹² ruled that life does not mean only animate existence but personal liberty must also be included in it to give it a true meaning and he further said that

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely bare necessities of life, such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being.

Also, in *Subhash Kumar vs. State of Bihar*¹³, the court expanded the meaning of right to life envisaged under Article 21 and includes the right of enjoyment of pollution free water and air for full enjoyment of life under right to life.

The Supreme Court has also declared the “right to healthy environment” to the status of a fundamental right under Article 21 of the Constitution and thus progressive enriched the environmental jurisprudence, the apex court further transformed principles of international environmental law, like sustainable development, polluter pays principle, public trust doctrine, precautionary principle, and intergenerational equity¹⁴ into national environmental jurisprudence. Likewise in oleum gas leak case, the Supreme Court once again reiterated the same view and evolved the new principle of absolute liability holding the person absolutely liable for the wrongs done against the environment rejecting the earlier one of strict principle and there is a long list of cases where Supreme Court took the same view and tried its level best to administer justice to the victims of pollution. Flooding of environmental litigation in the country because of increasing environmental degradation and resulting climate change and difficulty to deal with the cases where techno-scientific issues are involved compelled the court to show their inability to deny to adjudicate such cases as these cases involves assessment of scientific data and technical expertise¹⁵ and thus recommended to the government for establishing specialized courts to be called as environmental courts deal such matters.

Increasing pressure of the court and international commitments to comity of nations forced the Indian government to constitute a committee called as Tiwari committee¹⁶ and to find out the possibilities of establishing environmental courts in India which after its report recommended to the government to establish courts known as green courts not only at national level but also at state level, or if possible at regional levels, in which equal number of professional judge and technical experts as members would sit together to adjudicate the matters to provide justice to the victims of environmental damage in real sense and, thus, at first time, the need was felt to establish courts as specialized courts in India and, from here, the germs of green courts or tribunals were infused in our country. After the Tiwari committee report in the year 1980¹⁷, the Supreme Court increased its pressure on the government to constitute separate forum to handle environmental litigation.

¹¹ M. C. Mehta vs. Union of India, Supreme Court of India, Judgement of 15 May 1992 (1992) 3 SCC 256, 257.

¹² Maneka Gandhi vs. Union of India, AIR 1978 SC 597.

¹³ AIR 1991 SC 420.

¹⁴ Rural Entitlement Kendra vs State AIR.

¹⁵ M. C. Mehta vs. Union of India 1986(2) SCC 176.

¹⁶ Shodhganga.inflibnet.ac.in. This report of committee for recommending legislative measures and administrative machinery for ensuring environmental protection published in September, 1980.

¹⁷ Id.

Again, in the year 2000, in the case of AP pollution control board vs. Prof. M. V. Naidu¹⁸, the court speaking through justice Jagannath Rao felt the need of having environmental courts in the country and directed the law commission of India to study the possibilities of setting up of specialized courts in India and law commission thus submitted its 186th report¹⁹ which also recommended for setting up of green courts in India for dealing with matters of environmental degradation and climate change in the country, thus we see the series of events that actually paved the way for the formation of environmental courts in India. According to G. Pring and C. Pring (2016), also improving upon the environmental rule of law, access to justice and environmental disputes resolution was felt as indispensable to achieve the united nation's agenda of sustainable development and the sustainable development goals (SDG) for 2030, particularly Sustainable Development Goal No. 16, which says "to provide justice for all and to build effective accountable and inclusive institutions at all level" to accomplish this goal, establishing of specialized courts in the form of tribunal dealing exclusively with the environmental matters has become essential and unavoidable for the government of India. Moreover, all over the world, more than 1,200 environmental courts, has been established so far which are already functioning in various countries of the world, like Australia, New Zealand, and many other countries, are either planning or planned to establish these courts in the coming future (G. Pring & C. Pring, 2016).

As far as India is concerned, realizing the need of specialized particularly, after the report of Tiwari committee, the government of India took some positive steps in this direction and enacted a legislation by the name National Environmental Tribunal Act of 1995 (NETA)²⁰ for "effective and expeditious disposal of cases arising from accidents occurring while handling hazardous substances with a view to give relief and compensation for damages to persons property, and environment at large" but these tribunals could not come into existence for one or the other reasons, and finally, the Act was repealed after the passing of the National Green Tribunal Act in June 2010. The Indian judiciary is now set to turn "green" with the Law Commission of India recommending, in its 186th report, the constitution of specialized environmental courts to strengthen and revitalise environmental governance²¹. The Law Ministry has formulated the required draft legislation in the form of National Green Tribunal (NGT) Act 2010 which awaits legislative sanction for long (Sharma, 2007). This extension of establishing green court covers

environmental issues through dynamic judicial activism has augured welfare environmental governance in India. The constitution of a "green" branch of judiciary to adjudicate environmental matters is a significant step towards improving the quality of environment at a time when India has been caught in a tussle between developmental and sustainability issues.

Improvement in institutional arrangements to provide easily accessible environmental justice to people is a part of the international agenda highlighted in instruments like Rio Declaration on Environment and Development, 1992 and the Aarhus Convention, 1998. Such institutional changes carry a greater significance in case of emerging market economies like India where trade and development issues are set to clash with environmental imperatives. Keeping the development of environmental jurisprudence in India as the background, this article highlights the problems afflicting the Indian judicial system which have led to a call for a specialized judiciary. It is proposed to highlight the significance of various dimensions of the "green" court project in light of the international experience concerning such courts in Australia and

¹⁸ AIR 2001 2 SCC 62.

¹⁹ Law Commission of India, "186th report on constitution of environmental courts in India", Sep. 2003, available at <http://lawcommissionofindia.nic.in/reports/186%20report.pdf>.

²⁰ Act No. 27 of 1995.

²¹ *Supra note 19*.

New Zealand. This article highlights that the constitution of a new court system may not be such a “green” plan after all, unless it is made capable of adjudicating in an atmosphere independent of dominating political interests plaguing such specialized courts and thus, as an alternative, it advocates for the establishment of specialist divisions within the existing Indian High Courts thus proposed a “multifaceted, multi-skilled body which would combine the services” provided by existing forums in the environmental field to act as “one stop shop” for faster, cheaper and more effective resolution of environmental disputes because scientifically unsound or delayed decisions may wreak havoc in terms of irreversible environmental damage and irreparable economic loss so that objective of securing ‘environmental justice could be secured in true sense.

Thus, these courts as a specialist courts with specialist judges are playing a very important role in discharging of justice since their inceptions which can further be understood taking into account the examples from other jurisdictions as well²².

Outlines of Environmental Courts in Other States

Green courts are also established by other states in their respective jurisdictions for doing climate justice to the litigants and to the environment as well by speeding up trials related to environment understanding the technicalities of the disputes. Two important examples of green courts which can be seen and analyzed are the Land and Environmental Court (hereafter “LEC”) of New South Wales, Australia and the New Zealand Environment Court (hereafter “NZEC”). To understand better the working of green courts, it is mandatory to look into and analyze the structure, power, and jurisdictions of these courts. Both Law Commission of India’s recommendations and the Supreme Court recommendations are characterizing these experiments as “ideal”, and have heavily relied on them to define the proposed Indian system (Sharma, 2008, p. 50).

Green Courts of Australia—An Overview

Green courts in Australia are known as “Land and Environmental Courts (LEC)”, which were established under the Land and Environment Court Act, 1979,

a superior court with the same jurisdiction as the New South Wales Supreme Court²³ and consists of: judges and nine technical and conciliation assessors. Judges and Commissioners are appointed by the Governor, and Commissioners must have the widest possible qualifications. special knowledge or qualifications in the field of urban planning, environmental planning, environmental sciences, including issues related to environmental protection and environmental assessment, architecture, engineering, measurement or building construction, natural resources management and urban planning or heritage²⁴. The court has joint jurisdiction in the framework of planning and production statuses and “review and enforcement jurisdiction” regarding environmental and planning provisions. His jurisdiction extends to matters additional to matters falling within his jurisdiction, thus enabling the resolution of matters that accidentally affect the environment. The Court’s door is open to anyone who complains about a violation of the relevant laws. Article 22 authorizes the Court to grant any remedy of any nature, conditionally or unconditionally, so that any controversy can be determined completely and definitively and the multiplicity of proceedings is avoided. At procedural level, the Court is not obliged to comply with the rules of evidence and may obtain assistance of any person having professional or technical qualifications relevant to any issue.

Justice Paul Stein, Judge, LCE, has highlighted the following benefits arising out of the Court’s integrated jurisdiction over the last 20 years: (1) Decrease in multiple proceedings arising out of the same environmental dispute; (2) Reduced litigation with consequent savings to the community; (3) A single combined jurisdiction is administratively cheaper than multiple separate tribunals; (4) A greater degree of certainty in development projects; (5) Reduction in costs

²² See note 1 above.

²³ Sec. 20(2) of Australia Land and Environment Court Act, 1979 (NSW).

²⁴ Id. Sec. 12.

and delays may lead to cheaper project development and cost for consumers; (6) Greater convenience, efficiency and effectiveness in development control decisions. The efficient and timely disposal of cases by LEC is a well-recognized fact and the available figures reveal that the Court has an ideal clearance ratio 101 of 100 per cent. It has established consultative committee in form of “Court Users Group” whose main function is to recommend to the Chief Judge improvements in the functioning and services provided by the Court and act as a communication channel to disseminate court related information. The Group has a wide range of membership across engineering, architectural, planning, surveying streams along with representatives of the legal profession (Cowdroy, 2002, p. 59). In overall terms, the LEC has been an outstanding success in terms of efficiency and effectiveness.²⁵

Environmental Courts of New-Zealand—An Overview

Like Australia, the New Zealand government also established the green courts to tackle the problem of environmental matters in their jurisdiction and thus passed series of act by virtue of which green courts could come into existence.

The NZEC, established under the Resource Management Act, 1991 (hereafter “RMA”), is an independent specialized court consisting of Environment Judges and Environment Commissioners acting as technical experts. The Governor-General appoints them for a period of five years on the recommendation of the Minister of Justice, while ensuring a mix of knowledge and experience including commercial and economic affairs, local government, community affairs, planning and resource management, heritage protection, environmental science, architecture, engineering, minerals and alternative disputes resolution processes.

The Resource Management Act empowers the Court with general duty of avoiding, remedying, or mitigating adverse effects on the environment and thus promoting sustainable development in accordance with the Act. The Court exercises wide range of powers over environmental issues (Ministry for the Environment, 2015) which include three most important areas, the first power of making and declaration of laws²⁶, the second power of appellate review on a de novo²⁷ basis of resource consents and proposed district and regional plans or policy statements²⁸, and the last power to enforce duties under the Resource Management Act through civil and criminal proceedings. The Court has powers to declarations on questions regarding division of authority between regional authorities and acts of government entities. Under its appellate jurisdiction, the court reviews planning instruments, like regional policy statements and plans, give consents on merits. Further powers prescribed in the Act may be quoted in the following words as

It has the power to either confirm or direct the local authority to modify, delete, or insert any provision referred to it and such authority is empowered to effectuate the decision of the Court. Lastly, it can issue “enforcement orders” on application of any person on any of the four grounds specified underneath, that is Injunction against actions contrary to the provisions of the RMA, regulations, rules in regional or district plans, or resource consents; orb. Injunction against action that “is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment”; or Directing a person affirmatively to comply with the RMA and other instruments or to avoid, remedy, or mitigate adverse effects on the environment.

²⁵ Justice Paul L. Stein, Paragraph 91.

²⁶ Sections 310-313 of New Zealand Resource Management Act.

²⁷ A de novo review entails that not only does the Court decide the ultimate merits of the decisions it reviews, but it does so based on evidence that is adduced a new before the court, rather than on the evidence that was before the Council from which the appeal or reference is made to it. Section 290(1) specifies that in exercising its appeal powers, the Environment Court “has the same power, duty, and discretion as the person against whose decision an appeal or inquiry is brought”. This can be contrasted with the Indian standard of review wherein the Court determines only the legality and propriety of the decision-making process without interfering with merits of the decision itself.

²⁸ See Sections 120, 292, and 293 of RMA.

On behalf of that person; or compensating others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource consents. With the consent of the parties, at any time after proceedings are lodged, the Court may ask one or more of its Environment Commissioners to conduct mediation or conciliation to resolve the dispute. The mediation service of the Court is regarded as 'innovative' and cost-effective as its own technically oriented Commissioners Act as mediators (Higgs, 2007, p. 61). On the procedural side, limitations on rules of evidence are non-existent²⁹, proceedings are less formal and it encourages individuals and groups to represent themselves. Third parties may also apply to it for an order to enforce the RMA against anyone else. Its decisions may be appealed to the High Court on questions of law only³⁰. In view of its overarching powers, it has been rightly characterized as the adjudicator of sustainability. Initially, the Court was confronted with delays in disposal of mounting caseload. However, in 2003, the Government provided additional financial resources after a thorough review of this issue (Ministry for the Environment, 2003). Since then, the case pendency has halved and the "clearing ratio" has improved to a level above 90 percent which speaks volumes about its efficiency. (New Zealand Environment Court, 2005, p. 8; 2006, p. 9; 2007, p. 8)

Some Glimpses of Green Tribunal Act of 2010

As mentioned above, after the recommendations of Tiwari committee reports³¹ and huge pressure of apex courts, finally the government of India passed "the National Green Tribunal Act 2010"³². The Indian experience of working of National Green Tribunal can be well understood by analyzing the legislation which gives birth to their creation, i.e., National Green Tribunal Act of 2010. As we know the Act was passed with a view to do justice to the environment and victims of environment, it is designed keeping the drawbacks of the traditional courts where the judges lack technical expertise and shown their inability to adjudicate environmental matters several times. The national tribunal after their creation started functioning from May, 2011 with the clear objective of providing justice to the litigants and for protection and conservation of flora and fauna including enforcement of legal rights relating to environment and giving relief and compensation for damages and property and for matters connected therewith in an effective and expeditious manner.

Composition of Green Tribunal

India's National Green Tribunal consists of a full time chairperson³³ and minimum 10 to 20 full time judicial members, and 10 to 20 full time experts' members³⁴. The chairperson of the tribunal has been vested with the power to invite anyone or more persons having specialized knowledge and experience in a particular case before the tribunal to assist the tribunal in that case³⁵. The chairperson judicial members and expert members of the tribunal are appointed by the central government³⁶. The chairperson is appointed by the central government in consultations with the chief justice of India³⁷. The judicial members and experts members of the tribunal are appointed on the recommendations of such selection committee and in such manner as may be prescribed³⁸. Only judge of the Supreme Court of India or chief justice of a high court is eligible to appointed as the chairperson or a

²⁹ New Zealand, Resource Management Act, 1991, Sections 274(1) and 276.

³⁰ Id., Section 287.

³¹ See *supra* note 13.

³² NGT Act 2010 (Act No. 19 of 2010) India.

³³ Id.

³⁴ Id.

³⁵ Id. Sec. 4(2) this power has not been invoked so far till date by the tribunal.

³⁶ Id. Sec. 6(1).

³⁷ Id. Sec. 6(2).

³⁸ Id. Sec. 6(3).

judicial member³⁹. A person who is or has been a judge of the high court is also qualified to be appointed as a judicial member of the tribunal⁴⁰. A person is qualified for appointment as an expert member, if he has a degree in Master of Science (in Physical Sciences or Life Sciences) with a doctorate degree or Master of Engineering or Master of Technology and has an experience of 15 years in the relevant field, including five years practical experience in the field of environment and forests including pollution control, hazardous substance management, environment impact assessment, climate change management, and biological diversity management in a reputed national level institutions⁴¹.

A person having administrative experience of fifteen years including experience of five years in dealing with environmental matters in the central or a state government or in a reputed national or state level institution is also eligible for being appointed as expert member of tribunal⁴².

The chairperson or the judicial member, if he was a judge of Supreme Court holds office for a term of five years or up to 70 years of age whichever is earlier⁴³. The chairperson or the judicial member, if he was chief justice of high court holds office for a term of five years or up to 67 years of age whichever is earlier⁴⁴. Similarly the judicial member, if he was judge of high court, holds office for a term of five years or up to 67 years of age whichever is earlier. The expert member holds office for a term of five years or up to 65 years of age whichever is earlier⁴⁵. The chairperson, judicial member, and expert member are not eligible for re-appointment⁴⁶ to avoid conflict of interest; it is included explicitly in the Act itself that the chairperson, judicial members, and expert members of the tribunal shall not hold any other office during this tenure⁴⁷. In addition to that, for a period of two years from the date on which they cease to hold office, they cannot accept any employment in or connected with the management or administration of any person who has been a party to a proceeding before the tribunal⁴⁸. Their appointments by central government or state government, however, have been saved by the statute. The central government may in consultation with the chief justice of India remove the chairperson or judicial member from office on certain specified grounds which include *inter alia* abuse of his position as to render his continuance in office prejudicial to the public interest⁴⁹. The chairperson or judicial member can be removed from his office by an order made by the central government after an enquiry made by a judge of the Supreme Court in which such chairperson or judicial member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges⁵⁰. The expert member may also be removed from his office by an order of the central government on the same grounds on which chairperson or judicial member may be removed.⁵¹ The

³⁹ Id. Sec. 5(i).

⁴⁰ Id. Sec. 5(1) proviso.

⁴¹ Id. Sec. 5(2a).

⁴² Id. Sec. 5(2b).

⁴³ Id. Sec. 7 first proviso.

⁴⁴ Id. Sec. 7 second proviso.

⁴⁵ Id. Sec. 7 third proviso.

⁴⁶ Id.

⁴⁷ Id. Sec. 5(3).

⁴⁸ Id. Sec. 5(4).

⁴⁹ Id. Sec. 11(1).

⁵⁰ Id. Sec. 10(20).

⁵¹ Id. Sec. 10(5).

Act provides that the numbers of expert members shall in hearing an application or appeal and be equal to the number of judicial members hearing such application or appeal.⁵²

Jurisdictions and Powers of the Tribunal

Unlike Australia and New Zealand environmental courts, India's green tribunal deals with environmental matters and not with planning and land management. Planning and land matters are dealt with by civil courts in India. Chapter 3 of NGT Act deals with jurisdiction and powers of the tribunals. Section 14 of the Act prescribes original jurisdiction to the tribunal; Section 16 provides appellate jurisdiction to the tribunal and Sections 15 and 17 deals with the powers of the tribunal to order for the relief and compensation to the victims of the pollutions and restitution of environment. The Act further provides only civil jurisdiction to the tribunal. An interesting thing about this Act is that original jurisdiction of the NGT is the language in which it is drafted which states that the tribunal shall have jurisdiction over all civil cases where a substantial question relating to environment is involved and such questions arises out of the implementation of the enactments specified in Schedule I of the act⁵³. Schedule I of the Act contains only seven enactments as:

- The Water (prevention and control of pollution) Act, 1974 (hereinafter Water Act);
- The Water (preventions and control of pollution) Cess Act, 1977;
- The Forest (conservation) Act, 1980;
- The Air (prevention and control of pollution) Act, 1981 (hereinafter Air Act);
- The Environment (protection) Act, 1986;
- The Public Liability Insurance Act, 1991;
- The Biological Diversity Act, 2002.

The schedule even does not include all modern environmental law legislations. For instance, Wildlife Act⁵⁴ has been excluded. In India, there are more than 200 legislations having direct or indirect bearing on environment, which have been excluded from the purview of the act. Thus, to this extent, the present legislation has a myopic operation by providing a limited jurisdiction (Jariwala, 2011).

The NGT Act gives jurisdiction to the tribunal to hear the disputes relating to the enforcement of any legal rights relating to environment.⁵⁵ Under its appellate jurisdiction,⁵⁶ the tribunal can hear appeals from any directions, orders, or decisions made by appellate authority under the Water Act, Water Cess Act, and Air Act. It can also hear appeals from any or order passed by the state government under the Water Act, Forest Act as well as from any directions issued by the state pollution control board under the Water Act, order by the National Biological Diversity (NBA) or State Biological Diversity (SBB) under the Biological Diversity Act.

India's green tribunals has been vested with jurisdiction and power to provide relief and compensation to the victims of pollution and other environmental damages arising under those seven enactments mentioned above for restitution of damaged property and for restitution of the degraded environment⁵⁷. The tribunal, while passing

⁵² Id. Sec. 4(4c).

⁵³ NGT Act, *supra note* 32, Schedule I.

⁵⁴ Wildlife (protection) Act, 1972.

⁵⁵ NGT Act, *supra note* 32, Sec. 14(1).

⁵⁶ Id. Sec. 16.

⁵⁷ NGT Act, *supra note* 32, Sec. 15(1).

any order or decisions or award, can apply the principles of sustainable development, the precautionary principle, and the polluter pays principle.⁵⁸ The decisions of the tribunal are taken by majority.⁵⁹ If there is a difference of opinion among the members, when hearing a matter and the opinion is equally divided, then the chairperson hears such matters and decides, provided if he has not heard matters earlier.⁶⁰ However, where the chairperson himself has heard such matters along with other members of the tribunals, and if there is a difference of opinion among the members and the opinion is equally divided, then in such cases, he shall refer the matter to other members of the tribunal who shall hear such applications or appeals and decide⁶¹.

An appeal from the award, decisions or order of the tribunal goes to the Supreme Court of India.⁶² However, in one of the cases, Madras High Court in its order dated February, 4 2014, held that high courts did have jurisdiction to entertain appeals against the orders of the tribunal (Subramani, 2014). The aggrieved person may file the appeal within a period of 30 days from the date on which the order or decision or direction or determination is communicated to him. The period can be extended by the tribunal to 60 days in case of sufficient cause.⁶³

Further, over and above the powers mentioned in the Act, the tribunal shall have all the powers vested in the civil court under the Civil Procedure Code 1908.⁶⁴ It should be remembered that the Act gives civil powers to the tribunals and not the criminal jurisdiction to prosecute offenders of environmental crimes. As far as civil jurisdiction is concerned, the tribunal can exercise the jurisdiction where a substantial question relating to environment is involved which specifically includes enforcement of any legal right relating to environment and such questions arise out of the implementations of the enactments specified in Schedule I. The substantial question relating to environment as defined in the Act includes two types of questions⁶⁵. Firstly, it includes an instance where there is a direct violation of a specific statutory environmental obligation by a person by which the community at large is affected or the gravity of the damage to the environment is substantial or the damage to the public health is broadly measurable. Secondly, it includes an instance where the environmental consequences relate to a specific activity or a point source of pollution. Schedule I of the Act lists only seven statutes as mentioned above. Decisions given by the majority members shall be binding there is also provision for award of costs and also costs in case of false and vexatious litigations including the lost benefits due to any interim injunction? The orders and decisions of the courts are executed by the civil courts having a local jurisdiction one more important provision which allows the compensation ordered for the damage of environment to be deposited in the environment relief fund.⁶⁶ The money so deposited shall be utilized by the authority in such manner as may be prescribed, previously such money was deposited in the consolidated fund and it was utilized for general purposes. Now, the money so deposited in the environment fund will be utilized only to the extent to repair or regenerate the damaged environment to maintain status quo as it was before damage. Further, the National Green

⁵⁸ Id. Sec. 20.

⁵⁹ Id. Sec. 21.

⁶⁰ Id.

⁶¹ Id.

⁶² Id. Sec. 22

⁶³ NGT Act *supra note* 32, Sec. 16 proviso.

⁶⁴ Act No. 5 of 1908.

⁶⁵ NGT Act, *supra note* 32, Sec. 2(m).

⁶⁶ Id. Sec. 24.

Tribunal will follow the principles of natural justice and principle of sustainable development at the time while giving decisions also the court has been exempted to follow the strict rules of evidence as mentioned in the Indian Evidence Act of 1872.

Penal Provisions Under the Act

The Act of 2010, for the first time, comes out with a heavy penalty in terms of fine.

According to its provision a person who fails to comply with any order or award or decisions of the tribunal be punishable with imprisonment extending to a period of three years or with fine which may extend to ten core rupees, or with both.⁶⁷ If the failure or contravention continues, the tribunal may impose additional fines which may extend to *twenty-five thousand rupees* for every day during which such failures or contravention continues after conviction for the first such failure or contravention.⁶⁸ However, in case a company is guilty than the fine shall be increased to *twenty five cores rupees* and in case the failure or contravention continues, with additional fin which may extend to *one lakh rupees* for every day during which such failure or contravention continues after conviction for the first such failure or contravention.⁶⁹ Special provision for penalty is made for the failure by the government departments, if it fails to comply with any order, award or decision of the tribunal, the head of the department is deemed to be guilty of such failures and is liable to be proceeded against for having committed an offence under the Act and punished accordingly.⁷⁰

Major Flaws in the Act

Though there is good number of provisions in the Act to deal with the issues of environmental protection and promotion, but despite these provisions, the major flaws of the legislations are demonstrated in various ways. First, the Act was passed basically to fulfil the obligations of international conference of Stockholm⁷¹ and Rio where India was a signatory party secondly, Article 21 of the constitution of India has been given an expansive meaning by the Supreme Court in catena of case as mentioned above resulting in emergence of neo-fundamental rights, including the right to healthy environment which needed an effective judicial protection. But unfortunately, both the conferences did not specifically advocate for a specific tribunalized justice and as such the aforesaid reference is misplaced in the present case. Furthermore, the demand of constitution of an environmental court was first discussed in the Tiwari committee⁷² and a detailed infrastructure of such courts was recommended by the law commission. It is unfortunate that these important recommendations were not given due place in the objectives of the legislation and also it was proposed by the report that environmental courts should be established at all level right from district, regional, state, and national level but unfortunately the Act established National Green Tribunal in 2010 with its seat at new Delhi only and became functional from there only from 5th may 2011⁷³. Later govt. of India issued order for establishing tribunals at four regional places at Chennai, Pune, Bhopal, and Calcutta⁷⁴. Circuits courts were also later established at few other places but these are not sufficient looking to the increased pendency of environmental disputes in the country and the government should

⁶⁷ Id. Sec. 26.

⁶⁸ Id.

⁶⁹ Id. Sec. 26 proviso.

⁷⁰ Id. Sec. 28.

⁷¹ *Supra note 4.*

⁷² *Supra note 32.*

⁷³ Ministry of Environment and Forest (MoEF), govt. of India, notification, 5th May 2011, SO 1003 E.

⁷⁴ Ministry of Environment and Forest (MoEF), govt. of India, notification, 17th August, 2011, SO 1908 E.

immediately take steps in forming these courts as per the recommendations of the Tiwari report so that fast and effective justice could be given to the needy.

Secondly, the major flaw of the legislation is demonstrated in making the “substantial question” relating to environment arising out of the implementation of those specified seven statutes as mentioned above. Schedule I to the Act referring to only seven legislations is absolutely not justified and unwarranted and should be deleted. Section 14 needs to be amended to entertain cases involving enforcement of any legal or constitutional right relating to environment. The right may arise from the constitution of India, from any environmental statute directly or indirectly protecting the environment or it may arise from any tort action. It may be noted that in India the modern environmental law, including those seven statute operates on criminal justice administration which stipulates deterrent of punishment. The original jurisdiction of the tribunal under the NGT Act could have been with respect to offences committed under those listed seven legislations, but it does not have criminal jurisdiction to prosecute offenders under the specified acts. Reference in this regard may be given of council of environ-legal action vs. union of India⁷⁵ (popularly known as “*Bichhri village*” case).

Thirdly, in case of qualification of an expert member, it may be pointed out that in the given eligibility requirement even a junior scientist or teacher may be appointed as expert member now the million dollar question is that can such a person be put on par with Supreme Court or high court judge? Also, the question of protocol may arise here because protocol demands that only highly placed person of eminence and reputation can be allowed to sit with the judges in the tribunal, so the qualification clause of experts needs to be amended. Further, the alternative qualification is 15 years administrative experience and five years are required in dealing with environmental matters in the central or a state government or in a reputed national level institutions. It is surprising that in case of this category no academic specialized qualifications are prescribed⁷⁶. Moreover, it will give a place even to bureaucrats to administer environmental justice.

Last but not least, there is provision in the Act which says about the appointment of the chairperson by the central government in consultation with the chief justice of India. Here it is not clear whether “consultation” will have the same meaning as “concurrence” under Article 124 of the Indian Constitution of India.⁷⁷ Also, there is nothing about as to who will make the selection committee for appointments of members, so it may say that it is not drafted properly. One more defects which I felt in the Act is about qualifications and tenure of expert members because in the fast changing world where technology is changing rapidly new areas or more advanced mode of technology come into existence so to pace with them tenure of expert members should not be fixed for five years but less than it so that better person with latest knowledge could be absorbed to meets the ends of justice in real sense. One more flaw which generally criticizer points out is that these courts are toothless as they do not enjoy the power of entertaining public interest litigations mentioned under Articles 32 and 226 of the Indian Constitutions enjoyed by Supreme Court and high court respectively which is an important weapon in the hands of citizens to come to the courts for violations of their fundamental rights so in that sense the tribunal looks toothless.

⁷⁵ AIR 1996 SC 1446.

⁷⁶ See Sec. 5(2)(b).

⁷⁷ See *S C Advocates-on-Record Assn. vs. union of India*, AIR 1994 SC 268.

There also exists disparity in the age limit for which a member shall hold office. Section 7 and its proviso⁷⁸ provides for different age limit for different members ranging from 60, 67, and 70 years. It would have been better if the age limit for all should have been kept same and instead of varied age limit, the members should have been allowed to continue his term for five years only. This thing could have maintained the continuity in the work of tribunal which is a sign of matured forum. So, these were some drawback which is noticed in the NGT Act there might be more which could be identified and these need to be addressed to make the forum of environmental justice in real sense.

Justifications for Creations of Green Tribunals in India

Despite so many flaws noted above, establishment of green tribunals in India has their own justifications. They have many advantages over traditional courts as far as litigation related to environmental matters is concerned. As a specialized forum of environmental justice, they better understand the problems and solve the disputes expeditiously and in that way the tribunals resembles to “fast track court” in disposing of matters relating to environmental protection and conservation. So far the green courts have disposed of 29,760 matters out of 32,626 matters which were instituted before the courts efficiently and there remains only 2,866 matters pendency before the courts.⁷⁹ In that sense, the green courts are doing speedy and cheap justice to the environmental victims and thus are playing a great role in social transformation. Preston has identified 12 key features which in assessing successful operation of environmental courts and tribunals (ECT) (Preston, 2014) these may be summarized as under:

- status and authority;
- independence and impartiality;
- centralized jurisdictions;
- understanding of judges and members;
- work as one stop shop for environment related matters;
- knowledge of scientific and technical expertise;
- promoting access to justice;
- quick and fast resolutions of environmental disputes;
- accountability and responsiveness to environmental litigations;
- enrichment of environmental jurisprudence.

Besides the above 12 characteristic of environmental courts, G. N. Gill (2014), while speaking with respect to National Green Tribunal of India, highlighted that these court took into consideration the important international principle of “sustainable development”, “precautionary principle”, and “polluter pays principle”. Thus, ignoring the pros and cons of the green tribunals, it appears that that these courts since their inception in 2011 are playing a pivotal role in discharging climate justice. Other aspects which justify the creations of specialist environmental courts can be summarized here as under (Leadbeter, 2011).

- They create a group of decision-makers who have knowledge and experience in the environmental area. They can also accommodate persons with non-legal back ground as expert members having technical and

⁷⁸ See *supra* note 36.

⁷⁹ See the NGT website at: <https://greentribunal.gov.in/> (last accessed on 30th December 2020).

scientific expertise in areas, such as environmental science, land use planning, water and engineering and pollution controls.

- Such bodies can speed up the process of hearing and determining appeals if environmental matters are taken out of the main streams courts lists (which in many countries suffer from lengthy backlogs and delays).

- They are visible and obvious example of government action in response to community demands for greater levels of environmental protection.

- With regards to costs specialist courts can adopt particular costs rules which can reduce costs for certain parties. For example, in South Australia, the third part planning appeals (where a challenge has been made by way of appeal to a planning authority's decisions on a particular development proposal) are not subject to any cost orders. This means that each party bears their own costs but no one else's costs whether or not they win or lose the case;

- Pring argues that there is a need for consistency in decisions. In his opinions, proper applications of the doctrine of precedent together with the convention that the various judicial members of courts will endeavour to ensure their decisions are consistent with those of other court members will go a considerable way towards achieving this in any court system. Where the specialist environmental courts can, however, very usefully ensure uniformity is in relation to be application of penalties in criminal matters. Experience in South Australia suggests that where the specialists court deals with such matters rather than the general courts, it results in the application of more consistent penalties and higher penalties than if the matter were dealt with in the ordinary court

- Such courts provide demonstrable commitments on the part of the government to environmental justice.

- These courts can ensure greater accountability of government departments if those departments know that their actions and decisions can be reviewed by independent and impartial courts.

- Such court better facilitates the fast tracking of urgent cases. It avoids matters being placed in the "too hard" baskets.

- Specialist's courts have more flexible rules of procedure and evidence and less formality and process. In South Australia, the environment resources and development court is quite accommodating of unprecedented litigants in ways what would not normally be countenanced in the conventional court system.

- Specialist courts are more inclined to promote, require and facilitates the use of specialist alternative dispute resolution mechanisms, such as conciliations, mediations, third party neutral evaluation, and arbitration.

- One of the real advantages is that related to what Pring calls "remedy integration". The fact that one court when dealing with one matter can call upon civil, criminal. And administrative jurisdictions in the same forum are very useful.

- Experience has generally been that specialist environmental courts and tribunals allow greater public participation in the review process; this is particularly allowed through more open and liberal standing provision.

Conclusions

In view of the above mentioned data on the functioning and effectiveness of National Green Tribunals, the present work is formulated to find out the germs which gave birth to the formation of these courts in India and, as a specialised forum, their role in effective disposal of cases and doing justice towards the victims of litigants, tribunals is getting popular day by day and people's trust in the working of these courts is phenomenally increasing. This fact is proved from the data collected in a survey that number of cases filed in 2012 from 548 has increased to 2,348 in the first three months of 2014 (Tandon, 2016). Its credibility is also increasing day by day as it has successfully resolved the cases in the limited period of time and has thus achieved the purpose for which these courts were basically created, except few high profile cases it has been able to hit projects of central and state governments and also of big corporate sectors which were running violating environmental regulations (Rosencranz & Sahu, 2014). On various occasions, the tribunal has decided unhesitatingly against the projects of government. It has issued warrants against the ministers of state governments and once it issued a warrant against the commissioner, Delhi police and thus has shown its courage and impartiality by doing so. It has once fined heavily to Shri Shri Ravi Shankar ji for violating environmental regulations for his programme organized by him at the bank of Yamuna, New Delhi. The tribunals have also issued detailed guidelines various times for state and central governments for taking steps for preventing environmental degradation in all its dimensions, it issued detailed guidelines in one of the matters for preventing and controlling water pollution.⁸⁰ NGT also takes *suo motu* actions in the interest of environment if it satisfies that public health will suffer from this kind of projects, there are good number of examples when it has invoked *suo motu* jurisdiction, which though is not vested in the tribunal in the parent act of NGT Act, and that is why this raised a controversy in the country among academicians, lawyers, and other legal luminaries that whether green tribunals can take action *suo motu* or not? In the year 2016, the tribunal invoked *suo motu* matters eleven times. In one of the matters taken *suo motu* by the tribunal for poor quality of drinking water in the city, the court issued directions to the authorities concerned to take immediate steps to restore the quality of water in the city of Chennai.⁸¹ The NGT under the chairmanship of justice Swatanter Kumar⁸² has witnessed a new era in the walk of greening India and green justice by his fearless decisions against the central government, state government and also decisions against pollution control boards. Needless to say that he has played a very pro-active role in making the tribunal a forum of justice extending its jurisdictions for public interest litigations and *suo motu* actions.

As discussed above, the green courts have many advantages over the traditional courts, impressed by their style of working many states, like Kenya, South Africa, Guyana, Philippines, China, Bolivia, New Zealand, Chile, India, and Tanzania, have passed legislations for their emergence in their jurisdictions, surprisingly 41 states in total have so far established environmental courts. Till 2016, 1,200 environmental courts have already come into existence after the first Land and Environment Courts of New South Wales of Australia. Which according to Brian J. Preston's honourable justice, was the world first specialist environmental superior court of record in the world? this court was different from South Australian court who sits at district level and it is situated at supreme level, thus we see that their importance in discharging justice in matters of environment is increasing all over the

⁸⁰ Rajendra Singh Bhandari vs. State of Uttarakhand & others (original application No. 318) 2013.

⁸¹ *Suo motu vs. secretary, govt. of Tamil Nadu* (Application No.182 of 2013) 2013.

⁸² A former judge of Supreme Court of India and second person appointed as chairperson of NGT appointed on 20th Dec., 2012.

world and thus inspired by the experiences of environmental courts of others we established green tribunals in India also

Thus, from the above discussion, it proves that tribunals are working very efficiently and effectively and it has helped in restoring the rights of people and redressing the injury especially of those who suffers from environmental degradation the right of people to live in pollution free and healthy environment as ruled by the Supreme Court while extending the meaning of life under Article 21 of the Constitution is thus protected by these forums. And thus, in that sense acts as a real trustee complying with the principle of “public trust doctrine” by safeguarding environment and all its natural resources from being degradation by defaulters for their private ends. In the last, I would say that forums, like green tribunals are discharging justice to the needy in true manner and these courts in real sense has transformed the society and thus may be called as true social transformer thus steps should be taken to strengthen them.

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