# DECENTRALIZING ENVIRONMENTAL DISPUTES IN INDIA

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## ABSTRACT

India lacks a comprehensive climate legislation, however, there are several environmental legislations to combat the effects of climate change. In relation to protecting the environment, the proactive efforts of the Indian judiciary that has often acted as a 'lever of transformation' has been recognized globally. However, it has been seen that in most climate change litigation in India, climate concerns that affect human well-being often take a backseat while these litigations usually get limited to enforcement of existing environmental laws. This paper highlights the role of India's National Green Tribunal which was established as a dedicated environmental court under the National Green Tribunal Act 2010 using it is an example to underscore how far the decentralization of environmental justice has worked in India. The paper brings to attention the out the jurisdiction, powers, and functions of the tribunal for effecting environmental justice, the significant cases adjudicated by it, the principles applied, the accessibility and value addition to environmental jurisprudence through innovative application of law and the objectivity demonstrated by the tribunal in balancing the protection of the environment and sustainable development.

***Keywords***: National Green Tribunal, Environment, Justice, Sustainable Development, India

## INTRODUCTION

Environmental disputes are both complex and difficult to resolve usually because they involve disputes over the use and exploitation of natural resources and the widespread harmful effects that it has on various marginalized and vulnerable groups in each society (Ansari, Ahmad and Omoola, 2017). Further, environmental disputes are often intertwined with politics, economy, culture, and religion which makes addressing core issues such as repercussions of human activity on the environment even more challenging for formal adjudicatory bodies (Siegel, 2007). The effectiveness of traditional litigation-focused judicial decision making process has often met with stark criticism because of its failure to provide a creative, efficient, and sensible outcome to environmental disputes. Moreover, since traditional litigation system are still very much formal, expensive, and tedious there is often much delay in resolving matters pertaining to environmental disputes which in turn often leads to more harm being done to the environment (Abdullah, 2015). It is believed that the courts in India will approximately take somewhere between 9 to 33 years in order to solve all pending environmental law litigation given that there were already near about 48,000 pending environmental law related matters in various courts in the country at the end of 2018 (Sengupta and Pandey, 2020). Note that the pendency of cases is linked to slow disposal rate along with increasing number of new cases being brought to the courts ever year.

In view of the structural difficulties associated with the existing traditional litigation focused adjudicatory mechanism, a case has been made to move towards alternative dispute resolution (ADR) mechanisms which is seen as a less formalized private decision making that directly involves the disputing parties (Siegel, 2007). The concept of incorporating ADR in the resolution of environmental disputes is, however, not new. ADR mechanisms such as negotiation, mediation, conciliation, arbitration, court-annexed mediation, and other hybrid processes have been brought into play to successfully resolve environmental disputes in the United States since the 1970s (Sipe and Stiftel, 1995). Even in India several expert committees and commissions have suggested creating alternate modes of dispute resolution with the primary aim of reducing the caseload from the various High Courts and transferring the same to specialized forums equipped with the tools to provide speedy justice in environmental cases (Mishra, 2010). In this paper, the applicability of alternative dispute resolution (ADR)


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mechanisms especially in the form of specialized forums in resolving natural resource and environment related disputes will be examined. For this purpose, the paper mainly focuses on the efficacy of the National Green Tribunal (as a specialized forum) in presenting itself as an effective alternative to protracted litigation.

## NATIONAL GREEN TRIBUNAL (NGT): A SPECIALIZED FORUM

The settlement of environmental disputes involving complex scientific and technical questions have always been a matter of discourse, resulting into the demand of an alternative environmental dispute resolution mechanism. Many jurists have emphasized on the importance of such alternative forums for speedy and effective disposal of environmental disputes in order tobring transformation to environmental governance (Pring and Pring, 2016). For instance, in the United Kingdom, an argument has been advanced by the judiciary for the adoption of a model which comprises of a multi-skilled body equipped to render faster, cheaper, and more effective resolution of environmental law disputes (Mishra, 2010). In relation to India, landmark pronouncements of the Supreme Court such as M. C. Mehta v. Union of India [1986] 2 SCC 176; Indian Council for Enviro-LegalAction v. Union of India [1986] 3 SCC 212 and A.P. Pollution Control Board v. M. V. Nayudu [1999] 2 SCC 718 have laid the foundation for establishing of environmental courts in the country. In view of the Supreme Court's observations for establishing environmental courts in India, the Law Commission of India, through its 186$^{th}$ report recommended the establishment of environmental courts in the country (Gill, 2015). This particular recommendation was made considering the challenges faced by the judiciary in the understanding and interpretation of both scientific and technical issues pertaining to environmental law disputes (Gill, 2015). The Law Commission was of the opinion that in establishing environmental courts a balanced approach needs to be adopted based upon both scientific as well as legal considerations so as to arrive at a reasoned decision. The commission was also of the view that such specialized courts will be in a position to carry out on-site inspections and gather oral evidence and also their establishment would reduce the burden of the judiciary in India in deciding complex environmental issues by providing accessible and speedy justice to the aggrieved person (Gill, 2020). Accordingly, on 31 July 2009, the National Green Tribunal (NGT) Bill was introduced in the Lok Sabha by the Government of India through the Ministry of Environment and Forests


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(MoEF). The NGT Tribunal was seen as a big step taken by the government towards bringing in substantive reforms in its approach towards environmental law governance in the country (Gill, 2020). The government also proposed the creation of a circuit system for the new tribunal.

As per the preamble of the NGT Act, the Act is seen as a fundamental step taken by the government to fulfil its commitments under the Stockholm Declaration 1972 and the Rio Conference 1992 in working towards achieving the objectives of providing both protection and improving the environment. The NGT Act also aims towards ensuring effective access to justice which helps in realizing the right to healthy environment under Article 21 of the Constitution of India. A unique aspect of the NGT is that it acts as a special forum consisting of judicial and technicalexperts to solve issues related to the environment (Sahu and Dutta, 2021). The NGT Act allowsfor the tribunal to have wide powers including powers to lay down its own procedure to solvematters. Further, under Section 29 of the Act, all matters pertaining to the environment are to be determined by the tribunal and not any civil court.

Note that, Section 20 of the NGT Act makes NGT obligatory to apply principles underpinning international environmental law, such as, sustainable development, the precautionary principle, andthe polluter pays principle while passing any decision. The Supreme Court on various occasions has emphasized the significance of these principles in India. The Supreme Court has emphasized the core relationship of 'precautionary principle' and the 'polluterpays principle' with sustainable development within the contours of Article 21 of the Constitution. Further, the Supreme Court has also pointed out that the 'polluter pays principle' should notjust be interpreted to mean absolute liability for causing harm to the environment andcompensating the victims but the interpretation should also be extended to including the cost of restoring the environment to its original state. The Court has been of the opinion that remedying the damaged environment and compensating the victims is a critical aspect of the concept of 'sustainable development' (Gill, 2015). It can be argued that the provisions of the NGT Act when read in conjunction with the above mentioned case laws provide guidelines to the members of the tribunal and strengthen the overall environmental law regime.


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## NATIONAL GREEN TRIBUNAL (NGT) IN INDIA: MEASURING PERFORMANCE

Since its inception the NGT has been playing a vital role in promoting environmental justice in India mostly because of its ability to involve and make use of technical experts in the deliveryof scientific decisions and thereby contributing towards achieving better environmental results.Note that, the Locus standi principle which has been liberalized for "an aggrieved person" (under the NGT Act) so that a person can approach the tribunal under its original or appellate jurisdiction has its origin in the concept of 'Public Interest Litigation' in India. The liberal approach of the tribunal backed the community participation in India's environmental justice discourse. For example, in Jaya Prakash Dabral and Others v. Ministry of Environment and Forests and Others [Original Application No. 12 of 2011], the NGT opined that "any person whether he is a resident of that particular area or not, whether he is aggrieved/injured or not, can approach this tribunal. In environmental cases, any citizens or group of public-spirited citizens can agitate as to the correctness of the study of environment and ecology made by thegranting authority." Likewise, in Samir Mehta v. Union of India [Original Application No. 24 of 2011], the NGT stated that term "aggrieved person" includes an individual, even a juridicalperson in any form considering environmental impacts affect not just an individual but the entire society. Hence, even if a person has not suffered any personal injury due to any environment related issues but is concerned with such impacts directly/indirectly should have the right to bring an action in the larger public interest and for the protection and preservationof the environment.

A study conducted by analyzing some 1,130 decided cases by NGT between July 2011 and September 2015 provides evidence that NGOs/social activists/public-spirited citizens are the most frequent plaintiffs before NGT (Gill, 2020). They account for 533 plaintiffs (47.2%) of 1,130 cases. Affected individuals/communities/residents brought 17.7% of all cases, with a success rate of 56%. For example, in Vimal Bhai v. Ministry of Environment and Forests [Appeal No. 5 of 2011], the tribunal allowed an application by three environmentalists with respect to granting of environmental clearance for the construction of a dam for hydroelectric power (Gill, 2020). In R. J. Koli v. State of Maharashtra [Application No. 19 of 2013], the tribunal allowed an application by traditional fishermen who soughtcompensation for loss of livelihood due to infrastructural project activities.

NGT has also shown liberal approach pertaining to delayed application on sufficient grounds. The tribunal emphasized that such approach is essential to promote substantial justice when no negligence or inaction or want of a bona fide is imputable to a party.

Recognizing "eco-centrism", the NGT in Tribunal on Its Own Motion v. Secretary of State [Original Application No. 16 of 2013], stated the following: "eco-centrism is, therefore, life-centered, nature-centered where nature includes both humans and non-humans" (Gill, 2020). Thus, the tribunal recognized conservation and protection of nature and inanimate objects as aninextricable parts of life. The quasi-adversarial, quasi-investigative, and quasi-inquisitorial nature of the NGT undoubtably promotes people's faith in the system thereby encouraging peoples' participationin the process of adjudication of environmental issues. For example, the investigative procedure which involves on-site inspection by expert members to evaluate claims is a novel step which is different from conventional adversarial system of justice. Similarly, bringing in of scientific experts as full court members within the decision-making process has also led to the promotion of a symbiotic and interdisciplinary decision-making process within the tribunalwhich goes a long way in achieving harmonization of legal norms with scientific knowledge (Gill, 2020).

One of the NGT's most recent problem-solving procedures is the stakeholder consultative adjudicatory process through which the NGT aims at resolving major issues related to public health, environment, or ecology. The stakeholder consultative adjudicatory process brings together stakeholders and the tribunal's scientific judges to consider diverse views on a particular issue for better resolution. The exercise of suo motu power in environmental cases characterizes NGT's responsive naturetowards environmental issues. Though the NGT Act is silent about the authority to initiate suomotu proceedings, as per a decision by a three-judge bench of the Supreme Court of India in Municipal Corporation of Greater Mumbai v. Ankita Sinha & Others [Civil Appeal No. 12122-12123 OF 2018], the NGT can initiate suo motu proceedings. The Court however made it clearthat the NGT's suo motu jurisdiction would have to abide by the principles of natural justice. The activism of the NGT between 2012-2017 was most evident in addressing the environmentalconsequences of huge investment and big infrastructure projects. The NGT, through a series ofjudgments, set aside approvals granted to infrastructure projects based on the violation of lawand faulty studies. For instance, the


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NGT suspended the approval granted to the South Koreangiant POSCO's steel plant in Odisha due to a lack of proper environmental impact studies andassessments. This marked the NGT's first major decision in Praffula Samantra v. Union of Indiaand Others Appeal No 8/2011. The success of the NGT also prompted the Supreme Court to review pending environmental cases and consider its limitation with respect to environmental law expertise. Consequently, the Supreme Court in *Bhopal Gas Peedith Mahila Udyog Sangathan v Union of India* [2012] 8 SCC 326 transferred all environmental cases, both active and prospective, to the NGT for expeditious and specialized judgments and to avoid the likelihood of conflicts of orders between High Courts and the NGT (Gill, 2020). Thus, the institutionalization and transformation sought by the NGT has led to a metamorphosis of societal environmental interests that encapsulates the wellbeing of not only the individual, but also the larger public interest (Gill, 2020).

## NATIONAL GREEN TRIBUNAL (NGT): SOME CONCERNS

The NGT has been facing varied challenges in terms of inadequate logistic and infrastructure facilities, couple with inappropriate housing for bench appointees since its inception and it has also led to the resignation of three judicial members between 2012 and 2013. Contrary to the statutory mandate of minimum 10 and maximum 20 judicial and non-judicial expert members along with a full-time chairperson, there are only five expert members and six judicial members, including the chairperson for allthe five benches of NGT as of June 2023. The non-availability of members has put a lot of pressure on the petitioners as they have to wait for years to get heard. Unlike the initial phase of the NGT, the hearing of petitions and judgments are not delivered within the stipulated time period of six months. Another challenge in the functioning of NGT has been found in its approach towards dealing with appeals against environmental and forest clearances for projects, mostly since December2017. In several cases, the NGT has rejected the need to review the authority's decision to approve infrastructure projects having severe environmental consequences. For example, of the 34 appeals heard by NGT in 2020, 31 appeals were dismissed on the ground of limitation,viz. delay or *locus standi* and a few on merits (Dutta 2020). For instance: In Samata v. Union of India and Others, Appeal No 71 of 2017, the petitioner challenged the environmental clearance for the coal-fired power plant in Bhadadri, Telangana. The project proponent had


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commenced work even before the grant of approval; violated procedural criteria for thermal power plants; non-consideration of super-critical technology; and non-compliance with emission standards for thermal power plants, but the NGT dismissed the appeal and held that the reasons for the delay in filing the appeal are not sufficient to extend the period of limitation to bring this appeal within the limitation period. So, the application lacks merits, and the same is liable to be dismissed. Similarly, in Sridevi Datla v. Union of India and Others, Appeal No 131 of 2018, NGT dismissed the appeal because the appeal was filed after 54 days of the decision taken by the authorities and did not adjudicate the petition on any substantial issues raised by the appellant.The Supreme Court set aside NGT's decision on appeal and directed the tribunal to hear the appeal on merit. Section 5(2) of the NGT Act, 2010 prescribes the requisite qualification for the non-judicial members, with specific qualifications in environmental science and engineering. However, since its inception, the NGT's non-judicial members are by and large dominated by bureaucrats. More than 50% of the non-judicial (expert) members are drawn either from the administrative services or forest services. This has limited the required technical and scientific inputson diverse and complex environmental matters during the decision-making process of the NGT. Now the NGT which has been conceptualized as a multidisciplinary body depends on out-side experts to address environmental issues. Hence, representation of environmental experts from diverse disciplinary backgrounds and also women representation is missing in NGT since 2011.

## CONCLUSION

The NGT Act is the result of the need of alternative dispute resolution mechanism for speedy and expeditious disposal of environmental litigation. The Act was passed after critical scrutinization in the Parliament so that it can be a tool to bring transformation in environmental justice delivery system. However, the tribunal has invested more time in settling disputes pertaining to construction related activities, focusing less on polluting industries and other activities as evident from analysis of various decisions passed bythe forum. Hence, a close monitoring of the working of NGT is need of the hour so that the implementation of the Act's mandate is not peripheral and diverse environmental issues are addressed effectively. The Tribunal, while adjudicating the cases must ensure that the founding principles of environmental law such as sustainable development, precaution and the polluter

paysprinciple are enforced. In short, the road ahead for the NGT is both long anddifficult. A major concern for the NGT is to not only safeguard its autonomy from those in powerful positions but to also ensure that its decisions conform to the elements of justice keeping in mind factors of equity, participation, and access to justice.

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