ENVIRONMENTAL JUSTICE DELIVERY SYSTEM IN INDIA: TRACING THE EVOLUTION OF GREEN JUSTICE

Written By ***Ankita Pandey***

Law Associate, National Judicial Academy, Bhopal

ABSTRACT

Going by the conventional rule, it is the legislature and the executive which are responsible for the governing process. But the Indian experience, particularly in relation to the environmental issues has been quite different. For the past few decades, the Indian Supreme Court has been actively contributing in the protection of the environment. In addition to its role of interpretation and adjudication, the court has been active in evolving new principles of environmental jurisprudence and creating new institutions and structures through its various directions and judgments. One of the main reasons for the judiciary to take pro-active role in the environmental regime is the failure of the other organs of the government in discharging their constitutional and statutory duties. The constitutional framework of the country incorporates provisions for not only incorporating the internationally recognised principles within the national regime but also provides scope for the judiciary in evolving the environmental jurisprudence. The various innovations brought about by the judiciary as part of the environmental law while according recognition to the fundamental rights of the people which have formed part of both substantive as well as procedural law are worth appreciating. However, as regards the jurisprudential basis of the concept of 'green courts' as to what led to the adaptation of this concept in the Indian regime would go on to have an insight into the recommendation of the Law Commission's report upon the constitution of 'environmental courts' in the country. The paper also evaluates in detail the origin and functioning of the National Green Tribunal in India. This has been regarded as a step further towards improving the quality of environment, especially at a time when there is a tussle between the environmental and sustainability issues at the national level.

1. INTRODUCTION

The present work is an endeavor of the author to make an evaluation of the environmental justice delivery system in the Indian context. The author has tried to give a comprehensive overview of the insight and approach of the judiciary towards the environmental issues and concerns.

The idea of environmental protection has been a part of the Indian tradition and practice from the ancient times. Kautilya, during the regime of Chandra Gupta Maurya in his 'Arthshastra' extensively dealt with the issue of environment protection by laying down the rules for the protection and upgradation of environment in great detail. Mauryan King Ashoka also displayed compassion for wild life and killing of certain species of creatures was prohibited during his regime. Even in our scriptures, various elements of the environment are subject of worship. During the colonial rule, however our ancient prudence was disregarded and the idea of environmental exploitation for materialistic things gained impetus.[1] In addition, growth of industrialization and the lack of awareness to handle the fast pace of development has brought to attention many environmental issues.

The global concerns for environmental crisis have led the evolution and remarkable growth of international environmental law.[2] Like international human rights law, discipline of international environmental law has been one of the most important phenomena in post Stockholm period. The growth of international environmental law has compelled us to revisit to our existing political, economic and social values and structures at the national level.

Article 245 of the Constitution of India which deals with territorial jurisdiction of the legislative power confers the power to the parliament to make laws for the whole or any part of the territory of India. Article 246 dealing with the subject matter of laws, empowers the parliament to have 'exclusive' power to make laws with respect to the Union list. The parliament has exclusive power to legislate on all conceivable international matters which have been enumerated under the Union List. Under Article 253 the parliament has exclusive power to make any law for implementing any treaty, agreement or convention with any other country or countries or any decision made at any

[1]Justice Sunil Ambawani, *Environmental Justice: Scope and Access*, Workshop on Sustainable Development for the Subordinate Judiciary, August 19th-21st, 2006.
[2]PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press 2nded. 2003).

international conference, association or other body. These provisions suggest that the parliament has sweeping power to legislate on international matters.

The Directive Principles contained in Part IV (Article 37 to 51) of the Constitution, though not enforceable are fundamental in the governance of the country and it "shall" be the duty of the State to apply these principles in making laws. Article 51 which specifically deals with international law and international relation, inter alia, provides that the 'state shall endeavor to foster respect for international law and treaty obligations'. However, in environmental matters, it appears, no such use of Article 51 has been done by the courts. Here, the courts have invoked Article 48-A (duty of the state to protect environment) to develop a fundamental right to environment as part of the right to life under Article 21.

Thus, the constitutional framework provides enough scope for the incorporation of the various internationally recognized environmental principles within the national legislative framework. Not only this, the Indian judiciary has also taken recourse to the constitutional provisions in evolving new concepts and principles of environmental jurisprudence.

2. EVOLUTION OF DOCTRINES

There have been a number of principles evolved at the various international conferences and summits which form part of the international environmental jurisprudence. This section analyses the incorporation by the Indian judiciary of some of the most significant principles within the national regime.

2.1. Polluter Pays Principle

The formulation of certain principles to develop a better regime for protecting the environment is a remarkable achievement. In ***M.C. Mehta v. Union of India,***[3] the Supreme Court formulated the doctrine of absolute liability for harm caused by hazardous and inherently dangerous industry by interpreting the scope of its power under Article 32. According to the court, this power could be utilized for fashioning new remedies and strategies.[4] The new remedy, based on the doctrine of absolute liability, was later on focused in the ***Sludge* case**. The people in a village suffering from

[3] AIR 1986 SC 1086.
[4] *Id.* at 1089.

lethal waste left behind by a group of chemical industries were asked to file suits in *forma pauperis*, and the state government was directed not to oppose the application for leave to sue in *forma pauperis*.[5] In ***M.C. Mehta v. Kamal Nath,***[6]the compensation was stipulated by way of restitution of environment and ecology when the apex court found that the flow of the river was diverted for eco-tourism.

The responsibility of the polluter for compensating and repairing the damage caused by his act or omission is the quintessence of the polluter pays principle. Absolute liability of hazardous and inherently dangerous industry is the high water mark of the development of the polluter pays principle. Despite its deterrent impact on potential polluters, the doctrine is limited in the sense that it can be applied only at the remedial stage, i.e. after the pollution has taken place.

2.2.Precautionary Principle

The precautionary principle emphasized by the United Nations Commission on Environment and Development (UNCED), held in Rio De Janeiro in the year 1992, signifies a preventive approach. It states:

> *"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. When there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."*[7]

The polluter pays principle and the precautionary principle were accepted as part of the legal system in the ***Sludge case***[8] and the ***Vellore Citizens Forum case***[9], where the court directed assessment of the damage to the ecology and imposed on the polluters the responsibility of paying compensation.[10] Though in the latter case the Supreme Court ordered the closure of all tanneries in certain districts, which were not connected with common effluent treatment plants (CETPs), the

[5]Indian Council for Enviro-legal Action v. Union of India, AIR 1996 SC 1446, 1468.
[6](1997) 1 SCC 388, 415.
[7]Principle 15.
[8]*Supra*note 5.
[9]Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715, 2721.
[10]M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 415.

precautionary principle came to be directly applied in ***M.C. Mehta v. Union of India***[11] for protecting the Taj Mahal from air pollution.

In ***Andhra Pradesh Pollution Control Board v. M.V. Nayudu,***[12] the apex court noted that it is better to err on the side of caution and prevent environmental harm than to run the risk of irreversible harm. Thus, we see that the evolution of precautionary principle is an instance of judicial strategy of implementing an international norm as part of the legal system. However, the wider dimensions of this doctrine were considerably reduced in the ***Narmada Bachao Andolan v. Union of India,***[13] where the court explained:

> *"When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecological balance, the burden of proof.....must necessarily be on the industry or unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigating steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known that the principle of sustainable development would come into play, which will ensure that mitigating steps are and can be taken to preserve the ecological balance.*[14]

2.3.Public Trust Doctrine

Recognition of public trust doctrine for the protection of natural resources is another judicial achievement. It is in ***M.C. Mehta v. Kamal Nath***[15] that the apex court approved this doctrine for the first time. The government sanction to the deviation of the natural flow of the river for the sake of increasing the facilities of a motel was held to be violating the trust conferred on the state to protect the natural resources. In ***M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu,***[16] the Supreme Court applied the doctrine when it found that the Lucknow *mahapalika* entered into a contract with the petitioners for constructing an underground shopping complex beneath a park. Although the

[11]AIR 1997 SC 734.
[12]AIR 1999 SC 812.
[13]AIR 2000 SC 3751.
[14]*Id.* at 3803, 3804.
[15]*Supra*note 10, at 388.
[16]AIR 1999 SC 2468.

major part of the work was over, the court held that the contract was without tender and also against the public trust doctrine, as the *mahapalika* had deprived themselves of their obligatory duties as a trustee to maintain parks. In ***Hinch Lal Tiwari v. Kamala Devi,***[17] the Supreme Court held that the government and other authorities had noticed that a pond was falling in disuse and, therefore, should have bestowed their attention to develop the same. Such an effort would, on one hand, have prevented ecological disaster and on the other, provided better environment for the benefit of the public at large.[18]

3. SUBSTANTIVE AND PROCEDURAL INNOVATIONS BY THE JUDICIARY

The ill-conceived stature of law and the ill-equipped administrative set-up have constantly been struggling in order to come up with an amicable solution so as to meet the developmental needs as well as the environmental concerns.[19]The judiciary, in such situations has played a significant role by taking innovative measures in substance and in procedure, thereby providing new dimensions to the environmental justice delivery mechanism in India.

3.1.CONCEPT OF PIL

The most significant procedural innovation in the field of environmental jurisprudence has been the incorporation of the well-known concept of Public Interest Litigation (PIL). Litigation in India, till the early 1970s can be said to be in its rudimentary form for the reason that it could only be used for obtaining remedy against violation of private vested interests. However, there came to be a drastic change in the scenario during the 1980s because of the efforts of Justice V.R. Krishna Iyer and Justice P.N. Bhagwati in an attempt to bring within its ambit wider issues largely affecting the interest of the general public.

It would be pertinent to note that earlier there was no provision as such in the environmental legal framework by way of whicha third party mayapproach the Court in case the party was not the direct victim of the environmental problems. Thus, the traditional locus standi concept turned out to be the biggest obstacle in the path of attaining environmental justice. The court did not allowed

[17](2001) 6 SCC 496.
[18]*Id.* at 501.
[19]M. K. Ramesh, *Environmental Justice: Courts and Beyond*, 3(1) INDIAN JOURNAL OF ENVIRONMENTAL LAW 20, 32 (2002).

such petitions for the reason that much of its focus was on the identity of the petitioner rather than the subject of petition.[20]However, later the court emphasized that where large and unidentified mass of people are affected by pollution any person having sufficient interest may initiate legal proceedingsso asto assert diffused and meta-individual rights in environmental problems.[21]

A good number of cases have been initiated through PIL on environmental issues. This began with the ***Dehradun lime stone quarrying case***[22], subsequently the ***Ganga Water Pollution case***, ***Delhi Vehicular Pollution case***, ***Oleum Gas Leak case***, ***Tehri Dam case***, ***Narmada Dam case***, ***Coastal Management case***, and ***T.N. Godavarman case***, all of which came to the attention of the court through the mechanism of PIL. Most of these cases were initiated by the Non-Governmental Organisations (NGOs) and activists on behalf of individuals, groups or public at large, in order to ensure stricter implementation of constitutional provisions various statutory enactmentsparticularly aimed at protectingthe environment as well as the enforcement of fundamental rights. As per records out of 104 environment relating cases from the year 1980-2000 in the Supreme Court, 54 were filed by individuals not directly affected and 28 filed by NGOs. Thus, it can be inferred that PIL has provided an opportunity even to third parties to represent the affected masses and the environment itself.

Moreover, the court can also be seen to have willingly made alterations in the procedural aspects in order to entertain environmental cases. For instance, in case of a wide range of offenders, the Court has on its own taken it to be considered as a representative action thereby issuing orders and binding the entire class. In a case to prevent pollution of river Gangafiled against Kanpur tanneries and Kanpur Municipal Council, notices were issued by the court to all concerned industries and authorities requiring them to make an appearance.[23] Similarly, T.N. Godavarman Thirumulpad filed a petition in the Supreme Court to protect the deforestation of the Nilgiris forest by illegal

[20]G. L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40(1) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 66,68 (1991).
[21]RLEK v. State of Uttar Pradesh and Others, AIR 1985 SC 652.
[22]The Dehradun lime stone quarries litigation filed by the Rural Litigation and Entitlement Kendra in 1983 was the first PIL on environmental issue in the country before the Supreme Court.
[23]M.C. Mehta v. Union of India, AIR 1988 SC 1037.

timber operations.[24]From a mere matter of preventing illegal operations in one forest, the SC expanded this case as a means to reform the country's forest policy.

The positive approach of the court towards environmental litigations by allowing third party representations has led to dramatic transformation of the environmental jurisprudence in India, both in form and substance.[25] Often, judicial proceedings are a costly affair therefore, by allowing the NGOs and other public-spirited people to make representations for the poor and disadvantaged people of the society, the court has made an attempt to secure the rights of the people while granting compensation and other remedies to those affected by environmental degradation.

However,in recent years somepractical difficulties and constraints have also emerged because of entertainment of PILs relating to environmental matters. The cases are being filed either with little or no preparation at all owing to the lack of Court's expertise on technical issues.[26] One of the most important concerns is that the PIL mechanism is becoming increasinglypersonalized, individualistic and attention-seeking. Theinstances of identification of such cases with the personality of a single judge or litigant are also highly relevant.[27]However, it is a travesty of justice thatif the outcome of a particular case is dependentupon the judge presiding over it.

3.2.EXPANSION OF RIGHT TO LIFE

Articles 32 and 226 of the Constitution have given wide powers to the Supreme Court and the High Courts with respect to the enforcement of fundamental rights of the citizens.In addition, Article 136provides another route for judicial review.

Earlier, these provisions had been narrowly interpreted as one where fundamental rights and other provisions of the Constitutionsbeing described as procedure established by law.[28]However, in 1978, the court breathed substantive life to Article 21 by requiring state action interference with life or liberty to be just, fair and reasonable and the procedures be authorised by law.[29]

[24]T. N. Godavarman v. Union of India, AIR 1997 SC 1228.
[25]Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4(1)LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 5, 6 (2008).
[26]*Supra*note 19, at 20.
[27]Shyam Divan, *Cleaning the Ganga*, 30(26) ECONOMIC AND POLITICAL WEEKLY 1557 (1995).
[28]A.K. Gopalan v. Union of India, AIR 1950 SC 27.
[29]Maneka Gandhi v. Union of India, AIR 1978 SC 597.

A brief account of the interpretation of right to life as also including right to environment would be worth illustrating. For example, in ***Ratlam Municipality v. Vardhichand and Others,***[30] the court upheld public nuisance as a challenge to the component of social justice and rule of law and thatdecency and dignity are the non-negotiable facets of human rights. Similarly, in ***Dehradun Lime Stone Quarryingcase***, the court held that economic growth cannot be said to be achieved at the cost of environmental degradation and peoples' right to live in a healthy environment. In ***Doon Valleycase***, Article 21 has been to include right to live in a healthy environment and that there should be minimum disturbance and hazardto the ecological balance to their cattle, house and agricultural land and undue affection of air, water and environment.[31]Ithas also been emphasized in ***Ganga water pollution case***wherein right to life has beenstretched to include the right to protect the environment for the present as well as future generation.[32] In ***M.C. Mehta v. Union of India,***it was accepted by the court that environmental pollution and industrial hazards not only constitute potential civil torts, but the violation of right to health as well. In this way, by interpretingArticle 21 the court has attempted to convert constitutional guarantees into positive human rights.

Thus, the Supreme Court must be credited for creating a host of environmental rights and thereby enforcing them as fundamental rights. The legal system while guaranteeing a Constitutional and statutory right to environment might prove to be as good as non-existent where no methods for the participation of citizens are made available. This has been the experience in Brazil, Spain, Portugal, and Ecuador.[33]However, the Indian experience significantly contrasts from these experiences. Although, there is no direct articulation of the right to environment either in the Constitution or in any of the laws concerning environmental management in India but the environmental groups have been successful in motivating the Court to view the environmental rights as part of the fundamental right to life which are individual as well as collective at the same time.

3.3.CONTINUING MANDAMUS[34]

[30]AIR 1980 SC 1629.
[31]*Supra* note 21, at 656.
[32]*Supra* note 23 at p. 1045.
[33]Article 45, Article 66, Article 335 and Article 19 (2) of the respective countries such as Spain, Portugal, Brazil and Ecuador contain specific provision for the enjoyment of fundamental right to live in a healthy environment but no substantive methods exist for their protection.
[34]*Supra* note 19, at 21.

Generally, when a judgment is passed by a court the executive becomes duty bound to see that it gets enforced.The reason being that the court can only give guidelines for the implementation of its decision it cannot be present to oversee its implementation.[35] It is a commonly observed practice among the enforcement agencies that they tend to postponethe implementationof thecourt's decisions under one pretext or another. Such an attitude makes it difficult for the very litigants who have won the case to approach the court again and again so as to avail the benefits of the decision given in their favour. Thus, to inspect this problem the higher judiciary came up with another yet innovation known as*continuing mandamus.*[36] Under this method, the court would issue directions and guidelines which the administration would be required to conformwithin a particular time-frame and then report back to the court regarding the progress of the implementation.[37]

3.4.SPOT VISIT

Another significant innovation of the judiciary in resolving environmental dispute can be found in judges' pursuit to have first-hand information in order to understand the true nature of environmental problems and issues. This has been done through spot visit. In ***Ratlam***[38] case, Justice V.R. Krishna Iyer before arriving at a decision, visited Ratlam and assessed the problem and thereby directed the Ratlam Municipality to construct proper drainage system in the city through appropriate measures. Similarly, in ***Doon Valley case***, Justice P.N. Bhagwati made a visit of the area and thereby found that the litigation involved some complex issues including rights of workers, traders the and fragile ecology of the area. An independent committee was then appointed to assess the problems and directions were issued to the state government to shut down certain mining units operating illegally while certain other units were allowed to operate subject to certain conditions. In ***Narmada Dam case***, Justice Bharucha expressed dissatisfaction on his visit to the dam site when he found that the rehabilitation process and the manner in which environmental clearance was given for constructing the dam were not proper.[39]

[35]*Id*.
[36] In Vineet Narain v. Union of India &Ors., 1997(7) SCALE 656, popularly known as the 'Hawala case', the Supreme Court adopted this technique.
[37]*Supra* note 19, at 22.
[38]*Supra* note 30, at 1622.
[39]*Supra* note 13, at3753.

This technique of spot visit has enabled the judges to assess the environmental concerns at the ground level. In this way, there has come to be significant difference in the final outcome of the case. However, spot visit in such cases is more of individual or personal interest of the judges as opposed to being a standard decision-making process.

3.5.EXPERT COMMITTEE

Another innovation in this regard is the Supreme Court's discretion in appointing independent expert committee or place reliance on state appointed expert committee with respect to environmental issues. In ***Doon Valley case***,[40] the issue before thecourt was whether careless mining, being done under a legal and valid license, would have any adverse effect on the ecology. A Committee was appointed by the court headed by D.N. Bhargav, for inspecting the lime-stone quarries. Based on the Committee's report, some mining operations were directed to be closed immediately, while certain others in a phased manner. Again, in ***S. Jagannath v. Union of India***,[41]based on the studies of the Central Pollution Control Board, the court declared intensive and semi-intensive aquaculture to be environmentally harmful. In ***Godavarman case***,[42] the Court asked the central and the state governments to appoint committees so as to undertake studies relating to several problems relating to forest protection and to oversee the implementation of court's orders in this respect.

In contrast to this, in certain cases the court did not appoint independent committee for examining the impact of infrastructure projects on environment and people at large. In ***Tehri Dam case***, the Environmental Appraisal Committee of the MoEF, came to the conclusion that the Tehri Dam Project should not be granted environmental clearance and should therefore be stopped.[43]However, the majority decision given by Justice G.P. Mathur and Justice S. Rajendra Babu allowed the construction of the dam without ensuring the compliance of the conditions of environmental clearance.[44]In the same way, in ***Dahanu Taluka Environment Protection Group and others v. Bombay Suburban Electricity Supply Company Limited and others,***[45] the report of the Appraisal

[40]*Supra*note 21, at 653.
[41]1997 (2) SCC 87.
[42]*Supra*note 32, at1231.
[43]Tehri Bandh Virodhi Sangarsh Samiti and Others v. State of Uttar Pradesh and Others, 1992 Supp (1) SCC 45.
[44]Prashant Bhushan, *Supreme Court and PIL*, 39(18) ECONOMIC AND POLITICAL WEEKLY 1773 (2004).
[45]1991 (2) SCC 542.

Committee which opined that Dahanu is ill-suited for construction of thermal power plant was not followed by the court.[46]

3.6.ENVIRONMENTAL AWARENESS AND EDUCATION

The Supreme Court has also contributed in spreading environmental literacy and awarenessas well as establishing the need for environmental education. In the case of ***M.C. Mehta v. Union of India,***[47] the Supreme Court emphasized upon such need in the following words:

> *"In order for the human conduct to be in accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires. This would be possible only when steps are taken…..to make people aware of the indispensible necessity of their conduct being oriented in accordance with the requirements of law."*[48]

In this case, the Supreme Court stressed upon spreading environmental awareness through its inclusion in the academic curriculum upto matriculation level. The state governments and Education Board were directed to take steps for including environmental education.[49] In a recent ***M.C. Mehta v. Union of India,***[50] NCERT was directed to prepare and submit before the court a module syllabus for all grades so that the court may consider the probabilities of introducing the syllabus uniformly in the country. All the respondent states and authorities were asked to implement the orders in every educational institution and that non-compliance on part of any institution would amount to disobedience and would call for disciplinary action.[51]

[46] *Id.*
[47] AIR 1992 SC 382.
[48] *Id.* at 384.
[49] The fact that the Bar Council of India decided to introduce Environmental law as a compulsory paper for legal education at the graduate level is one of the most notable steps in recent times. See LE (cir no 4/1997) dated October 21, 1997.
[50] AIR 2004 SC 1193.
[51] *Id.*at 1194.

4. CONCEPT OF 'GREEN COURTS': THEORETICAL JUSTIFICATIONS & PRACTICAL NECESSITY IN INDIA

There is no doubt that specialized forums are better equipped for evolving superior procedural norms and in developing superior quality jurisprudence since they comprise of judges expert in relevant matters and who have had greater exposure to such legal policy regime.[52] This brings uniformity, consistency and predictability in the decision making process which in turn strengthens public confidence and thereby contributes in developing a rich jurisprudence. Some of the incidental benefits attached to this include time and cost savings as massive documentation in order to understand the technical points of law in the relevant field can be avoided thus making the litigation process easier and quicker.[53]

Lord Woolf has expressed the practical need for a 'Green Court' in his Lecture to United Kingdom Environmental Law Association, the theme of which was- *'Are the Judiciary Environmentally Myopic?'* It points out the extreme inadequacy of the regular courts to deal with the specifics of environmental law and the need to move beyond their traditional role of detached Wednesbury review.[54] Woolf, therefore proposed a 'multi-faceted, multi-skilled body' which would combine the services provided by existing forums in the environmental field and act as a 'one stop shop' for faster, cheaper and more effective environmental dispute resolution.[55]

Talking of the Indian context, our Constitution guarantees the right to speedy access to justice,[56] which is something which must necessarily be assigned to environmental rights. Article 39A[57] requires the State to secure a legal system which is socially inclusive and equally accessible to all

[52]Raghav Sharma, *Green Courts in India: Strengthening Environmental Governance?* , 4(1) LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 50 (2008), available at http://www.lead-journal.org/content/08050.pdf.
[53]The American Bar Association Central and East European Law Initiative (CEELI), *Concept Paper on Specialised Courts*, June 25, 1996 in Raghav Sharma, *Green Courts in India: Strengthening Environmental Governance?*, 4(1)LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL (2008).
[54]Whitney, *The Case for Creating A Special Environmental Court System-A Further Comment*, 15 WM. & MARY L. REV. 33 (1973).
[55]*Supra* note 53, at 58.
[56]Salem Advocates Bar Association v Union of India, (2005) 6 SCC 344.
[57]Article 39A reads as: Equal justice and free legal aid-The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

people. More so, the jurisprudential basis of PIL arises basically from the recognition of the rights of the deprived, illiterate and the poor.[58] Thus, to constitute environmental courts can be considered to be a sacred constitutional obligation on the State.

One of the most significant factor necessitating the formation of specialised courts in India is that the general courts lack the expertise to deal with matters relating to the environment especially those which involve scientific uncertainty. The Supreme Court of India has, in three landmark cases[59], expressed in the following words the difficulties arising because of the lack of expertise:

> *"The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts…..or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies."*

Another significant factor, which contributes to the 'practical necessity' argument, is the fragmented nature in which the remedies are available providing for multiple routes for appeal under the different statutes.[60] The Environmental Courts would therefore, act as a 'one stop shop' for all sorts of environmental adjudication.

Looking from a holistic perspective, the necessity of a 'green' court can be best expressed in the following words:

> *"The costs and administrative changes involved in setting up such a Tribunal to handle the majority of existing appeals would be modest compared to the policy gains to be made. Such a Tribunal would bring a greater consistency of approach to the application and interpretation of environmental law and policy…..the Environmental Tribunal would lead to the better application of current environmental law and policy, a more secure basis for*

[58]Guruvayur Devaswom Managing Committee v. C.K. Rajan, (2003) 7 SCC 546 and People's Union for Democratic Rights & Ors. v. Union of India & Ors., (1982) 3 SCC 235.
[59]M.C. Mehta v Union of India, (1986) 2 SCC 176, 202, Indian Council for Enviro Legal Action v Union of India, (1996) 3 SCC 212 and A.P. Pollution Control Board case.
[60]Robert Carnwath, *Environmental Enforcement: The Need for a Specialist Court*, 9(2) J.P.L.799 (1992).

addressing future challenges, increased public confidence in how we handle environmental regulation, and the improved environmental outcomes which should follow."[61]

5. CRITICAL ANALYSIS OF THE LAW COMMISSION OF INDIA'S RECOMMENDATIONS

The Law Commission of India undertook the study with respect to Environmental Courts in response to the call by Supreme Court to do so wherein a structure was proposed to establish Environmental Courts at the state level with an option to have one Court for more than one State.[62] The 186th Report makes recommendations in this regard as to the composition, powers and procedures of the proposed courts. In pursuit, the LCI was guided by the model of environmental court established in New Zealand and the Land and Environmental Court of New South Wales and also the observations of the Supreme Court in four judgments, namely, ***M.C. Mehta v. Union of India***[63], ***Indian Council for Environmental-Legal Action v. Union of India***[64]; ***A.P. Pollution Control Board v. M.V. Nayudu***[65] and ***A.P. Pollution Control Board v. M.V. Nayudu II***.[66]

The 186th Report of the LCI on the proposal to establish Environmental Courts stated, that the *"National Environmental Appellate Authority constituted under the National Environmental Appellate Authority Act, 1997…..had very little work. It appears that since the year 2000, no judicial member has been appointed. So far as the National Environmental Tribunal Act 1995 is concerned, the legislation is yet to be notified after eight years of enactment…..thus, these two tribunals are non-functional and exist only on paper."*

It was stated that the proposed court shall have original jurisdiction on environmental disputes with all powers of a Civil Court and shall have the power to grant all reliefs under the Code of Civil Procedure, 1908 or other statutes like the Specific Relief Act, 1963.[67] It will have all appellate powers now conferred under the Water (Prevention & Control of Pollution) Act, 1974, the Air

[61] *Id.*
[62] 186th Report of the Law Commission of India, at 142.
[63] AIR 1987 SC 965.
[64] (1996) 3 SCC 212.
[65] [1999] 2 SCC 718.
[66] [2001] 2 SCC 62.
[67] *Supra* note 62, at 145.

(Prevention & Control of Pollution) Act, 1981, and the various Rules made under the Environment (Protection) Act, 1986.[68] In addition to this, the jurisdiction under the National Environment Tribunal Act, 1995 and the authority under the National Environmental Appellate Authority Act, 1997 is proposed to be transferred to the Environment Court.[69]

The National Environment Tribunal Act, 1995 which was enacted to make provision for strict liability in cases of damages arising out of any accident which occurs while dealing with any hazardous substance and also for the establishment of a Tribunal for the purpose of carrying out expeditious and effective disposal of cases arising therefrom. Unfortunately, the Act was never notified by the government and none such Tribunal came to exist. The LCI has rightly expressed its distress over this gross failure and noted that if anything like the Bhopal Gas Disaster occurs, there is no such Tribunal in place which would be in a position to deal with the matter and grant damages expeditiously.[70]

However, even then the LCI failed to contemplate a scheme to ensure independence of the proposed 'Green' Courts from the clutches of the government. In this respect, it is pertinent to analyze the structure and positioning of the proposed 'Green' Courts. Their status, as such was not meant to be projected as being anything more than that of any other statutory tribunal. It is indeed an open secret that whenever the power of appointment of judges is entrusted with the executive it has led to an impediment in the proper functioning of justice. It's quite unfortunate that the report inspite of this bitter experience, failed to ensure that the Environmental Courts do not meet the same fate.

The Central Government has over and again urged the apex Court to do away with its Forest Bench. The government's part of the story being that the orders passed by the said Bench has been based on the opinion of persons not qualified in forestry and this has in turn led to appropriation of the executive's power and have also contributed to social unrest, growing poverty and spur in naxalite activities over the years. Furthermore, the MoEF has chipped on the Supreme Court over the composition of the Forest Advisory Council, vehemently refusing to include in the Council persons

[68] *Id*. at 142-144.
[69] *Id*. at 149.
[70] *Id*. at 101, 104.

recommended by the Court.[71] Now, such attitude on part of the Government posed a big question and more so a threat on the independence of the proposed 'Green' Courts.

Moreover, the foremost reason for the creation of these courts was that the traditional courts lack the required expertise when it comes to environmental matters. However, the constitution of the courts in the form of mere civil courts left them vulnerable to interference at the hands of the inexperienced forums. Taking the instance of the Godavarman petition wherein the apex Court used its power under Article 32 by way of continuing mandamus in order to prevent rampant deforestation and to promote afforestation is particularly instructive here.

Also, there was no reason for exclusion of criminal jurisdiction with respect to environmental offences as the High Court could effectively have been foreseen as the appellate body.

An essential aspect of justice at any given level is the total independence of the judiciary from all sorts of political pressures. It would have been better to constitute them in the form of a specialised division of the existing High Courts. Also, the District Courts could also have had such divisions from which the appeal would have gone to the respective High Court divisions. In this way the environmental justice delivery system could have been made more people oriented.

6. THE NATIONAL GREEN TRIBUNAL: AN OVERVIEW

The creation of the National Green Tribunal in India (NGT) has been a result of a long faceted process and was influenced by a number of factors:

- necessity to rectify the previous failures of the institutions set up for the enforcement of legislations (like the National Environmental Tribunal and the National Environmental Appellate Authority);
- growing international movement towards the creation of environmental courts;
- need to facilitate access to environmental justice to the citizens;

The political origin in this regard, the 186th Report of the LCI states that the proposal was made "pursuant to the observations of the Supreme Court of India in four judgments"[72] where reference

[71] *Govt, SC disagree over forest panel members*, INDIAN EXPRESS, January 6, 2007 and *We need experts, not activists, said Govt, rejecting all 9 names proposed by SC panel*, INDIAN EXPRESS, January 10, 2007.
[72] *Supra* note 63-66.

was made to a "multi-faceted" Environmental Court with "judicial and technical/scientific inputs." Without underscoring the weight of political will and the merits of the Parliamentary majority enacting the National Green Tribunal Act, 2010 we could define the establishment of NGT in India as a "judge-driven reform."[73]

However, needless to say that the 186th Report of the LCI did not immediately result in the approval of the reform. It was way ahead in 2009 when the UPA government through its Environment and Forest Minister Jairam Ramesh introduced in the Lok Sabha the National Green Tribunal Bill, 2009. A report from the Access Initiative-India emphasized that "the narrow and limited scope of jurisdiction, and the narrow scope of remedial orders, would confine the Tribunal's powers" and that it contained "crippling limitations on the claims that can be litigated."[74]

6.1.MAIN FEATURES OF THE NATIONAL GREEN TRIBUNAL

The National Green Tribunal (NGT) is a federal judicial body set up under the NGT Act, 2010 the specific mission of which is "the effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources".

6.1.1. Jurisdiction of the Tribunal

The Tribunal has jurisdiction over all civil cases where a substantial question relating to environment is involved and such question arises out of the implementation of the enactments specified in Schedule I to the Act.[75] It would be pertinent to mention here that the Act does not extend to criminal offences.[76] A serious limitation imposed by Section 14(3) is with respect to a time limit of six months within which the applications for adjudication of dispute shall be entertained by the Tribunal. The tribunal is empowered to allow such applications to be filed within a further period not exceeding sixty days, if it is satisfied that the applicant was prevented by

[73]S.S. Prakash & P.V.N. Sarma, *Environment Protection vis-a-vis Judicial Activism*, 2 SUPREME COURT JOURNAL 56(1998).
[74]The Access Initiative–India Coalition [TAI-India], *How Green Will be the Green Tribunal?*, www.accessinitiative.org, at VI.
[75]Schedule I lists the main environmental laws of the Indian union: 1. The Water (Prevention and Control of Pollution) Act, 1974; 2.The Water (Prevention and Control of Pollution) Cess Act, 1977; 3.The Forest (Conservation) Act, 1980; 4.The Air (Prevention and Control of Pollution) Act, 1981; 5.The Environment (Protection) Act, 1986; 6.The Public Liability Insurance Act, 1991; 7.The Biological Diversity Act, 2002.
[76] This is the reason the Wildlife Act is not included in Schedule I.

sufficient cause from filing the application within the said period. This limitation clause is unduly restrictive in certain situation pertaining to health and pollution[77] for the reason that the effects of pollution often take years to be perceivable by the victims.

6.1.2. Composition

The Act provides that the Tribunal would consist of a full time chairperson and not less than ten but subject to maximum of twenty full time judicial and expert members as the Central Government may from time to time notify. The Act has sought balance with respect to the number of judicial and expert members wherein in the event of a deadlock the authority would vest with the chairperson of the tribunal. The Tribunal is empowered to invite any one or more persons having specialized knowledge and experience in particular cases before the Tribunal to assist the Tribunal in that case.[78]

6.1.3. Powers and Procedure

The Act provides that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall rather be guided by the principles of natural justice.[79] The Tribunal shall also have power to regulate its own procedure.[80] The Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.[81] It shall have the same powers as that of a civil court under the Code of Civil Procedure.[82] The decision of the Tribunal which is taken by majority of its members shall be binding. The Act provides for finality of the order of the Tribunal.[83] Where the Tribunal holds that its claim is not maintainable or is false or vexatious, the Tribunal may, if it so thinks fit, after recording its reasons make an order to award costs, including lost benefits due to any interim injunction.[84]

[77] G. Nain Gil, *A Green Tribunal for India*, 22(3) JOURNAL OF ENVIRONMENTAL LAW 470(2011).
[78] National Green Tribunal Act(2010), section 4.
[79] *Id.*section 18(2).
[80] *Id.*section 19(2).
[81] *Id.*section 19(3).
[82] *Id.* section 19(4).
[83] *Id.*section 21.
[84] *Id.*section 23(1) &(2).

6.1.4. Locus Standi

Another significant feature of the Act is that of locus standi[85]. The rules of access, in fact, seem to be quite extensive and almost similar as in case of Public Interest litigation before the Supreme Court, wherein not only the persons who are directly concerned by the dispute are sought to be admitted, but also a wide range of subjects included in clauses (e) and (f) of section 18(2) finds place. Further, clause (b) grants access to the Tribunal to "any person aggrieved, including any representative body or organization". This particular provision seeks to probably relieve the apex Court, to some extent, of the burden of PILs with respect to environmental matters.

6.1.5. Penalty

The Act bestows power on the Tribunal to impose penalties if its orders are not complied with, which may either be three years imprisonment or fine upto ten crores and in relation to offences committed by companies, the fine may extend even to twenty five crores.[86] The act holds a tough stand against companies.[87] In case it is proved that the offence was committed with the consent or connivance of, or the neglect is attributable to any director, manager, secretary or other officer of the company, then such director, manager, secretary or other officers shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Thus, this court can very rightly be called 'special' because India is only third such country in the world following Australia and New Zealand to have adopted such a system. The constitution of the Tribunal is a huge step forward towards achieving the goal of environmental democracy.

6.2.FUNCTIONING OF THE NATIONAL GREEN TRIBUNAL

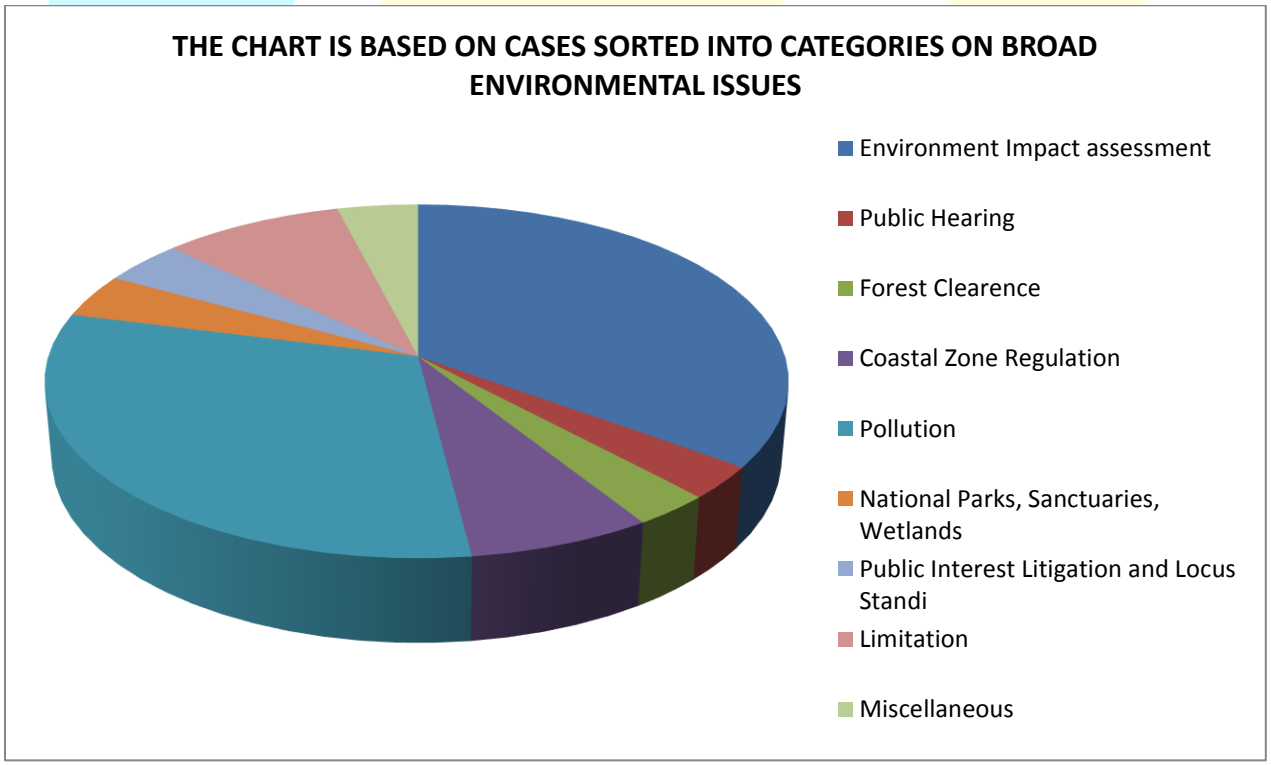
The year in which NGT was set up there came a number of significant judgments on a range of issues. Justice Swatanter Kumar was appointed Chairman of the NGT on December 20th, 2012. It is important to take note that there has been a visible change in the manner in which cases have been dealt with post the period of his appointment. That is to say, the judgments have gone to be much stricter in their approach, in the sense that the Tribunal has not shown any leniency even

[85] *Id.* section 18.
[86] *Id.* section 26(1).
[87] *Id.* section 27.

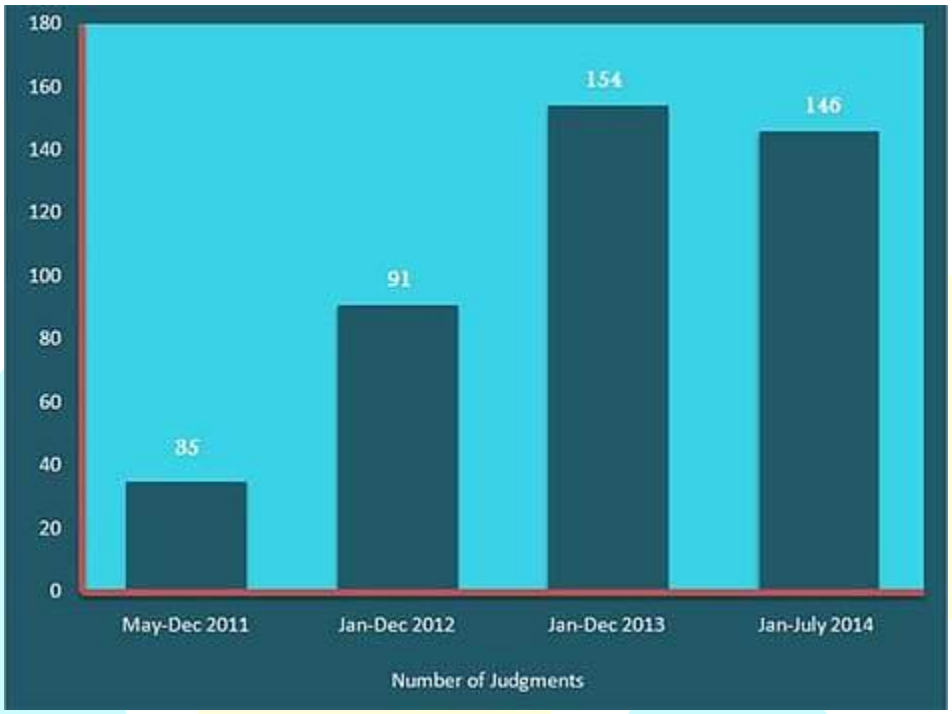
while dealing with government authorities or the MoEF. This, in itself speaks volumes about the functional quality of the NGT which in fact, is very critical to the survival of the hopes of sustaining environmental democracy in our country.

The NGT has been quite functional since its inception in terms of both the quantity as well as quality of judgments that it delivers. To have an overview of the functioning of the NGT in delivering environmentally benign judgments, we can have a glimpse at the following figures which represents the number and the percentage of cases disposed of in the National Green Tribunal.

The following figure represents the vast range of environmental issues over which the National Green Tribunal has delivered judgments and enriched the environmental jurisprudence.



The figure below represents the number of cases disposed of by the National Green Tribunal since its inception in the recent years.



The Tribunal, therefore, is an important step in the access to justice on environmental matters and its mandate is much wider than earlier environmental Courts and Authorities.

6.3.SOME LANDMARK JUDGMENTS OF NGT

6.3.1. Posco Case

The NGT in this case suspended the Environmental Clearance given to South Korean Steel Major POSCO's 12 Billion Dollar Project in Orissa, believed to be the biggest Foreign Direct Investment in the Country. The tribunal alleged that there was departmental bias in favour of the project.[88] On March 30, 2012, the NGT held that the final order of the Environment Ministry permitting the POSCO project to go ahead should be suspended until a full review of the project can be undertaken by specialists with fresh terms of reference. In this case, the clearance was given for 4 a MTPA steel plant, but the land, water etc. were allocated for 12 MTPA project.[89] The tribunal

[88]*Three Years of National Green Tribunal*, CENTRE FOR ENVIRONMENTAL LAW (2012), http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/article_by_cel/.
[89]*Id.*

has observed that, "A close scrutiny of the entire scheme…reveals that a project of this magnitude particularly in partnership with a foreign country has been dealt with casually, without there being any comprehensive scientific data regarding the possible environmental impacts."

6.3.2. Goa Foundation case[90]

The Goa foundation case was a landmark case that established NGT's jurisdiction in all civil cases which involve a substantial question of environment. The petition sought directions to the respondents to exercise the powers conferred upon them under the enactments stated in Schedule I to the NGT Act, 2010 for preservation and protection of Western Ghats within the framework, as enunciated by the Western Ghats Ecology Expert Panel in its report dated 31st August, 2012.[91] The Tribunal held that there is a statutory obligation upon the state to protect the environment and ecology of these Western Ghats. The applicant has been able to make a case of non-performance of the statutory obligation by the State and other authorities concerned on the one hand and that of the need for preventing degradation of the environment and ecology of these Western Ghats under the precautionary principle, on the other.

6.3.3. Sand Mining case

In this case, the issue of large scale illegal and impermissible mining activity going on the bank of Yamuna, Ganga, Chambal, Gomti and Revati amongst others was raised. Such activities cause heavy removal of minerals from the river beds and thereby pose serious threat to the flow of the river, forests upon river bank and most seriously to the environment of these areas.[92] It was highlighted that majority of persons carrying out the mining activity of removing mineral from the river bed have neither license to extract sand nor have they obtained clearance from MoEF/SEIAA at any stage.[93] NGT therefore, issued direction to 'restrain any person, company, authority to carry out any mining activity or removal of sand, from river beds anywhere in the country without obtaining environmental Clearance from MoEF/SEIAA and license from the competent authorities.'

[90]http://www.wwfindia.org/?9722/Goa-Foundation-and-Ors-Vs-Union-of-India-and-Ors.
[91]*Id.*
[92]*Supra*note 87.
[93]*NGT Orders No Sand Mining without Environment Clearance*,EIA RESOURCE AND RESPONSE CENTRE,http://www.ercindia.org/index.php/latest-updates/news/875-ngt-orders-no-sand-mining-without-

6.3.4. Perugundi SWM Plant case[94]

In this case, the environment clearance given by the state government to set up an integrated solid waste management plant at Perungudi was set aside by NGT on the ground that the site of the proposed plant was less than 10km from the Guindy National Park. The tribunal took notice of the 2006 notification of the MoEF declaring 10km area around a national park as eco-sensitive.[95] Accordingly, permission has to be sought from the environment ministry and an environment impact assessment has to be done before any project can begin within such zone. Thus, the NGT delivered a jolt to the Environmental Clearance given to Chennai Corporation Integrated Solid Waste Management Project at Perungudi. It is important to observe that there is a very sensitive line between the orders passed by the NGT and those of the Supreme Court. NGT has succeeded in bridging the gap between a Tribunal and the Apex Court of the country.

7. CONCLUSION

It can affirmatively be established that environmental justice is no doubt a part of the socio-economic development of any society. The superior judiciary of our country has made tremendous efforts and progress in upholding the right of the citizens to environmental justice. The activist role played by the judiciary has gone a long way in protecting the environment in a big time by evolving progressive environmental jurisprudence for the land. More importantly, in doing so, the judiciary rejected inadequate and outdated doctrines and principles and did not shy away in introducing new strategies. For instance, the judiciary allowed the admission of PILs relating to important ecological issues. It also entertained petitions under Articles 32 and 226 by broadening the outmoded and rigid doctrine of *locus standi.* Therefore, credit must definitely go to our judiciary for taking significant measures in relation to protection of the environment especially at a time when the executive branch failed in this regard despite having full legal authorization.

In view of the crisis between the executive and the legislature in discharge of their Constitutional obligations, the innovative methods adopted by the Supreme Court have significantly sought to bypass the dysfunctionality of the other organs thereby enabling proper enforcement of environmental laws. However, the judiciary had, in an attempt to make access to justice

[94]*The National Green Tribunal*, 3 (2006),http://www.hecs.in/TGT/the-green-tabloid-issue-1-pg-3
[95]*Perugundi Waste Plant on Hold*, TIMES OF INDIA, February 25, 2012.

environmentally benign, reflected upon the need to set up specialized courts, which ultimately took shape in 2010 with the constitution of the National Green Tribunal.

It is, however feared that the NGT might face the fate similar to the other tribunals of the country owing to the extreme political and executive interferences. Reference must be made, at this point to the 124th Report of the Law Commission of India where it was proposed for having separate divisions of High Courts for different branches of law and accordingly more judges to be appointed to man those branches by retaining the existing framework. It is affirmatively asserted that such a branch functioning within the existing framework of the judiciary could have been a much effective weapon to combat environmental issues. Fortunately, the good news is that the NGT has been functioning extremely well till now and has shown effective marks while addressing the environmental protection regime. It would be too early at present to comment any further upon the fate of this particular tribunal and its commitment towards the environment protection regime.

Therefore, after analyzing the environmental issues and concerns present before us and more importantly the attitude of the executive authorities in dealing with them, the judiciary and the National Green Tribunal appear to be the only hopes. However, it remains to be seen how the National Green Tribunal proceeds towards the environment protection regime in the years to come by overcoming the continued and steadfast resistance offered from implementing agencies.