

Law, Judiciary and Environmental Governance **Need of Separate Environment Courts In India**

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ENVIRONMENTAL JURISPRUDENCE

In India environmental law has seen considerable development in the last two decades. Most of the principles under which environmental law works in India come within this period. The development of the laws in this area has seen a considerable share of initiative by the Indian judiciary, particularly the higher judiciary, consisting of the Supreme Court of India, and the High Courts of the States. The role of the administration, although a critical factor in the success of any environmental management programme, has seen its share of problems of scale and definition. The essence of the existing law relating to the environment has developed through legislative and judicial initiative¹.

Today, most discussions on environmentalism in our country begin with the Stockholm Conference (1972). But, some ancient texts tell us that our society paid more attention to protecting the environment than we can imagine. These texts tell us that it was the dharma of each individual in society to protect Nature, so much so that people worshipped the objects of Nature. Trees, water, land and animals had considerable importance in our ancient texts; and the Manusmriti prescribed different punishments for causing injury to plants. Kautilya is said to have gone a step further and determined punishments on the basis of the importance of a particular part of a tree.² From this, what comes in front of us is that environmental management and control of pollution was not

¹ With few exceptions such as Environment Impact Assessment (1994), Coastal Regulation Zone Notification (1991), and the Joint Forest Management Programme, the wealth of Indian environmental management stems from legislative and judicial actions. However, the Ministry of Environment and Forests is the nodal agency for virtually all environmental management processes set up by the legislature.

² C.M. Jariwala, "Changing Dimensions of Indian Environmental Law", in Law and Environment (P. Leelakrishnan (ed.), Lucknow: Eastern Book Co., 1992) p.1 at 2

limited only to an individual or a group, but society as a whole accepted its duty to protect the environment. The dharma of protecting the environment was to sustain and ensure progress and welfare of all. The effort was not just to punish the culprit, but to balance the eco-system as well. In this attempt, the ancient texts acted as cementing factors between the right to exploit the environment and a duty to conserve it which is now internationally recognized as the concept of 'Sustainable Development'. The definition of environment in India is more anthropocentric and broad, it includes not only sustainable development but also air and water pollution, preservation of our forests and wildlife, noise pollution and even the protection of our ancient monuments, which are undergoing severe stress due to urbanization and consequent environmental pollution. Community resources such as tanks, ponds, etc. have now been articulated by the Supreme Court for inclusion in the concept of environment, and why should it not be so, considering they all affect the quality and enjoyment of our life³. Thus it is clearly come out from all of these aspects that concern for environment is not a new concept in India but still it demands more vigilance in this area for the development of environmental jurisprudence and justice. Our constitution has certain provision for environment protection and developments which were discuss below.

Development of Environmental Jurisprudence and Justice

Environmental Jurisprudence in India made a beginning in the mid-seventies when Parliament enacted the Water (Prevention and Control of Pollution) Act, 1974. But soon, there was a quantum leap with the amendment of our Constitution in 1976 and incorporation of Article 48-A⁴ in the Directive Principles of State Policy and Article 51-A (g)⁵ in the Fundamental Duties of every citizen of India. Both these Articles unequivocally provide for protection and improvement of the environment. Inevitably, Parliament enacted the Air (Prevention and Control of Pollution) Act, 1981 and the

³ Hinch Lal Tiwari v. Kamala Devi, (2001) 6 SCC 496: "The material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution."

⁴ Protection and improvement of environment and safeguarding of forests and wild life. – The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

⁵ Fundamental duties – It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Environment (Protection) Act, 1986. With this core group of three enactments, a modest beginning was made by Parliament. Unfortunately, soft laws were enacted (and they continue to remain so) at a time when strong legislation was critical for environmental conservation.⁶

Prior to 1980s, only the aggrieved party could go to the court and seek remedy for his grievance and any other person who was not personally affected could not do so as a proxy for the victim or the aggrieved party. But around 1980, the Indian legal system, particularly the field of environmental law, underwent a drastic change in terms of discarding its moribund approach and instead, charting out new horizons of social justice.⁷ The Supreme Court appreciated the necessity of sternness in environmental issues and seized the opportunity in *Municipal Council, Ratlam*⁸ in this case residents of Ratlam filed a complaint under Section 133 of the Criminal Procedure Code alleging that the Municipality had failed to prevent the discharge from the nearby alcohol plant of malodorous fluids into the public street and provide sanitary facilities on the roads. The Municipal Council approached the Supreme Court and one of the key questions raised was whether “by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost”. The Supreme Court directed the Municipality to follow the statutory duties and stop the effluents from the Alcohol plant from flowing into the *Nala* or street. It was held by the Supreme Court that:

A little later in the decision, it was said that, “Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies”.

Having given its *raison d'etre* for taking a proactive approach in matters pertaining to the general environment, the Supreme Court later entertained a letter petition from an NGO called the Rural Litigation and Entitlement Kendra. This initiated the first case that directly dealt and concerned itself with the environment and ecological balance. In a

⁶ http://ekh.unep.org/files/best%20practices_judicial%20activism%20in%20india.doc visited on- 1st September 2007

⁷ www.legalserviceindia.com/articles/jjj.htm visited on- 5th September 2007

⁸ *Municipal Council, Ratlam v. Shri Vardhichand and others*, (1980) 4 SCC 162

series of decisions⁹the Supreme Court considered the complaint of the petitioner regarding illegal and unauthorized limestone quarrying and excavation of limestone deposits which apparently affected the ecology of the area, caused environmental disturbances which damaged the perennial water springs in the Musoorie Hills, disturbed the natural water system and the supply of water both for drinking as well as for irrigation. On the recommendation of the bhargava committee, the Supreme Court ordered that for the most dangerous mines and mines falling within the Mussoorie city be denied renewal of lease and their operation be stopped. It was also pronounced by the Court that ‘preservation of environment and keeping the ecological balance unaffected is a task which not only the Governments but also every citizen must undertake as it is a social obligation’ and ‘fundamental duty’ of all citizens under Article 51-A (g) of the Constitution.

The Supreme Court was called upon, under these circumstances and in the absence of any legal framework or any precedent, to perform a creative but delicate exercise and come out with novel solutions and ideas to tackle the crisis. This was achieved by setting up enquiry committees from time to time. Various committees appointed by the Supreme Court included:

1. The Bhargava Committee to look into the question whether safety standards were met by the mines, the possibility of land slides due to quarrying and any other danger to the individuals, cattle and agricultural lands due to mining operations.
2. An Expert Committee called the Valdia Committee to look into the disturbance of the ecology, air, water and environmental pollution due to quarrying and the use of stone crushers.
3. A High Powered Committee headed by Mr. Bandopadhyay to look into some of the aspects mentioned above and also a Monitoring Committee called the Geetakrishnan Committee to monitor the directions issued by the Supreme Court.

Supreme Court also invite objection against the reports of these committees which would file within reasonable time. These objections were considered, and as and when

⁹ Rural Litigation and Entitlement Kendra v. State of U.P. (1985) 2 SCC 431, (1985) 3 SCC 614, (1986) Supp SCC 517, (1987) Supp SCC 487, (1989) Supp 1 SCC 504, (1989) Supp 1 SCC 537, (1989) Supp 2 SCC 384 and (1991) 3 SCC 347

necessary, mining activity and stone quarrying were prohibited. Supreme Court also directs the government to provide proper rehabilitation to those workmen's who become jobless by this practice. All this was obviously not achieved in a single day but took several years. The results achieved, with the intervention of the Supreme Court, were more than satisfactory and the Musoorie Hills have now been restored to their pristine glory.

In between all these there is dramatic event occurred in Delhi on 4th and 6th December 1985 There was a leak of Oleum Gas from the factory premises of Shriram Foods and Fertilizer Industries. In this case Supreme Court of India enunciating new principle of an absolute and non-delegable duty to the community¹⁰. The gas leak affected a large number of persons and one lawyer practicing in the District Courts in Delhi died. Memories of the Bhopal Gas Disaster that had occurred a year earlier were instantly revived¹¹.

An activist lawyer immediately initiated proceedings in the Supreme Court bringing out the problem caused by the leakage of oleum gas. The Supreme Court appointed a team of experts to look into these recommendations which were given by Manmohan Singh Committee. The team reported that the recommendations of the Manmohan Singh Committee were being complied with. However, this Expert Committee also pointed out various inadequacies in the plant and opined that it was not possible to eliminate hazards to the public so long as the plant remained in its present location in Delhi. In view of the conflicting reports received by it, the Supreme Court appointed a Committee of Experts called the Nilay Chaudhry Committee. A consideration of the reports of all these committees showed that they were unanimous in concluding that the element of risk to workmen and the public could only be minimized, but not totally eliminated.

In this background, the Supreme Court suggested that the Government evolve a National Policy for the location of toxic and hazardous industries and that it should set up an independent centre with professionally competent and public-spirited experts to provide

¹⁰ M.C. Mehta v. Union of India, (1986) 2 SCC 176, (1986) 2 SCC 325 and (1987) 1 SCC 395

¹¹ Just after the Bhopal Gas Disaster concern for environment protection increases and Environment (Protection) Act, 1986 came in India.

scientific and technological inputs. The reason for this was that the Supreme Court found it difficult to get proper advice and expertise to enable it to arrive at a correct decision. The Supreme Court also recommended the setting up of Environmental Courts to deal with situations of this kind. Chief Justice Bhagwati showed his deep concern for the safety of the people of Delhi from the leakage of the hazardous substance. J. bhagwati held:

“We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of danger to the community and maximising safety requirements in such industries.”

The importance of this case lies in the conclusion arrived at by the Supreme Court that an enterprise engaged in a hazardous or inherently dangerous industry which poses a threat to the health and safety of its workmen and the residents of nearby areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of its activity which is undertaken¹². If any harm does result, then the enterprise is absolutely liable to compensate for such harm and it is no answer to say that it had taken all reasonable care or that the harm occurred without any negligence on its part. In other words, the Supreme Court evolved a principle of absolute liability and did not accept any of the exceptions in such a case as mentioned in *Rylands v. Fletcher*¹³

The trend of activist intervention having been set by the Supreme Court, and some important steps relating to protection of the environment having been taken, a large number of cases in public interest then came to be filed in the Supreme Court which passed various orders in these cases from time to time. It is not necessary to discuss all these decisions, as indeed it is not presently possible, except those in which there was a significant development of the law or a significant contribution to the Environmental Jurisprudence in India. Some are discuss below:

The most characteristic feature of the Indian environmental law is the important role played by the public interest litigation .The majority of the environment cases in India since 1985 have been brought before the court as writ petitions, normally by individuals

¹² Satish C. Shastri, “ Environmental Law in India” Second Edition, Eastern Book Company 2005

¹³ (1868) LR 3 HL 330

acting on pro bono basis¹⁴.The public interest litigation is as a result of the relaxation of the *locus standi* rules

The judiciary, in their quest for innovate solutions to environmental matters within the framework of public interest litigation, looked to constitutional provisions to provide the court with the necessary jurisdiction to address specific issues. But the fundamental rights part of the constitution of India does not have any specific mention of the environmental matters. Here the Supreme Court played a pivotal role. The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of the environmental jurisprudence in India. Furthermore, Article 142 afforded the Supreme Court considerable power to mould its decisions in order that complete justice could be done. As the Supreme Court is the final authority as far as matters of constitutional interpretation are concerned, it assumes a sort of primal position in the Indian environmental legal system. For example, the fundamental right contained in Article 21¹⁵ is often cited as the violated right, albeit in a variety of ways.

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*,¹⁶ Bhagwati, J., speaking for the Supreme Court, stated that:

“We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, 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 beings.”

In *Subhash Kumar v. State of Bihar*¹⁷, the Court observed that:

“The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If

¹⁴ See Soli.J.Sorabjee(Ed),Law and Justice –An anthology, Universal Law Publishing Company,New Delhi(2003) p.345

¹⁵ Article 21: “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

¹⁶ AIR 1981 SC 746.

¹⁷ AIR 1991 SC 420.

anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution...”

The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. There are numerous decisions wherein the right to a clean environment, drinking water, a pollution-free atmosphere, etc. have been given the status of inalienable human rights and, therefore, fundamental rights of Indian citizens.

In *M.K. Sharma v. Bharat Electric Employees Union*¹⁸, the Court directed the Bharat Electric Company to comply with safety rules strictly to prevent hardship to the employees ensuing from harmful X-ray radiation. The Court did so under the ambit of Article 21, justifying the specific order on the reason that the radiation affected the life and liberty of the employees.¹⁹ In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*²⁰, the Supreme Court based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21.²¹ Thus, expanding the scope and ambit of Article 21 to cover in it the rights which are not expressly enumerated, the Supreme Court has interpreted the word “life” to cover in it “all aspects of life which go to make a man’s life meaningful, complete and worth living”. It will also cover his tradition, culture, heritage and health

INTRODUCTION TO THE NEED OF SEPARATE ENVIRONMENT COURT

A great Judge emphasized the imperative issue of environment said that he placed Government above big business, individual liberty above Government and environment above all.²²

¹⁸ 1987 (1) SCALE 1049.

¹⁹ For a discussion of the widening scope of fundamental rights, see *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

²⁰ AIR 1985 SC 652.

²¹ *T. Damodar Rao v. Municipal Corporation, Hyderabad*, AIR 1987 AP 171; *L.K. Koolwal v. State of Rajasthan*, AIR 1988 Raj 2.

²² *Tarun v. Union of India* (AIR 1992 SC 514)

Such is the importance of Environmental Courts as envisaged by the Supreme Court. At this point of time we have 29,315 pending cases in the Supreme Court, 32, 24,144 cases in various High Courts and over 2,53,50,570 in various subordinate courts. By the time you finish reading this sentence hundreds more would have been filed. Under these tons of various cases it is of utmost importance to treat environmental cases. Considering the fact that the every day of pendency of the case means greater loss to the ecology. Hence we are of the opinion that in order to deal with this anomaly the constitution of specialized 'environmental courts' is very essential.

To start with this paper in Environmental Law dealing with the need of Specialized Environmental courts to suit the needs of the country, a cursory appraisal of certain judicial decisions is essential. In the Judgment of the Supreme Court of India in *A.P. Pollution Control Board vs. M.V. Nayudu*²³, the Court referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as part of the judicial process, after an elaborate discussion of the views of jurists in various countries. In the subsequent follow-up judgment in *A.P. Pollution Control Board vs. M.V. Nayudu*²⁴, the Supreme Court, referred to the serious differences in the constitution of appellate authorities under plenary as well as delegated legislation²⁵ and pointed out that except in one State where the appellate authority was manned by a retired High Court Judge, in other States they were manned only by bureaucrats. These appellate authorities were not having either judicial or environment back-up on the Bench.

The need for Environmental Courts were advocated in two earlier judgments also. One was *M.C. Mehta v. Union of India*²⁶ where the Supreme Court said that in as much as environment cases involve assessment of scientific data, it was desirable to set up environment courts on a regional basis with a professional Judge and two experts, keeping in view the expertise required for such adjudication. There should be an appeal

²³ 1999(2) SCC 718

²⁴ 2001(2) SCC 62

²⁵ The reference here is to the appellate authorities constituted under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981

²⁶ 1986(2) SCC 176 at page 202

to the Supreme Court from the decision of the environment court. Again in the judgment of *Indian Council for Enviro- Legal Action v. Union of India*²⁷ in which the Supreme Court observed that Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner. It is important to note here that the National Environmental Appellate Authority constituted under the National Environmental Appellate Authority Act, 1997, for the limited purpose of providing a forum to review the administrative decisions on Environment Impact Assessment, had very little work. It has to be noted that since the year 2000, no Judicial Member has been appointed. So far as the National Environmental Tribunal Act, 1995 is concerned, the legislation has yet to be notified despite the expiry of eight years. Since it was enacted by Parliament, the Tribunal under the Act is yet to be constituted. Thus, these two Tribunals are non-functional and remain only on paper.

In view of the observations of the Supreme Court in the above said judgments, and having regard to the inadequacies of the existing appellate authorities, - which neither contain judges nor have the assistance of experts - and their limited jurisdiction, - this Project proposes to review the position with a view to bring uniformity in the constitution of these bodies and the scope of their jurisdiction. There arises a need to constitute specialized 'environment courts' and should consist of judicial members assisted by technical experts. The court should be located along with all the other High Courts with a higher Appellate Authority. The Environment Court should exercise original as well as appellate jurisdiction. It should be able to grant all orders which a Civil Court could grant, including the grant of 'compensation' as visualized by the National Environmental Tribunal Act, 1995. Access to justice, particularly, in matters relating to environment, is an essential facet of Article 21²⁸ of the Constitution of India.

UNCERTAINTY OF SCIENCE AND PROBLEMS OF ENVIRONMENTAL COURTS

²⁷ 1996(3) SCC 212 at p. 252

²⁸ **Art 21. Protection of life and personal liberty.**—No person shall be deprived of his life or personal liberty except according to procedure established by law.

When the Wright Brothers told their clergy father of their desire to become scientists their father sneered that there was nothing on the planet left to be invented or discovered. Today we have men on Mars and telephones in our pockets. Although considerable progress has been made by science in areas concerning environment where the data play a crucial role, results of experiments conducted by scientific institutions have remained tentative. The results are accurate in proportion to the accuracy of data and to the extent that experiment by use of technology has been able to eliminate all chances of inaccurate conclusions. Borrowing words from Nicolas de Sadeleer *“Strictly speaking, it is no longer possible to have so-called technical standards that express the facts in a definitive manner. Complete scientific certainty is the exception, rather than the norm. Science will not have the power categorically to express single truth..... Henceforth, however, when scientists are committed, they will inform the decision-maker that their knowledge is incomplete and express doubts and differences, even ignorance....The disappearance of the alliance between knowledge and power will shatter the Weberian myth of the expert providing indisputable knowledge to a politician who takes decisions that reflect the values he defends.”*²⁹

We must understand that there are important differences between the quest for truth in the court-room and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”³⁰ Uncertainty, resulting from inadequate data, ignorance and indeterminacy, is an inherent part of science.³¹

Uncertainty becomes a problem when scientific knowledge is institutionalized in policy-making or used as a basis for decision-making by agencies and Courts. Scientists may refine, modify or discard variables or models when more information is available: however, agencies and courts must make choices based on existing scientific knowledge. In addition, agency decision-making evidence is generally presented in a scientific form

²⁹ Environmental Principles by Nicolas de Sadeleer, Ch.3, ‘Precautionary Principle’, p. 177-178, Oxford University Press, 2002

³⁰ *Daubert v. Merrel Dow Pharmaceuticals Inc:* (1993) 113 S.ct. 2786

³¹ ‘Uncertainty and Environmental hearing: (Brian Wyne Vol.2, Global Env'tl. Change p 111)(1992)

that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge may not be properly considered.³²

From the above survey of views, it is quite clear that the opinions as to science which may be placed before the Court keep the Judge always guessing whether to accept the fears expressed by an affected party or to accept the assurances given by a polluter.

In *Vincent v Union of India*³³ which involved the banning of certain drugs the court observed that the court was in a dilemma as to consider the view of the petitioners or the assurances of the polluter. The Court felt that once the experts had approved or disapproved the drugs, the Court will not go into the correctness of their decision. The Supreme Court made an effort to refer the issues to an independent committee of experts. In *Dr. Shivrao v. Union of India*³⁴ (Irish Butter case) and relied on the reports of the three expert committees formed by the courts. In like manner, in *A.P. Pollution Control Board vs. M.V. Nayudu*³⁵, the Court proceeded to have the claims of the party tested by experts. This case involved intricate questions of law of as to whether the setting up of industries would lead to environmental pollution. The industry filed a report of an expert which was accepted by the appellate authority constituted under section 28 of the Water Act, 1974 manned by a retired High Court Judge. The learned Judge, basing his decision on the opinion of a single scientist which was produced by the industry, came to the conclusion that if the industry became operational, it would not pose any hazard to the drinking water. This decision was affirmed by the High Court in writ jurisdiction under Art 226 of the Constitution of India. The High Court too simply went by the opinion of the expert scientist which was produced by the industry. But the Supreme Court felt that the opinion of the scientist was not tested or scrutinized by any expert body and required it to be thoroughly examined. The Supreme Court sought expert advice from the National Environmental Appellate Authority (NEAA). The NEAA basing its report on field investigations, hydrogeological studies, geophysical investigations, electric resistivity

³² Charmian Barton: The Status of the Precautionary Principle in Australia: (Vol 22, Harvard Environmental Law Rev. p 509 at pp 510-511 (1998).

³³ AIR 1987 SC 990

³⁴ AIR 1988 SC 953

³⁵ 1999(2) SCC 718

investigation, magnetic survey and tracer studies came to the conclusion that the industry would result in environmental pollution. The precautionary principle clearly applied here. Because the Appellate Authority and the High Court did not have the benefit of the opinion of any scientific bodies to test the correctness of the report of the single scientist whose report alone was there available to the appellate authority and the High Court, the decision went in favour of the Industry. But, as the Supreme Court had the benefit of the Reports of these institutions, it could arrive at a different conclusion.

Instead of leaving it to the discretion of the Courts to refer or not to refer scientific issues to independent experts, we propose to provide a statutory mechanism to provide scientific advice to the Court concerned. Complex issues of science and technology arise in court proceedings concerning water and air pollution. For example, we have serious problems of cleansing our rivers, streams and lakes, and cleansing, disposal or recycling of waste and sewage, disposal of toxic waste, hospital waste, nuclear waste, radio active material, removal of the effect of detergents, waste-oils, dealing with genetically modified organisms, adverse effects of pesticides, asbestos etc. A variety of industries like steel, textiles, leather pose different types of problems of pollution. Air pollution from industries and from traffic today is quite grave. Then we have problems of climatic changes, depletion of ozone etc. We have serious problems of noise both at the work place and in residential areas. There are no proper systems for Environment Impact Assessment. There are problems faced in the matter of protection of forests and wild life. The list of issues is unending.

Technical and scientific problems today arise in a variety of ways and at various stages before the Courts. Today the need arises for sustainable development. The courts have to deal with myriad issues ranging from the taxes to be paid to the compensation to the workmen to the pollution being caused. The Courts must therefore be able to perform a balancing task. That cannot be done effectively, unless the Court gets judicial as well as scientific inputs. The Courts cannot simply close down industries based on the evidence produced by the industry concerned. These problems which are like under-currents, should also be taken care of by the proposed Environmental Court.

It is true that the High Court and Supreme Court have been taking up these and other complex environmental issues and deciding them. But, though they are judicial bodies, they do not have an independent statutory panel of environmental scientists to help and advise them on a permanent basis. They are prone to apply principles like the Wednesbury Principle³⁶ and refuse to go into the merits. They do not also make spot inspections nor receive oral evidence to see for themselves the facts as they exist on ground. On the other hand, if Environmental Courts are established in each State, these Courts can make spot inspections and receive oral evidence. They can receive independent advice on scientific matters by a panel of scientists. PIL in matters of environment can be refused to be entertained in the same manner as consumer related writs have been refused to be entertained consistently by the High Courts for the Consumer Courts under the Consumer Protection Act, 1986. We have also the example of special environmental courts in Australia, New Zealand and in some other countries and these are manned by Judges and expert commissioners. The Royal Commission in UK is also of the view that if environmental courts are established, the High Courts may refuse to entertain applications for judicial review on the ground that there is an effective alternative remedy before these Courts. It is for the above reasons we are proposing the establishment of separate environmental courts in each State.

The above judgments of the Supreme Court of India will show the wide range of cases relating to environment which came to be decided by the said Court from time to time. The Court has been and is still monitoring a number of cases. It will be noted that the Court constantly referred environmental issues to experts, and the Court has been framing schemes, issuing directions and continuously monitoring them. Some of these judgments of the Supreme Court were given in original writ petitions filed under Art. 32 while the others were decided in appeals filed under Art 136 against judgments of the High Courts rendered in writ petitions filed under Art 226. These cases have added tremendous burden on the High Courts and the Supreme Court. The idea proposed for the formation of

³⁶ The Wednesbury principles of reasonableness are used to determine whether an agency has acted outside the scope of its delegated administrative powers.

Environmental Courts is primarily intended to lessen this burden, as already stated. But that as it may, the Supreme Court has, in the various cases referred to above, laid down the basic foundation for environmental jurisprudence in the country.

ENVIRONMENTAL COURTS OR APPELLATE ENVIRONMENTAL BODIES IN INDIA AS AT PRESENT

General jurisdiction of various civil, criminal and constitutional Courts:

We have referred, in detail in the previous chapters through case law showing the wide range of powers exercised by the High Courts and the Supreme Court on a variety of environmental issues under Art. 226 and Art. 32 respectively. Apart from these superior Courts, the subordinate civil courts exercise powers in regard to public and private nuisances.³⁷ Criminal Courts exercise powers under various sections of the Indian Penal Code (IPC) dealing with offences relating to environment. Chapter XIV of the IPC refer to offences under sections 269, 270, 271³⁸, fouling water of public spring or reservoir³⁹, making atmosphere noxious to health⁴⁰, negligent conduct with respect to poisonous substances, fire or combustible matter, explosive substances, machinery, and pulling down or repairing buildings; animals⁴¹, endangering life or personal safety of others⁴² mischief⁴³, mischief by injury to works of irrigation or by wrongly diverting water⁴⁴, mischief by injury to public road, bridges, river or channel⁴⁵, mischief by causing inundation or obstruction to public drainage, attended with damage⁴⁶, and culpable homicide⁴⁷. Chapter X of the Code of Criminal Procedure, 1973 also contains provisions for enforcement of various provisions of the substantive law.⁴⁸

³⁷ See section 9 and also section 91 of the Code of Civil Procedure, 1908.

³⁸ Neglecting or doing malignant acts likely to spread infectious diseases dangerous to life, disobedience of quarantine rules

³⁹ section 277 IPC

⁴⁰ section 278 IPC

⁴¹ section 291 IPC

⁴² sections 336 to 338 IPC

⁴³ section 425 IPC

⁴⁴ section 430 IPC

⁴⁵ section 431 IPC

⁴⁶ section 432 IPC

⁴⁷ section 299 to 304A IPC

⁴⁸ See for eg. section 133 CrPC.

In addition, new offences are created by various provisions of certain environment related statutes.⁴⁹ All these offences today go for trial before the ordinary criminal courts. The appropriate criminal court will deal with the matter and is identified on the basis of the territorial jurisdiction and depending upon its power to award sentence of imprisonment to any person for particular number of years. The appeals on the criminal side are governed by the laws relating to criminal procedure.

Obviously, whether the matter is one of civil nature or criminal nature, once it is taken cognizance by any Court subordinate to the High Court, it will be dealt with by the said civil or criminal court along with the other cases before it and environmental cases are not normally given any priority in the matter of disposal. Of course, if the issue comes before the High Court or the Supreme Court under writ jurisdiction whether the matter is one brought by the affected party or parties or in a Public Interest litigation, these Courts take up these matters faster but the cases are not taken up day by day as may be done by an Environmental Court dealing exclusively with such cases.

The underlying message here intended is that none of the above Courts are courts having exclusive jurisdiction as regards environmental issues and the result is that there is delay in their disposal as compared to the time within which any special Environmental Court dealing only with issues relating to environment could have taken. It cannot be disputed that environmental matters have to be taken up early, monitored from time to time and be finally disposed of by a procedure quicker than that obtaining now. Further, the Courts today lack independent expert advice on environmental matters by a statutory panel attached to the Court and depend mostly on the expert evidence that may be adduced by the parties. The need for experts in environment to be associated with the Courts dealing with these cases has already been pointed out in the previous chapters⁵⁰.

⁴⁹ Sections 41 to 50 (Chapter VII) of the Water (Prevention and Control of Pollution) Act, 1974; sections 37 to 46 (Chapter VI) of the Air (Prevention and Control of Pollution) Act, 1981, sections 14 to 18 of the Public Liability Insurance Act, 1991, sec. 3A, 3B of the Forest (Conservation) Act, 1980; sec. 51 to 58 (Chapter VI) of the Wild Life (Protection) Act, 1972; sec. 15 to 17 of the Environment (Protection) Act, 1986.

⁵⁰ See supra Chapter II

Special Acts and appellate powers:

Environment (Protection) Act & Rules made thereunder:

Section 3(3) of the Environment (Protection) Act, 1986 enables the Central Government to constitute an authority or authorities for the purpose of exercising and performing such of the powers and functions of the Central Government under that Act (including the power to give directions under sec. 5 of that Act) and for taking measures with respect to the matters referred to in sec. 3(2) and subject to the supervision and control of the Central Government.

Several rules have been framed under section 25 of the Environment (Protection) Act, 1986. These rules provide for 'authorities' who implement the rules and also provide for 'appellate authorities' who are all officers or Departments of Government. Various rules have been made under sec. 25. Some rules framed under the Act regarding appointment of 'authorities' do not prescribe appellate authorities.

In the Hazardous Wastes (Management and Handling) Rules, 1989, Rule 18 provides for an appeal against any order of grant or refusal of an authorization by the Member-Secretary, State Pollution Control Board (or any officer designated by the Board) – to the Secretary, Department of Environment of the State Government.

In the Rules of 1989 relating to Manufacture, Storage and Import of Hazardous chemicals, Rule 2(b) refer to the 'authority' mentioned in Col. 2 of Schedule 5 as being the authority which will perform various functions under Rule 3. The said Schedule 5 designates various authorities or persons to exercise the functions such as (1) Ministry of Environment and Forests under Environment (Protection) Act, 1986; (2) Chief Controller of Imports and Exports under the Import and Export (Control) Act, 1947; (3) The Central Pollution Control or the State Pollution Control Board or Committee under the Environment (Protection) Act, 1986; (4) Chief Inspectors of Factories under the Factories Act, 1948; (5) Chief Inspector of Dock Safety appointed under the Dock Workers (Safety, Health and Welfare) Act, 1987; (6) Chief Inspector of Mines appointed under the

Mines Act, 1952; (7) Atomic Energy Regulatory Board appointed under Atomic Energy Act, 1972; (8) Chief Controller of Explosives appointed under the Explosives Act and Rules, 1973. No provision is made for an appeal in these Rules.

In the Municipal Solid Wastes (Management and Handling) Rules, 2000, various functions are to be performed by the Municipal Authority, State Governments, Union Territories, Central Pollution Control Board and State Pollution Control Board or Committee. No appeal provision is made. In the Ozone Depleting Substances (Regulation & Control) Rules, 2000, various functions have to be performed by the authority specified in Schedule V thereof. Here, in Col (4), the Schedule specifies the 'authority' and Col. 6 specifies the appellate Authority also. The appellate authorities are Secretary, Ministry of Environment and Forests, or in certain cases, the Dy. Secretary in the same Ministry.

In the Noise Pollution (Regulation & Control) Rules, 2000, Rule 2(c) defines 'authority' as an authority or officer authorized by the Central Government or the State Government, as the case may be, in accordance with the laws in force and includes a District Magistrate, Police Commissioner or any officer not below the rank of a Deputy Superintendent of Police. There is a definition of 'Court' in Rule 2(d) but the Rules do not deal with the functions of the 'Court'. No appellate authority is referred.

Bio-Medical Waste (Management & Handling) Rules, 1998 defines 'Prescribed Authority' under Rule 7 for enforcement of the Rules and designates the authority as the State Pollution Control Board in States or such Committees in Union Territories. Rule 13 defines the appellate authority as the authority to be notified by the State Government or Union Territory.

Thus, it will be seen that in the various Rules made under sec. 3 of the Environment (Protection) Act, 1986, there are authorities /(or in some cases) appellate authorities constituted but there is no appeal to a judicial body. Nor do the appellate authorities, wherever they are constituted, have any expert assistance. They are all bureaucrats.

Water (P&CP) Act, 1974 and Rules made thereunder:

The Water (P&CP) Act, 1974 contains provisions for 'appeals' to an appellate authority, to be constituted by the State Governments to deal with appeals by persons aggrieved by orders of State Board and then a revision to the State Government.⁵¹ The Union Territory of Chandigarh, on 11.4.88, appointed three officers of Government as the appellate authority for purposes of sec. 28 of the Water (P & Co of P) Act, 1974. The Pondicherry Government, on 5.4.88, appointed its Chief Secretary as the appellate authority. The Delhi Administration appointed a single person appellate authority on 18.2.92 who is the Financial Commissioner.

Haryana (Prevention and Control of Water Pollution) Rules, 1978 (22.12.78) state in Rule 23 that the appellate authority shall consist of two persons to be nominated by the Government and must have the following qualifications with qualification of graduate in Engineering and a third person who is a law graduate with 3 years experience as a lawyer.

Maharashtra Water (Prevention & Control of Pollution) Rules, 1983 prescribe an appeal to the 'appellate authority' to be designated by the State Government. Punjab Water (Prevention & Control of Pollution) Appeal Rules, 1978 provide for an appeal to the appellate authority. It is not clear who is designated under these Rules.

Uttar Pradesh Water (Consent for Discharge of Sewerage and Trade Effluents) Rules, 1981 provides for an appeal to an appellate authority specified by the Government. Only in Andhra Pradesh, the appeal under sec. 28 of the Water Act, 1974 read with AP (Water P & P) Rules, 1977 lies to a High Court Judge.⁵² Thus, except in Andhra Pradesh, there is no appeal to a body which consists of a Judicial Member. There are also no experts to assist the appellate authority.

⁵¹ See section 25 and 26 of the Water (P&CP) Act, 1974

⁵² See *A.P. Pollution Control Board vs. Prof. M.V. Nayudu* 1999(2)SCC 718 at 735.

Air (P&CP) Act, 1981 and Rules made thereunder:

The Air (P&CP) Act, 1981, contains provision in sec. 31 for 'appeals' to an appellate authority to be constituted by the State Government. The Andhra Pradesh Air (Prevention and Control) Rules, 1982 Rule 37 speaks of an appeal to the appellate authority against orders of the State Board. Gujarat Rules, 1983 also provide in Rule 18 for an appeal. So does Rule 24 of the Haryana Rules, 1983. Rule 25 of the Karnataka Rules, 1983 provide for an appeal. Kerala Rules, 1984, provide for an appeal under Rule 34 to the appellate authority. Rule 21 of Madhya Pradesh Rules provide for the appeal. Rule 32 of the Maharashtra Rules deal with appeals. Tamil Nadu Rules, 1983, provide for appeal in Rule 35. West Bengal Rules, 1983 provide for appeal in Rule 17. The Union Territories Rules, 1983 provide for appeal in Rule 17. We do not have any evidence before us to say that the appeals lie to a Court or a judicial officer who is also having expert advice.

Summary of the appeal provisions in the above Acts and Rules (Lack of judicial and expert inputs):

It will be noticed that several of the special statutes e.g. Environment (Protection) Act, 1986, Water (P&CP) Act, 1974, Air (P&CP) Act, 1981, delegate power to the State Governments/Union Government to designate appellate authorities. The appeals lie generally, as can be seen from the above paragraphs, to various officers of government or Departments of Government. Except in one or two cases, the appeals do not lie to a judicial body comprising a judicial officer. In no case does the appellate authority have the assistance of experts in the field of environment. In the light of the discussion in the earlier chapters and experience of establishment of Environmental Courts abroad, the Law Commission is of the opinion that the present system is not satisfactory so far as disposal of these appeals are concerned. The appeal is practically the first opportunity for a party or even third parties affected by pollution, to seek relief. In the view of the Commission, such appeals must lie to an appellate Court having special jurisdiction and must comprise of persons who have or had judicial qualifications or have considerable experience as lawyers. They must also be assisted by experts in environmental science. As stated in the earlier chapters, it is now well recognized in several countries that the

appeals must lie to Court manned by persons with judicial knowledge and experience, assisted by experts in various aspects of environmental science.

TWO OTHER STATUTORY ENVIRONMENTAL TRIBUNALS AND DEFECTS THEREIN

- **National Environment Tribunal Act, 1995:**

This enactment was made by Parliament, as stated in the preamble, to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of the Tribunal for effective and expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property and the environment and for matters connected therewith or incidental thereto. Liability under sec. 3 is to be on basis of 'no fault' and under sec. 4 compensation is payable. Under sec. 9(1), the Tribunal shall consist of a Chairperson and such members as Vice- Chairpersons/Judicial Members and Technical members as the Central Government deems fit. It can sit in Benches but each Bench must consist of a Judicial and Technical member. Chairman shall be person who is or has been a Judge of the Supreme Court or High Court, or has at least been Vice- Chairman for 2 years. A Vice-Chairman should be a person (a) who is or has been a Judge of a High Court or was a Secretary to Government of India for at least 2 years or has held any other post in Central or State Government, carrying a scale of pay which is not less than that of a Secretary to Govt. of India or (c) held post of Addl. Secretary in Govt. of India for 5 years and has acquired knowledge of or experience in legal, administrative, scientific or technical aspects of the problems relating to environment, or has at least 3 years experience as a Judicial member or a Technical member; or (3) a Judicial Member must be one who is or has been qualified to be a Judge of a High Court or has been a member of the Indian Legal Service and has held a post in grade I of that service for at least 3 years. A Technical Member is a person who has adequate knowledge of or experience in or capacity to deal with administrative, scientific or technical aspects of the problems relating to environment. No appointment of the Chairperson or Vice-Chairperson can be

made without consultation of the Chief Justice of India. No appointment of a Judicial or Technical Member can be made except on the recommendation of a Selection Committee appointed by the Central Government consisting of:

- (a) Chairperson of the Tribunal.
- (b) Secretary, Govt. of India, Ministry of Environment and Forests.
- (c) Secretary, Ministry of Law, Justice and Company Affairs.
- (d) Director-General, Council of Scientific and Industrial Research.
- (e) An Environmentalist to be nominated by the Central Government.

Term of office of Chairperson, Vice-Chairperson and other Members is 5 years. Appeals lie to Supreme Court on question of law. It may be stated that so far as the National Environmental Tribunal is concerned, since the Act itself has not been notified, the Tribunal has not been constituted in that last eight years. The fact remains that neither the Chairperson, nor Vice-Chairman nor Judicial or Technical Members have been appointed to this Tribunal in the last eight years. Such an important environmental Tribunal envisaged by Parliament has unfortunately not come into being. In fact, if there is tragedy like the Bhopal one, there is now no Tribunal which would grant damages expeditiously.

There are other aspects concerning the powers of the above Tribunal. It can only award compensation. It should have been given all powers which a Civil Court enjoys – so that it can grant declarations, permanent and mandatory injunctions, possession etc. No doubt, there is provision for the Tribunal sitting in Benches but the scheme does not envisage Court in each State. Further, the Members other than Judicial Members, are not always or necessarily experts in environmental matters. For example, under sec. 10(2) (b), if a Secretary to Government is appointed as Vice-Chairman, he need not possess any experience in environmental matters. It is not clear why only in the case of an Addl. Secretary who could be appointed as Vice- Chairman under sec. 10(2)(c), experience in environmental matters is a condition precedent. Similarly under sec. 10(3)(b), it is not stated that a member of the Indian Legal Service who can be appointed as a Judicial member need be person who has done some work in the field of environment. Again, so far as Technical members under sec. 10(4) are concerned, they can be persons only with administrative or scientific knowledge without any experience in problems relating to

environment. If one looks at the consistent pattern in other countries, as pointed out in Chapter IV, the Environmental Court should consist of Judicial Members and Environmental experts. The reason is that if they are expected to exercise normal judicial function of a Civil Court (as now proposed), or as a Court of original and appellate jurisdiction, there is no scope for appointing administrative officials or public servants other than judicial officers/members of the Bar with considerable experience. The Commission is of the view therefore that the Environmental Court must be manned by persons with judicial experience in the High Court and Members of the Bar with at least 20 years standing and have to be assisted by Environmental experts.

- **The National Environmental Appellate Authority Act,**

In 1997 this Act was, as stated in the preamble, intended to provide for the establishment of a National Environmental Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operation or process (or class of industries, operation or processes) shall be carried out or shall not be carried out subject to safeguards under the Environmental (Protection) Act, 1986. Under sec. 4 of the Act, the Appellate Authority was to consist of a Chairperson, a Vice-Chairperson and such other Members not exceeding three, as the Central Government may deem fit. Under sec. 5, the qualification for appointment as Chairperson is that a person who has been

(a) A Judge of the Supreme Court

(b) The Chief Justice of High Court

A person cannot be appointed as Vice-Chairman unless he has (a) held for two years the post of a Secretary to Govt. of India or any other post under the Central/State Govt. carrying a scale of pay which is not less than that of a Secretary to Govt. of India and (b) had expertise or experience in administrative, legal, management or technical aspects of problems relating to environmental management law or planning and development.

It will be noticed that there is some difference between the above provisions and those under the National Environment Tribunal Act, 1995. But here too, the Secretary to Govt. need not necessarily have experience in environmental matters to be appointed as Vice-

Chairman. The term of office is three years. It is understood that the Appellate Tribunal did not have much work in view of the narrow scope of its jurisdiction as per notification issued. It dealt with very few cases. After the term of the first Chairman was over, no appointment has been made. Thus these two National Environmental Tribunals are today unfortunately non-functional. One had only jurisdiction to award compensation and never actually came into existence. The other came into existence but after the term of the first Chairman ended, none has been appointed. It is in the background of this experience with the laws made by Parliament with regard to Environmental Tribunals that we propose to make appropriate proposals in chapter VII for constitution of environmental courts which can simultaneously exercise appellate powers as a Civil Court, and original jurisdiction as exercised by Civil Courts.

ENVIRONMENTAL COURTS TO FOLLOW CERTAIN FUNDAMENTAL PRINCIPLES

It is of the opinion that the Environment Court must follow the following principles. These principles must be part of the proposed statute dealing with Environmental Courts in order to help in the better functioning.

Polluter Pays Principle:

The Polluter Pays Principle was first adopted at international level in the 1972 OECD Council Recommendation on Guiding Principles concerning the International Aspects of Environmental Policies. The 1974 principle experienced revival by OECD Council in 1989 in its Recommendation on the Application of the Polluter Pays Principle to Accidental Pollution, and the principle was not to be restricted to chronic polluter. In 1991, the OECD Council reiterated the Principle in its Recommendations on the Uses of Economic Instruments in Environmental Policy.⁵³

The European Council adopted it in its Recommendation 75/436 in 1975 and reiterated in the Fifth Environmental Action Programme and in the 2001 EC Guidelines and in the

⁵³ www.oecd.org/dataoecd/32/52/34703969.pdf - 17 Sep 2005

Waste Framework Directive 1991 and Art. 10 of the Directive 1999/31/EC and Art. 99 Directive 2000/Cr/EC. It was adopted in single European Act (SEA) by Art. 130 R(Z) (new Article 174(2)) and Art. 130 of the EC Treaty.⁵⁴

National laws in Belgium, France, Germany have adverted to this principle. In international law, the principle is incorporated in the 1980 Athens Protocol, the 1992 Helsinki Convention on the Transboundary Effects Industrial Accidents, the 1993 Lugano Convention on Civil Liability for Damage Resulting From Activities Dangerous to Environment.⁵⁵

This principle was first stated in the Brundtland Report in 1987. This principle was also adverted to in *Indian Council for Enviro-legal Action vs. Union of India*.⁵⁶ In this case this was held that once any activity is inherently dangerous or hazardous dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity.

In *Vellore Citizens' Welfare Forum v. Union of India*⁵⁷ the Supreme Court interpreted the Polluter Pays Principle as the absolute liability for harm to the environment extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation. This principle of compensating the victim as well as the environment is laid down in sec. 3 of the National Environment Tribunal Act, 1995. Section 3(1), as already stated, refers to the compensation payable and it will be as per the heads specified in the Schedule. The Schedule contains items (a) to (n) out of which items (a) to (e) relate to the individual affected by the polluter while items (f) to (n) relate to the environmental damage, including that to the flora and fauna.⁵⁸

⁵⁴ *ibid*

⁵⁵ 'Environmental Principles' by Nicolas de Sadelers, Oxford 2002 at pp. 23, 24

⁵⁶ 1996(3) SCC 212.

⁵⁷ 1996(5) SCC 647, (at 659)

⁵⁸ refer to the relevant footnote and page number of the paper

Hazardous substances – Absolute liability

Absolute or strict liability is one where fault need not be established. It is no-fault liability. Initiatives such as the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to Environment; the European Commission Green Paper on environmental liability (1993) and the Chapter on liability for contaminated land of the Swedish Environment Code (2000), suggest that the polluter pays principle calls for the establishment of a strict liability regime.⁵⁹ There are four Nuclear Conventions, one of 1960, two of 1963 and another of 1971 which lay down strict liability. There are others dealing with oil spill-overs of 1969, 1971 and 1992 which too impose strict liability. More recently, in its White Paper on Environmental Liability, the European Commission stressed that liability independent of fault must be favored for two reasons: first, it is very difficult for plaintiffs to establish fault in environmental liability cases; and secondly, it is the person who undertakes an inherently hazardous activity, rather than the victim or society in general, who should bear the risk of any damage that might ensue.

In the Oleum Gas Leak case (*M.C. Mehta v. Union of India*)⁶⁰, the Supreme Court laid down that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and to those residing in the surrounding areas, owes an absolute and non delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part. The larger and more prosperous the enterprise, greater must be the amount of the compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The principles laid down in *Ryland v. Fletcher*:⁶¹ were modified. It is no longer

⁵⁹ www.cetim.ch/en/interventions_details.php?iid=146, also generally see www.unhchr.ch/environment/bp1.html

⁶⁰ AIR 1987 SC 1086

⁶¹ LR 3 H.L. 330.

permissible in the case of injury by use of hazardous substances, to prove merely that the injury was not foreseeable or that there was no unnatural use of the land or premises by the factory, as was the position under the law laid down in *Rylands vs. Fletcher*⁶². This principle was reiterated in *Indian Council for Environ-Legal Action v. Union of India*⁶³

Precautionary Principle:

The precautionary principle had its origin in the mid-1980s from the German *Vorsorgeprinzip*.⁶⁴ The decisions adopted by States within the North Sea Ministerial Conference mark the first use of this principle in international law. Explicit reference is made to it in the 1984 Bremen Ministerial Declaration of the International Conference on the Protection of North Sea, the 1987 London Ministerial Declaration of the Second International Conference for the Protection of the North Sea, the 1990 Hague Declaration of the Third Conference on the Protection of the North Sea and the 1995 Declaration of the Fourth Conference on the Protection of the North Sea. It was expanded in the field of marine pollution since 1980 and came to be set out in the 1990 OPRC Convention and various other Conventions. It was then extended to protection of coastal areas and fisheries sector and to atmospheric pollution.⁶⁵ It soon came to be included as a general principle of environmental policy.⁶⁶

It then came to be accorded universal recognition in Principle 15 at Rio in the 1992 UN Conference on Environment and Development which resulted in the Declaration on Environment and Development. Similarly, the 1992 Framework Convention on Climatic Change (UNFCCC) also refers to it. So does the preamble to the 1992 Convention on Biological Diversity (CBD). Various foreign courts have accepted this principle and has

⁶² *ibid*

⁶³ 1996(3) SCC 212 (see p 246, para 65) -

⁶⁴ www.umweltlexikon-online.de/fp/archiv/RUBrechtmanagement/Vorsorgeprinzip.php last accessed on 14 September 2005

⁶⁵ See *Environmental Principles*, Oxford, 2002 by Nicolas de Sadeleer p 94-95

⁶⁶ U.N. Economic Commission of Europe in 1990 (UNECE) in Bergen; in 1989 by the Governing Council of the UN Environment Programme (UNEP); in 1990 by the Council of Ministers of the Organisation of African Unity (OAU); and of the 1990 Ministerial Conference on the Environment of the UN Economic Commission for Asia and Pacific (ESCAP) and finally in January 1991 in the Environment Ministers of the Organisation for Economic Co-operation and Development (OECD).

been incorporated in their statutes.⁶⁷ The Supreme Court of India, in the case of *Vellore Citizens' Welfare Forum v. Union of India*⁶⁸ referred to the precautionary principle and declared it to be part of the customary law in our country. The Principle is contained in Principle 11 of the Principles laid down in the UN General Assembly Resolution on World Charter for Nature, 1982 and was reiterated in the Rio Conference of 1992 in its Principle No. 15. The same was reiterated in the *A.P. Pollution Control Board* case⁶⁹

The Principle of Prevention

The Prevention Principle takes care of reckless polluters who would continue polluting the environment in as much as paying for pollution is a small fraction of the benefits they earn from their harmful acts or omissions. Prevention of pollution must therefore take priority over compelling the polluter to cough up. The *Trail Smelter*⁷⁰ case was an international award which directed Canada to install protective measures to stop pollution in the neighbouring countries arising out of a foundry. This was treated as a transboundary obligation under international law. This principle was engrafted in Principle 21 of the 1972 Stockholm Declaration on Human Environment which stressed the 'responsibility (of States) to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction'. This was reiterated in Principle 2 of the Rio Declaration. This principle is incorporated in the 1979 LRATP Convention, the 1985 Vienna Convention for the Protection of the Ozone layer and the 1992 (B) and the Preamble of the UNFCCC. This is also a part of E.C. Law. There are treaties based on this principle on the subjects of marine environment, highseas fisheries, protection of rivers, atmospheric pollution, the Alps, Antarctica etc.⁷¹ National laws have also recognized this principle.⁷² Best available Technologies (BAT) is another aspect of this principle. Environment Impact Assessment

⁶⁷ It has been accepted by the European Court of Human Rights and applied by WTO Dispute Resolution Bodies, the International Tribunal for the Law of the Sea, the European Community Law. National legislations in the EC Member States (Germany, France, Belgium, Sweden) have adopted it. It is applied in UK because of Art 174 (2) of EC Treaty. It is applied also by US Courts and in Australia.

⁶⁸ 1996(5) SCC 647

⁶⁹ 1999(2) SCC 718

⁷⁰ 5 UNRIAA 39 (1941)

⁷¹ See Environmental Principles by Nicolas de Sadeleer, Oxford 2002, pp 62 to 65

⁷² Swiss, Danish, Belgian, French, Greek laws incorporate this principle. So does the US Pollution Prevention Act, 1990

is the crucial procedure which seeks toward off prevention. This is reiterated in Principle 17 of the Rio Declaration.

Principle of New Burden of Proof:

The UN General Assembly Resolution of 1982 on World Charter for Nature established this principle. EC Law also demonstrates the shift in the burden in the case of use of drugs, pesticides, food products, additives, food stuffs etc. EC's new hazardous wastes lists 200 categories of listed wastes. In US, though the Supreme Court in *Industrial Union Department AFL – CIU v. American Petroleum Institute*⁷³ put the initial burden on the regulator, several American statutes have shifted the burden of proof.⁷⁴ The WTO Appellate body has also applied this principle. Environmental Impact Assessment is intended to reduce the uncertainties attached to potential impacts of a project. In the *Vellore Case*⁷⁵, Kuldip Singh J observed as follows:

“The ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.”

In *A.P. Pollution Control Board case*:⁷⁶ it was explained that the ‘precautionary principle’ has led to the new ‘burden of proof’ principle. In environmental cases where proof of absence of injurious effect of the action is in question, the burden lies on those who want to change the status quo. This is often termed as a reversal of the burden of proof, because otherwise, in environmental cases, those opposing the change could be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden and the party who wants to alter it, must bear this burden.

Sustainable Development:

⁷³ 448 US at 632-635 (1980)

⁷⁴ See Federal Foods and Drug Act (21 U.S.C. section 348(c) (3)A), The Federal Insecticide, Fungicide and Rodenticide Act (FIFA) (21. USS section 360(a)(4)(B), Marine Mammal Protection Act. (16 USC section 1371).

⁷⁵ 1996(5) SC 647 p 658 para 11

⁷⁶ 1999 (2) SCC 718 (at p 734)

In the international arena 'Sustainable Development' came to be known as a concept for the first time in the Stockholm Declaration of 1972. Thereafter in 1987 the concept was given definite shape by the World Commission on Environment and development in the report called 'Our Common Future'. The Commission was chaired by the then PM of Norway Mrs. G.H. Brundtland and as such the report is popularly known as 'Brundtland Report'. In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document called 'Caring for the Earth' which is a strategy for sustainable living. Finally came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history deliberating and chalking out a blue print for the survival of the planet.

During the two decades from Stockholm to Rio '*Sustainable Development*' has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. Among the principles that form part of the concept of sustainable development, two important principles are *eradication of poverty* and *financial assistance to the developing countries*.

It is in the hands of humanity to make development sustainable, that is to say, seek to meet the needs and aspirations of the present without compromising the ability of future generations to meet their own. *The concept of sustainable development implies limits -not absolute limits, but limitations that the present state of technology or social organisation and the capacity of the biosphere to absorb the effects of human activities impose on the resources of the environment-, but both technology and social organisation can be organised and improved so that they will open the way to a new era of economic growth. The Commission believes that poverty is no longer inevitable. Poverty is not only a malaise in itself. Sustainable development demands that the basic needs of all are satisfied and that the opportunity of fulfilling their expectations of a better life is extended to all. A world where poverty is endemic will always be susceptible to suffering an ecological or any other kind of catastrophe.*⁷⁷

⁷⁷ Brundtland Report, Our Common Future, The World Commission for the Environment and Development, Aianza Publications 1988. Madrid (page 29)

Public trust doctrine:

The 'public trust' doctrine was referred to by the Supreme Court in *M.C. Mehta v. Kamal Nath*⁷⁸. The doctrine extends to natural resources such as rivers, forests, sea shores, air etc., for the purpose of protecting the eco-system. The State is holding the natural resources as a trustee and cannot commit breach of trust. In the above case, the State's order for grant of a lease to a motel located on the bank of the river Beas which resulted in the Motel interfering with the natural flow of the water, was quashed and the public company which got the lease was directed to compensate the cost of restitution of environment and ecology in the area.

Inter-generational equity:

Principles 1 and 2 of the 1972 Stockholm Declaration refer to this concept. Principle 1 states that Man bears solemn responsibility to protect and improve the environment for the present and future generations. Principle 2 states that the national resources of the Earth must be safeguarded for the 'benefit of the present and future generations through careful planning or management, as appropriate'. Principle 3 of the Rio Declaration, 1992 also states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

The Philippines Supreme Court entertained a case by a group of citizens representing the future generations for preservation of the ecology.⁷⁹ In this case the then President of the Philippines issued an executive order in 1987 in that behalf which specifically referred to the right so conferred 'not only for the present generation but for future generation as well'.

In *Minors Oposa*, a group of Filipino minors named OPASA, joined by their respective parents, representing their own generation as well as generations yet unborn, urged the

⁷⁸ 1997 (1) SCC 388

⁷⁹ See *Minors Oposa v. Secretary of the Dept. of Environment and Natural Resources* (DENR) (1994) 33 ILM 173 Also generally see Right of Future Generations by K.I. Vibhuti Vol. 21 Academy Law Review p. 219-235.

Supreme Court to enforce their and their unborn successors' constitutional right to a balanced and healthful ecology guaranteed under the Philippine Constitution and sought cancellation of all existing logging permits issued by the Dept. of Environment and Natural Resources (DENR) to different companies on the basis of the Timber Licence Agreements (TLAs) and for restraining the DENR from accepting, processing, reviewing or approving the TLAs. The Supreme Court allowed the applicants to file the case and emphasized the duty of the State as *parens patriae*. The Court observed that the petitioner's 'personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility'.

Hence concluding in this chapter these and other principles must be required to be applied by the Environment Courts and provision must be made therefor in the statute enabling the formation of the Environmental Courts.

RECOMMENDATIONS

On the basis of our discussion in previous chapters, the following recommendations seem to arise in our minds:

1. In view of the involvement of complex scientific and specialized issues relating to environment, there is a need to have separate 'Environment Courts' manned only by the persons having judicial or legal experience and assisted by persons having scientific qualification and experience in the field of environment.
2. In order to achieve the objectives of accessible, quick and speedy justice, these 'Environment Courts' should be established and constituted by the Union Government in each State. However, in case of smaller States and Union Territories, one court for more than one State or Union Territory may serve the purpose.
- 3.(a) The proposed Environment Court should consist of a Chairperson and at least two other members. Chairman and other members should either be a retired Judge of Supreme Court or High Court, or having at least 20 years experience of practicing as an advocate in any High Court. The term of the Chairperson and members shall be 5 years.
(b) Each Environment Court should be assisted by at least three scientific or technical experts known as Commissioners. However, their role will be advisory only.

4.(a) The proposed Environment Court shall have original jurisdiction in the civil cases where a substantial question relating to 'environment' including enforcement of any legal or constitutional right relating to environment is involved.

(b) The jurisdiction of civil courts is not ousted.

(c) The proposed Environment Court shall also have appellate jurisdiction in respect of appeals under:

(i) The Environment (Protection) Act, 1986 and rules made thereunder;

(ii) The Water (Prevention and Control of Pollution) Act, 1974 and rules made thereunder;

(iii) The Air (Prevention and Control of Pollution) Act, 1981 and rules made thereunder;

(iv) The Public Liability Insurance Act, 1991.

The Central and State Governments may also notify that appeal under any other environment related enactment or rules made thereunder, may also lie to the proposed Environment Court.

5.(a) The proposed Court should not be bound to follow the procedure prescribed under the Code of Civil Procedure, 1908, but will be guided by the principles of natural justice. The Court should also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.

(b) The proposed Court shall have all powers of civil court including power to punish for contempt.

(c) The minimum quorum for hearing a case, shall be two members including the Chairperson. At least one Commissioner should also remain present during the hearing of a case. The proposed Court can pass all kinds of orders, final or interlocutory. It can also award damages, compensation and can also grant injunctions (permanent, temporary and mandatory).

(d) The proposed Environment Court shall follow the principle of strict liability in case of hazardous substance, polluter pays principle, precautionary principle, preventive principle, doctrine of public trust, Intergenerational equity and sustainable development.

(e) The locus standi before the proposed Environment Court in original jurisdiction shall be as wide as it is today before High Court/Supreme Court in the writ jurisdiction in environmental matters.

(f) The proposed Environment Court shall also have power to frame schemes relating to environmental issues, monitor them and modify the schemes.

6. The proposed enactment for establishment of these Environment Courts should also contain other ancillary and miscellaneous provisions which are necessary, for example provisions regarding other staff, funds, place of sitting etc.

7(a) In view of the appellate powers of the proposed Environment Court, provisions relating to appeals contained in:

(i) Environment (Protection) Act, 1986 and rules made thereunder;

(ii) The Air (Protection and Control of Pollution) Act, 1981 and rules made thereunder;

(iii) The Public Liability Insurance Act, 1991 are required to be suitably amended.

(b) The proposed enactment should also contain a provision, namely,

“Notwithstanding anything contained in sec. 28 of the Water (Prevention and Control of Pollution) Act, 1974, any person aggrieved by the order passed by the State Board under sec. 25, 26 or 27 may prefer appeal to the Environment Court”.

8. The National Environment Tribunal Act, 1995 and The National Environmental Appellate Authority Act, 1997 may be repealed and provisions regarding functions and powers of the Tribunal and the Appellate Authority contained in those Acts be suitably transferred in the proposed enactment for establishment of the Environment Court.

9. Appeal against the orders of the proposed Environment Court, shall lie before the Supreme Court on the question of facts and law.

10. The powers of High Courts under Arts. 226, 227 of the Constitution of India and of the Supreme Court under Art. 32 of the Constitution of India shall not be ousted.

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