Sustainable Development as Environmental Justice

Exploring Judicial Discourse in India

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The principle of sustainable development has evolved to occupy centrality in environmental jurisprudence in India. The Supreme Court has reiterated its importance in the country's environmental legal regime. However, the jurisprudence has been criticised for framing it as a zero sum game where economic development has been repeatedly used as a justification to trump environmental violations, and therefore, rendering it as only declaratory and lacking in content and sufficient teeth to shape public action. But this has compelled policy and statutory recognition of the principle of sustainable development. The National Green Tribunal Act of 2010 recognises it too. This statutory recognition has paved the way for a robust jurisprudence spearheaded by the NGT that has actively sought to evolve a standard of review for public actions in effectuating the principle of sustainable development and in doing so has departed from the reductionist utilitarianism that had characterised the jurisprudence of Supreme Court.

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> There will have to be different targets for different countries, as countries are at different stages of development. Each country's right to development should be respected keeping in view the larger vision of sustainable development (Malhotra 2015).

The Minister of State for Environment, Forest and Climate Change, Prakash Javadekar's statement at an international conference in Delhi in 2015, touches on significant aspects of the concept of sustainable development. First, that the principle has universal appeal which demands almost ritual obeisance from national political leaders. Second, there is precious little that these leaders will agree on what constitutes sustainable development in terms of practice. Formal reiteration in several treaty texts has continued to reflect this fact. Lack of content, and therefore unenforceability, has been both the strength and its Achilles' heel (Samaan 2011). Lack of depth has also been found to be elemental in the construct of the concept itself which promotes multiple values, but ignores the necessary trade-offs that may be required in reality (Norgaard 1994). An empty vessel approach has also helped in indigenising the principle and this opportunity has been robustly exploited first by the Supreme Court, followed by the policymakers and now by the National Green Tribunal (NGT).

At the international level, the sustainable development goals (SDGs) have been adopted; they have to be attained by 2030. Interestingly, although the SDGs cover an entire spectrum of environmental goals, the emphasis seems to be on cleaning up pollution rather than on prevention. Acutely reflecting the inherent tensions that the principle of sustainable development has embodied in terms of focusing on soft goals with greater political acceptability rather than attempting a paradigm shift in economic policy was possibly envisaged by its framers and regularly demanded by civil society activists. Yet, one should not lose sight of the fact that the "empty vessel approach" has allowed great diversity in national measures and flexibility in the application of this principle. Thus, it is this national regulatory space that assumes more importance in this regard than the international legal arena. Consequently, despite the international antecedents of the principle of sustainable development, it is the national legal and policy regime and the principal actors engaged in the development and enforcement of this regime, that are the focus of my inquiry here.

This study has been divided into four sections. Section 1 discusses the benchmark case law on the principle of sustainable development as developed by the Supreme Court. Section 2 explains the statutory references to the principle of sustainable development. Section 3 explores key NGT case laws tracing the development of a standard of review for administrative decisions. Section 4 concludes with an exploration of the principle of sustainable development as foregrounding a sui generis notion of environmental justice in India and comments on some of the challenges that is faced by the NGT before its jurisprudence can become well-entrenched within the Indian environmental law.

1 Supreme Court's Jurisprudence on Sustainable Development

The story of principle of sustainable development in India begins with *Vellore Citizens Welfare Forum v Union of India* (1996). The judgment was given—more than a decade after the principle had gained international recognition in 1987. What explains the reticence of the Supreme Court in adopting this principle into the national environmental regime? This question is also interesting because it comes in the context of an increasingly activist judiciary, who was raring to produce a jurisprudence that would (if not obliterate) at least atone for its failure to adequately respond to the Bhopal gas tragedy (Baxi 1985).[1] A possible reason could be that inherent within the principle of sustainable development has been the vision of an alternative economic structure that would give due emphasis to environmental costs of economic activity. This would quite clearly take the Supreme Court into the domain of policymaking, and therefore, into the executive's ambit. The Supreme Court despite its activism was unwilling to do this. It was only in the early 1990s with the loose formulation of the principle in the Rio Conference that the principle was given adequate interpretational flexibility to be explored within the national context. The Supreme Court seized this opportunity to fashion jurisprudence on sustainable development that did not fundamentally challenge the existing state of affairs.

The Vellore case was filed in the Supreme Court as public interest litigation under Article 32 of the Constitution. It was contended by the Vellore Citizens Welfare Forum that the tanneries operating in the area were discharging untreated effluent in agricultural fields, roadsides and waterways. It had also led to the polluting of the Palar River, leading to scarcity of potable water in the area. A preliminary survey by the Tamil Nadu Agricultural Research University provided evidence that over 30,000 hectares of agricultural land in the tanneries belt had become unfit for cultivation.

The Court used this opportunity to trace the genealogy of the concept of sustainable development in international environmental law starting from the Stockholm Declaration in 1972. Relying on this genealogy the Court pronounced that

> We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient feature have yet to be finalised by the International Law Jurists (*Vellore Citizens Welfare Forum v Union of India* (1996), para 10: 658).

Making a case for the emergence of the principle of sustainable development as part of customary international law was important since only a few months before this case, the Court had made a tentative attempt to build a case for the application of the principle on the basis of municipal law (*Indian Council for Environmental-Legal Action v Union of India* 1996). Drawing on customary international law was, therefore, a deliberate strategy to bolster the earlier jurisprudence in embedding sustainable development within the Indian environmental law.[2] Further, the Court was both inventive and careful enough to underline that the characteristics of the principle were yet to emerge, thus, opening up a jurisprudential space for assuming authorship of the constituents of such a principle in the Indian context.

The Court then established a theoretical connection by stating that the precautionary principle and the polluter pays principle (PPP) are essential features of sustainable development. precautionary principle entails administrative authorities to anticipate and prevent environmental degradation in the face of threats of serious and irreversible damage.

Similarly, PPP is applied when an activity is hazardous and inherently dangerous, the person undertaking such an activity will be held absolutely liable or the loss that may be caused by his activity to any other person, irrespective of the fact that reasonable care was taken.

The Court found this an appropriate case for the application of the PPP. It stated that

> Consequently, the polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water, and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The 'Polluter Pays' principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution, but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology (*Indian Council for Environmental-Legal Action v Union of India* (1996), para 12: 659).

The sole emphasis on the PPP is not surprising since environmental pollution had already occurred. However, the Court missed an opportunity to elaborate on the species of hazardous activities that would attract application of the precautionary principle. As we will see, this initial emphasis on the PPP has come to define the Court's jurisprudence on the principle of sustainable development. Remediation (rather than prevention) has been the primary response of the Court to environmental pollution and this has shaped the Court's accommodative and "business as usual" response that has epitomised the Supreme Court's discourse on sustainable development.

The Vellore case is also an important benchmark of the Supreme Court's institutional tolerance of environmental violations. During the pendency of the case, the Court allowed opportunities for polluting leather manufacturing units to

work towards compliance by establishing effluent treatment plants (ETPs). ETPs are expensive investments but necessary and here the state government through entities such as the Tamil Nadu Leather Development Corporation (TALCO) had provided support in establishing such units. Eventually imposed a pollution fine of ₹10,000 to all tanneries in the region and ordered closure of all those tanneries which failed to obtain the consent orders necessary for operating under the Water (Prevention and Control of Pollution) Act, 1974.

Given the scale of violations and the resulting environmental pollution and the negative health effects due to massive pollution of surface water and groundwater (severely affecting agriculture and drinking water supply), the Supreme Court chose to provide several opportunities to these leather units to pursue compliance thereby assuring that non-compliance would be tolerated if suitable measures were taken to bring it to an end. Further, the fine imposed was non-prohibitive in scale and did not threaten the operational existence of these units. Social implications in terms of employment were an important parameter which the Court considered in responding to these environmental violations. The Court exploited the definitional flexibility inherent in the concept of "sustainable development" that allowed consideration of a range of non-environmental factors while addressing environmental issues.

Sardar Sarovar Project

In *Narmada Bachao Andolan v Union of India* (2000), the Supreme Court was confronted with a case in which a massive developmental project (Sardar Sarovar Project dam on the river Narmada) was challenged on the ground of non-completion of the environmental impact assessment (EIA) and the inadequate rehabilitation and resettlement efforts made for the project-affected persons. The petitioners had argued that this was a fit case for the application of the precautionary principle since the dam would potentially cause irreparable damage to the local environment. The Court sought to address this aspect by making a specious argument that this principle is applicable in cases where there is uncertainty prevailing as to the extent of damage or pollution. However, this was not such a case, because the effect of the dam on the environment was known. This was not completely true since EIA was not undertaken for the entire project. So at best the Court was making a claim based on the impact of dams in general as per anecdotal evidence. It went on to state that

> 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 then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation (*Narmada Bachao Andolan v Union of India (*2000), para 123: 727).

The objective is to reduce the environmental footprint of the project without fundamentally challenging the nature of the project itself.[3] This also seems evident from the arguments which were marshalled by the Court to support the dam project despite several instances of lack of non-compliance. This support was based on two prongs: first, that the dam was a policy decision by the government, and therefore, beyond the remit of a judicial challenge. Second, given the scale of public investment already poured into the project, any decision to abort or change course would lead to wastage of public monies.

N D Jayal and Another v Union of India and Others (2004) was a similar case in which the Tehri Dam project was challenged on environmental safety issues. The Supreme Court adopted a similar position to that in the Narmada Bachao Andolan case. On the face of obvious non-compliance of the project proponent, it chose to focus on the economic gains from the project (in this case a dam to generate hydroelectric power).

Interestingly, even the dissenting opinion of Justice Dharmadhikari in this case reflects the thinking of the majority decision in terms of the way in which environmental implications can and will necessarily be addressed while going ahead with development decisions.

He stated that

> A strategy for conserving or resources-effective use of non-renewable resources is the imperative demand of modern times. Whereas, minimum sustainable development must not endanger the natural system that supports life on earth, constant technological efforts are demanded for resources-effective production, so that sacrifice of one eco-system is counter balanced or compensated by recreating another system (*N D Jayal and Another v Union of India and Others* (2004), para 103: 409).

The presumption here is decidedly anthropocentric in assuming, that human capacity extends to the recreation of natural ecosystems. This approach is sustained by the Supreme Court's lack of enthusiasm to do little more than restate the principle in the face of non-compliance and to request for future compliance from the project proponent. It, thus, renders the principle formally enunciated, but practically redundant.

Another important aspect that has debilitated the development of the principle of sustainable development is the Court's embrace of a majoritarian ethical standard by introducing a test of proportionality in such cases.

In *Bombay Dyeing & Mfg Co Ltd (3) v Bombay Environmental Action Group and Ors* (2006) referring to a large number of decisions, it was stated that whereas need to protect the environment is a priority, it is also necessary to promote development stating:

> ...The harmonisation of the two needs has led to the concept of sustainable development, so such that it has become the most significant and focal point of environmental legislation and judicial decisions relating to the same. Sustainable development, simply put, is a process in which development can be sustained over generations. ...Making the concept of sustainable development operational for public policies raises important challenges that involve complex synergies and trade-offs (*Bombay Dyeing & Mfg Co Ltd (3) v Bombay Environmental Action Group and Ors (*2006), para 251: 521).
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> Consideration of ecological aspects from the court's point of view cannot be one sided. It depends on the fact situation in each case. Whereas the court would take a very strict view as regards setting up of an industry which is of hazardous nature but such a strict construction may not be resorted to in the case of country planning (*Bombay Dyeing & Mfg Co Ltd (3) v Bombay Environmental Action Group and Ors* (2006), para 277: 527).

Interestingly it is evident that even in case of developments which were of potentially hazardous nature such as large dams in earthquake-prone areas or nuclear power plants, the stricter scrutiny has not amounted to a complete rejection of the developmental activity itself. The utility of the developmental activity in terms of non-ecological indicators such as generation of electricity, employment and investment has been a critical measure for the Court in approving such activity even in the face of potentially irreversible and negative environmental changes.

Such a utilitarian perspective was yet again embraced by the Court in *G Sundarrajan v Union of India and Ors* (2013), wherein the issue was the operation of the Kudankulam Nuclear Power Project (KNPP) that was challenged on the ground of non-completion of the EIA. The Court stated:

> Court has emphasised on striking a balance between the ecology and environment on one hand, and the projects of public utility on the other. The trend of authorities is that a delicate balance has to be struck between the ecological impact and development. The other principle that has been ingrained is that if a project is beneficial for the larger public, inconvenience to smaller number of people is to be accepted. It has to be respectfully accepted as a proposition of law that individual interest or, for that matter, smaller public interest must yield to the larger public interest (*G Sundarrajan v Union of India &Ors* (2013): para 239 and 240: 737).

The proportionality test epitomises narrow utilitarianism most well expounded by the phrase "greatest good for the greatest number of people," as propounded by Jeremy Bentham. When confronted by developmental activities that may lead to negative environmental and health impacts, the Court has repeatedly[4] relied on this principle to justify developmental impacts benefiting the majority of population despite negative environmental and health impacts that may affect a minority.

Admittedly the Court has also had the occasion to take a different course while applying the principle of sustainable development—but these have been in the nature of exceptions. Exceptions relate to brown pollution issues which attracted disproportionate media attention, given the nature and scale of violation leading to environmental pollution and health hazards. Two landmark judgments in this regard are the *M C Mehta v Union of India and Ors* (2002) (Delhi CNG case) and the *Samaj Parivartana Samudaya and Ors v State of Karnataka and Ors* (2013) generally known as Bellary Mining case.

In the first case, the Court relied on the precautionary principle to contend that

> Norms for emission and norms for the fuel have existed for over the last two decades and the state of the environment is dismal despite the existence of these norms. The emission norms stipulated by the Government have failed to check air pollution, which has grown to dangerous levels across the country. Therefore, to recommend that the role of the Government be limited to specifying norms is a clear abdication of the constitutional and statutory duty cast upon the Government to protect and preserve the environment, and is in the teeth of the 'precautionary principle' (*M C Mehta v Union of India and Ors* (2002), para 11: 365).

Similarly, in the other case, the Court, faced with large-scale violations of mining quotas and administrative intransigence, ruled that

> Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48–A and 51–A(g) of the Constitution of India. In fact, these articles have been extensively discussed in the judgment in [M C Mehta case (2004) 12 SCC 118] which keeps the option of imposing a ban in future open (*Samaj Parivartana Samudaya and Ors v State of Karnataka and Ors* (2013), para 34, p 186).

In both these cases the Court mandated the prevention of developmental projects on the basis that it found it to be unsustainable. However, it is important to note that in both these cases the Court was confronted with abject administrative apathy coupled with intense media coverage, thus, almost amounting to an alibi for the Court to take a strong and decisive action in cases, where inaction would damage the institutional credibility of the judiciary itself.

Environmental Rights vs Development

Some conclusions on the Supreme Court's jurisprudence are apparent from this discussion. First, that the Court strove to develop a basis for the adoption of this principle into Indian environmental law, by developing arguments based on customary international law and constitutional interpretations. Reiteration as strategy has been vigorously pursued to embed this principle in the legal discourse. This is evident from the fact that a cursory study of environmental judgments post-Bhopal will attest to the almost ritual reference to the principle in all such cases.

Second, the Court quite successfully linked the application of sustainable development to that of precautionary principle and PPP. It could do so authoritatively precisely because of the lack of substantive content that was characteristic of the international expressions of the principle of sustainable development. Although it developed rich jurisprudence on both the shape and nature of these principles—curiously they have largely remained academic exercises due to inconsistency in their application (Rajamani 2007). The focus of sustainable development has been clean up of pollution rather than prevention of pollution. The Court has therefore chosen to apply the PPP more often rather than the precautionary principle. Further in most cases of PPP, given that the damage to the environment was left unestimated, ultimately it resulted in highlighting inaction by the state and more stringent orders by the Court (usually under direct monitoring), rather than actual payment for damages. State inaction has, therefore, been the subject of most environmental orders, instead of damages paid for by private parties. This has furthered diluted the effectiveness of the principle.

Third, one may intuitively raise the question that how has the Court been able to exclusively focus on the state, instead of holding private persons liable for environmental damages? This is a fallacy in framing the discourse almost exclusively in terms of a violation of a fundamental right under the Constitution. Procedurally, it was necessary to allow for public interest litigation on questions of violation of fundamental rights. Violation of fundamental rights is a ground for a direct cause of action in which the Supreme Court can be approached by ordinary litigants. Interpreting environmental violations as a violation of a fundamental right (Article 21: Right to life) has

meant that the Court has frequently been confronted with making a trade-off between environmental rights versus the right to development. And in most cases, the right to development has trumped the right to clean environment, resulting in an interpretation of the principle of sustainable development that is focused on development with a few environmental concessions attached. In adopting this approach the Court has also relied on a well-espoused path of denying a role of the Court in policy prescription (although there have been spectacular instances (for instance, *T N Godavarman Thirumulpad v Union of India* (2005): writ petition no 202/1995)—the Godavarman case—the longest-running continuing mandamus in the history of environmental protection in India, in which it has clearly chosen to do so (Chowdhury 2014) when confronted with such trade-offs.

2 Sustainable Development in Legislation

Despite limitations, the Supreme Court's reiterative strategy did succeed in embedding the concept within the Indian environmental law and policy regime. It increasingly found mention and was referenced widely in the policy documents of the government, namely, National Forest Policy 1988, National Conservation Strategy and Policy Statement on Environment and Development (both in 1992), National Agricultural Policy 2000 and the National Water Policy 2002. Perhaps the most authoritative statement was the multiple references to the principle of sustainable development made in the National Environment Policy (NEP) 2006.

In many ways the legislative representation of the principle of sustainable development (in the NGT Act) opened up a legal space for reimagining of sustainable development that was relatively unencumbered by the earlier jurisprudence. The NGT Act of 2010 explicitly provided for the application of the principle of sustainable development.

Section 20 of the NGT Act states that

> The tribunal shall, while passing any order, or decision or award, apply the principles of sustainable development, the precautionary principle and polluter pays principle.

Although there have been several environmental legislations previously that have made general references to the goal of sustainable development,[5] this is the first time that a clear reference has been made to the principle of sustainable development and a statutory obligation specified for the NGT to apply it in the context of environmental disputes. How has the NGT used this statutory mandate provided to it?

Before I explore the substantive aspects of the NGT's jurisprudence, it is necessary to discuss the institutional features of the NGT, given that it will fundamentally shape the NGT's jurisprudence.

The NGT was set up in 2010 through the NGT Act. The demand for a specialised environmental court has been one that has found resonance not only in the various judgments of the Court,[6] but also in the report of the Law Commission of India (2003). The NGT is not a court because unlike courts its powers are statutorily limited.

Its jurisdiction extends to all civil cases where there is a substantial question relating to environment and that arises out of the implementation of enactments specified in Schedule I. Schedule I includes all environment-related legislations with the exception of the Wildlife (Protection) Act, 1972, Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Indian Forest Act, 1927. The Environment (Protection) Act, 1986 is an important inclusion in the schedule, since it includes a number of important notifications such as on coastal regulation zone, EIA, hazardous substances (including microorganisms), noise pollution, ozone depletion, etc. Given that "environment" itself has been defined in an expansive manner (Section 2(c) of NGT Act) one can conjecture that the jurisdiction of the NGT itself is quite wide and open to interpretation, specifically with reference to any subject matters which could be said to fall under Schedule 1 legislations.

The act has been criticised for limiting access to justice since the jurisdiction of the civil courts have been taken away for environmental matters relating to these legislations mentioned in Schedule 1 and given to the NGT. Including the principal bench in Delhi, the NGT has only five benches, and therefore, has limited physical reach. On the other hand, the act provides for any aggrieved person to move an application for grant of relief and compensation, thus substantially liberalising access for litigants (Section 18(2)(e) of NGT Act).

It includes both judicial members and expert members, and is headed by a chairperson who is from the judiciary. Decision-making is by majority. This unique constitution of the bench allows the NGT flexibility in investigations for establishing facts. It has been quite forthcoming in appointing local commissioners to undertake spot investigations and also for supervising progress on enforcement of its orders.[7]

3 NGT's Jurisprudence on Sustainable Development

The NGT's case list has been dominated by EIA disputes. The primary data analysis has revealed that, disputes relating to environmental clearances granted form the basis for a majority of the cases (Patra and Krishna 2015). Such cases, therefore, feature quite prominently in the following analysis. However, there have been other cases in which the NGT has referred to the principle of sustainable development.[8]

In *T Muruganandam and Ors v Union of India and Ors* (2014), the environmental clearance granted by the Ministry of Environment, Forest and Climate Change (MoEF) to the Tamil Nadu Power Company was challenged. It was challenged on the ground that the cumulative environment impact assessment (CEIA) undertaken was not adhering to universally accepted scientific parameters, and therefore, bad in law. This was contested on the ground that under the Indian environment legislation scenario there are no known "universally accepted scientific parameters" for (CEIA) study. First the NGT categorically found that CEIA was required as per the precautionary principle and sustainable development. Second, it stated that the value of foreign judgment depends upon the persuasive force of their reasoning. Taking the example of the principles of sustainable development and precautionary principle—both developed in international law and then domesticated in Indian law—the Court forcefully argued that international standards may be applied in the Indian context if so required.

The NGT's keenness to adopt best international practices and standards and adapt them to the Indian circumstances is a welcome development. It reflects judicial astuteness in using a well-grounded example to support such a step. In many ways it also preserves the interpretative flexibility of the NGT in regard to international practices to address domestic problems.

In the case of *Jeet Singh Kanwar and Another v MoEF and Others* (2013), environmental clearance granted by the MoEF for the installation and operation and of a power plant in the village of Dhanras in Chhattisgarh was challenged by two residents of that village. The court relied on a judgment of the Supreme Court relating to mining activity in the Delhi–Haryana border (*M C Mehta v Union of India* (2004) and quoted that when in doubt (as to the environmental impact of allowing an activity or the negative economic impact of stopping an activity), protection of environment would take precedence over economic interest. Again applying the precautionary principle, the NGT ruled the well-laid out burden of proof test that whoever is proposing change will have to adduce the evidence that the proposed development is sustainable. And, in this case the project proponent failed to discharge such a burden of proof.

The project was proposed to be located near Korba, a critically polluted area, and therefore, affected by a moratorium established by MoEF in 2010 on allowing for further industrial activity in such heavily polluted areas. More pertinently, the environmental clearance was granted within five days of this 2010 notification, which the NGT termed as "non-application of mind." Further it extended the Supreme Court's interpretation of precautionary principle to contend

> (that) economic interest shall be put in the backseat when it is found that degradation of the environment would be long lasting and excessive. It need not be reiterated that the MOEF was aware of such environmental degradation and that is why the moratorium imposed earlier is still continuing. Ordinarily, nobody will take further risk of adding pollution load in the area which is already identified as critically polluted one. It appears that the MOEF did not seriously examine the relevant aspects prior to granting the EC in question (*Jeet Singh Kanwar and Another v MOEF and Others* (2013), para 24).

In many ways this was an indictment of the expert appraisal committee Expert Advisory Committee (EAC)[9] and the MoEF. Usually the courts have been reticent of challenging opinions of experts in regulatory bodies and have followed the convention of deferring to expert opinion (*Akhil Bharat Goseva Sangh v State of Andhra Pradesh* (2006). The NGT has been an exception in this regard. In many such environmental clearance cases, it has questioned clearances granted by the EAC–MoEF on the procedural grounds of non-application of mind or its failure to take into consideration all material factors. Inclusion of expert members within the NGT may perhaps explain the NGT's lack of reticence, and indeed, eagerness to question and challenge expert opinions.

M P Patil v Union of India (2014) is yet another interesting case where the NGT pushed the envelope further even while partially dismissing the challenge. The case involved not only ecological risk, but also great social impact since the project-affected persons—the group to be resettled and rehabilitated (R&R)—were particularly large. First, while reiterating the need to balance between environment and development as is entailed by the principle of sustainable development, it stated that given the considerable impact of the project on human displacement, the R&R scheme would be one of the most pertinent aspects to be considered by the EAC. Following from this the R&R scheme had to be elaborately deliberated upon by the project proponent and considered by the EAC and the views of the general public should be heard on this issue specifically during the public hearing.

Second,the NGT made a passionate plea for consideration of factors such as the impact on the livelihood of those who are primarily dependant on natural resources sourced from their immediate environment. It stated:

> In the framework of Indian economy, there is a relation between poverty and environment. Poverty and degraded environment are closely inter-related, especially where people depend primarily on natural resources based on their immediate environment for their livelihood. Restoring natural systems and improving natural resource management practices at the grass root level are central to a strategy to eliminate poverty (*M P Patil v Union of India* (2014), para 69).

This is markedly different from the Supreme Court's reductionist utilitarian reasoning. The NGT's reasoning accepts the reality of large groups of tribal population and forest-dwellers are dependent on the natural environment for their livelihood needs, and therefore, preservation and continued access to such natural environment is necessary for their existence. In case, access is denied due to an economic project (which may be beneficial to the larger public), it will lead to poverty and extreme deprivation. R&R for such projects, therefore, needs to address this reality and provide sustainable alternatives.

Rights of Access for Tribals

This is also in consonance with the legislative trends in environmental protection, wherein there has been growing realistion leading to statutory recognition of the rights of persons dependant on natural resources accessed from their immediate environments. Thus, in 2006, Parliament passed the landmark Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, recognising the historical wrongs that were perpetuated by colonial legislations (for example, Indian Forest Act of 1927) in excluding local persons from accessing the forest. It recognises the rights of tenure and access for the tribal communities and other forest-dwelling communities.

Third, the NGT also commented on the rationale behind the public hearing process as is provided for under the EIA notification. Relying on an earlier Delhi High Court judgment (*Samarth Trust v Union of India* (2010), referring to public hearing as a form of participatory justice, the NGT contended the objective of the exercise is to record the positive and negative aspects of the proposed project and apprised the EAC of ground realities. This is an important judicial clarification, especially given that, certain provisions of the EIA 2006 notification seem to suggest that the procedure itself may be ignored in case of unfavourable circumstances. It also underlines the importance of the public hearing process not only from the perspective of project-affected persons. It shows that it is critical to the regulatory process itself in

feeding important ground information to the regulator. Moreover, dismissing the respondent's contention that villager's apprehension registered during the public hearing did not have a scientific basis, and therefore, should be dismissed as mere apprehensions, the NGT contended that the onus was on the project proponent to prove that the apprehensions were ill-founded along with the positive obligation to prove that the project was

> not likely to do any environmental damage or cause deprivation of the livelihood and income of the project-affected persons. The onus squarely lies upon the NTPC to bring the establishment and operation of the project within the ambit of balanced sustained development (*M P Patil v Union of India* (2014), para 87).

Finally, the NGT only partially allowed the challenge by concluding that given the public utility of the project it could not be entirely dismissive of the project. However, it did pass several detailed directions for the EAC to review the environmental clearance including considering imposition of penalty on the project proponent for its inability to complete the R&R scheme and undertaking a site visit to record the views of project displaced or PAPs.

Perspective of Social Justice

Antarsingh Patel and Ors v Union of India (2012) was a similar case, in which the Maheshwar Hydro Power Project was challenged by project-affected persons. The NGT attempted to secure better legal cover for the rights of the project-affected persons by stating,

> It is no longer res integra that the benefits of developmental activities must go to the local people and their quality of life must improve instead of driving them to a disadvantageous position. Depriving them of the facilities which they were already enjoying, but are likely to be deprived of due to the proposed Hydro Electric project would be contrary to the law. Citizens are at the centre of development and as such all efforts are required to be made to avoid any hardships to the affected persons (*Antarsingh Patel and Ors v Union of India* (2012), para 15).

Here again, the NGT allowed the project to go ahead on the ground that the project had been constructed at a huge cost of public money, and therefore, it was pragmatic to allow it function. However, it sought to secure the interest of the project-affected persons by mandating that the aim would be to mitigate their losses, and consequently, a strict adherence to the R&R plan was absolutely essential. And failure of which could become a ground for the cancellation of the environmental clearance granted. Thus, although the statutory mandate of the NGT is limited and does not explicitly extend to R&R polices, it specified that since they are mentioned as one of the conditions for the grant of environmental clearances, they will fall within the ambit of consideration of the NGT. This also opens up an interesting social justice perspective to this entire debate on sustainable development.

Sudiep Srivastava v Union of India (2014) is another interesting case, because the NGT sought to develop an ethical standard of review for administrative actions. This case involved a challenge against the forest clearance that was granted for the Parsa East and Kante-Basan captive coal blocks (referred to as PEKB coal blocks) in Chhattisgarh. Forest clearance needs to be taken from the MoEF, when there is diversion of forest for non-forest purposes, mining being one such non-forest use. This is a statutory requirement under the Forest (Conservation) Act, 1980, which mandates that an expert committee—Forest Advisory Committee (FAC)—to advise the MoEF on such applications.

In this case the FAC advised the MoEF to deny forest clearance. However, the MoEF overruled the FAC to grant Stage I approval for forest clearance to the project applicant.

There were primarily two legal issues that the NGT addressed: the nature and scope of functioning of the FAC and what is the standard of review for administrative decisions applying the principle of sustainable development. On the first point, the NGT ruled that the FAC's role was advisory, and therefore, it was not obligatory on the MoEF. The FAC is a body with technical knowledge and the faculty to conduct site visits, and therefore, it is a competent body whose advice the MoEF is obligated to consider, while passing a "reasoned decision." A reasoned decision meant one which relied on appropriate reasoning based on data. Second, the doctrine of proportionality will be applicable—in terms of all relevant factors have to be taken into account, decision is in accordance with legislative policy and that it is consistent with principles of sustainable development. The NGT will undertake a procedural review to establish that the decision-making process was fair, fully informed and free from bias. Once it is established that the decision was fair, the doctrine of margin of appreciation will favour the decision-maker.

The NGT, therefore, seems to be merely alluding to a procedural review of the administrative decision for checking arbitrariness. However, it frames it as the following question: whether the minister's decision was fair and fully informed and consistent with the principle of sustainable development?

Interestingly, NGT relies on a Supreme Court decision on *Lafarge Umiam Mining Private Limited v Union of India and Ors* (2011) to underline that there is no broad definition of "sustainable development", and therefore, it would depend on the facts of each case. Who then is to determine that what is the substantive criterion for establishing the contours of the principle of sustainable development for each case? The obvious answer would be the judiciary or in this case the NGT. And this is exactly what the NGT goes on to do in the context of this case (although in a largely implicit manner). The NGT gave equal consideration to both developmental and environmental factors, and specifically held that developmental considerations cannot be presumed to overrule environmental factors in every case! In this case, the NGT found that

> The FAC did not examine all the relevant facts and circumstances while rendering its advice and to cap it the Minister acted arbitrarily and rejected the FACs advice for the reasons having no basis either in any authoritative study or experience in the relevant fields. In short, the reasons adduced by the Minister fail to outweigh the advice rendered by the FAC......It is therefore, just and necessary to remand back the entire case to the Minister with appropriate directions to get a fresh advice from the FAC on the material issues in the present case and to reconsider the entire matter afresh in accordance with law (*Lafarge Umiam Mining Private Limited v Union of India and Ors* (2011), para 49).

The NGT therefore went on to quash the minister's order and directed the FAC to reconsider, again underlining the road

travelled by the judiciary in India from abject judicial deference to expert bodies to that of substantive review of their advice in specific cases.

4 Conclusions

In many ways the Sudiep Srivastava case can be characterised as the Keshavananda Bharati moment in Indian environmental law. In the famous constitutional case of *Keshavananda Bharati v State of Kerala and Another* (1973), the Supreme Court propounded the contention that there is a basic structure of the Constitution which is inviolate and cannot be amended through constitutional amendments. Interestingly, the Supreme Court has not clearly specified what constitutes this basic structure except from securing for itself the moral and legal position to determine what constitutes this basic structure in an incremental manner. This has come to be known as the basic structure doctrine. Similarly, in the Sudiep Srivastava case, the NGT has mandated the application of the principle of sustainable development without determining the contours of the principle, and therefore, securing for itself the legal position to determine the contours of the principle in the context of the facts of each case. In effect, this substantively expands the nature and scale of judicial review as practised by the NGT. It is especially significant because the NGT is not any other Court, but is a tribunal with limited jurisdiction and powers.

The NGT in *S P Muthuraman v Union of India and Ors* (2015) declared two office memorandums (dated 12 December 2012 and 27 June 2013) of the MoEF ultra vires and quashed them. The NGT elaborated on its jurisdiction and powers, by stating the following:

> The legislature in its wisdom worded the provisions relating to the jurisdiction of the Tribunal (Sections 14 to 17 of the Act of 2010) very widely, and with a clear intent to provide this Tribunal with jurisdiction of a very wide magnitude…. it is quite clear that this Tribunal is having all the trappings of a Court and is conferred with the twin powers of judicial as well as merit review (*S P Muthuraman v Union of India and Ors* (2015), para 90, p 112).

This makes abundantly clear that the NGT is aware of its limited jurisdiction as a tribunal, and is therefore, keen to expand its jurisdiction to function as a full environmental court. The NGT's discourse on sustainable development should be seen in this context as another exemplar of its drive to expand its jurisdiction through substantiation of this principle.

The NGT has made a determined effort to move away from the Supreme Court's simplistic utilitarian (majoritarian) understanding of sustainable development, which inordinately focuses on clean up and pollution control rather than on prevention. Further, it has sought to highlight the subsistence aspects of natural resource management and the relationship between environmental degradation and poverty. More significantly, the NGT has sought to strengthen procedural safeguards which ensure the value of public participation in environmental decision-making. In developing such a range of judicial innovations, the NGT has been successful in avoiding the cul-de-sac which confronted the Supreme Court in being forced to make a trade-off between the right to development and the right to clean environment. The focus has therefore shifted from intergenerational equity aspect of sustainable development to exploring ways and means to establish intragenerational equity.

One can discern the emerging contour of a sui generis notion of environmental justice from the NGT's jurisprudence on the principle of sustainable development. Procedurally speaking, the NGT is strongly advocating for inclusiveness in environmental decision-making. This is evident from the re-imagination of public hearing within EIA process. The idea that this is a form of participatory justice itself is an important realisation on the part of the judiciary. This substantively departs from the legal text of the EIA Notification 2006. Under the notification, the regulatory authority is empowered to do away with public hearing owing to the local situation. This possibly refers to a law and order problem. The NGT has, however, repeatedly referred to the importance of public hearing not only as a method for ensuring that stakeholders are heard, but also substantively because it brings to the notice of the regulators' considerations which may be lost if the EIA process is reduced to a regulatory hurdle to be negotiated between the regulator and the applicant.

Independence and accountability of regulatory institutions is also an important feature of sustainable development. The NGT recognises the value in reducing arbitrariness in environmental decision-making by formulating a standard of review for administrative decisions. Thus, the jurisdictional integrity of independent regulatory experts, such as the EAC, in the context of EIAs, the FAC under the Forest (Conservation) Act, 1980 or the National Board for Wildlife under the Wildlife Protection Act, 1972 should be respected and trespassed by the executive only in exceptional circumstances.

More interestingly, the NGT also seems to be suggesting a substantive criterion for evaluating regulatory decisions. First, the interests and concerns most affected physically by decisions need to be given central consideration in any environmental decision. The NGT understands and appreciates that for a large majority of rural communities it is their dependency on natural resources that ensures sustenance. Any decision that substantially affects this dependence should be carefully evaluated. Simplistic presumptions that any decision that furthers the cause of economic development (usually large developmental projects such as mines, power projects, roads, etc) has an automatic positive impact both on the local population and the general public should be abandoned. A more nuanced understanding of the life patterns of locally-affected persons and acceptance of their opinions as both legitimate and required is a necessary first step towards environmental justice. Second, the principle of prevention has to be adopted in cases where the carrying capacity of the micro-environment has been exhausted. The CEIA of developmental decisions has to be undertaken and results of such assessments should guide environmental decision-making.

Despite such advancements, NGT's discourse on sustainable development remains painfully precarious. As an institution it

faces two challenges. First, given its limited jurisdiction and, that the Supreme Court is the appellate authority for the NGT, cooperation and backing of the Supreme Court is critical. Experience of the first five years of its operation suggests that the judicial tango between the Supreme Court and the NGT has been superb. However, this is very much dependant on personal equations between the chairperson (who has to be a former Supreme Court judge) and the judges in the Supreme Court. This may not necessarily be the case in the future. Second, the NGT has been aggressively pushing for environmental reforms in areas such as urban transportation (ordering the banning of diesel transportation vehicles more than 10 years old from National Capital Region) and this has not been welcomed by the executive (Dash 2015).

Nevertheless despite these challenges, the judicial discourse on sustainable development as developed by the NGT can potentially enrich Indian environmental law and for that reason alone, environmental lawyers, activists and academicians remain hopeful of it gaining sufficient traction to become firmly entrenched within the Indian legal regime. In this regard the contribution of both the Supreme Court (in reiterating the principle of sustainable development) and Parliament (in giving it statutory recognition) deserves appreciation.

NOTES

1 For instance, the Supreme Court developed the principle of "absolute liability" in the Oleum Gas Leak Case (*M C Mehta v Union of India and Ors* (1987)) as a principle of liability to be applied to those engaged in hazardous and inherently dangerous activity. This was a direct response to the Bhopal gas tragedy.

2 Relying on *Additional District Magistrate, Jabalpur v Shivakant Shukla* (1976); *Jolly George Varghese v Bank of Cochin* (1980) and *Gramaphone Co of India Ltd v Birendra Bahadur Pandey* (1984) the Court held that rules of customary international law which are not contrary to municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law.

3 The measures specified by the Court with regard to sustainable development for preserving the sociocultural environment of the displaced persons included inter alia integration of the displaced person with the neighbouring villages by organising medical check-up camps, animal husbandry camps, festivals, eye camps, rural development seminars for village workers, etc. Establishment of rehabilitation committees at different levels, respect of traditional beliefs, rituals and rights at the starting of house construction, the day and time of leaving the old house and village and the day and time of occupying the new house, etc. The sacred places at the native villages are being recreated along with their settlements at new sites.

4 *A P Pollution Control Board v Prof M V Nayudu* (1999); and *M C Mehta v Union of India* (2004); *Science and Technology and Natural Resource Policy v Union of India* (2007).

5 The Forest (Conservation) Act (1980), the Environment (Protection) Act (1986) and the Air (Prevention and Control of Pollution) Act (1981).

6 *M C Mehta v Union of India* (1986); *Indian Council for Environmental-Legal Action v Union of India* (1996); *A P Pollution Control Board v MV Nayudu*: (1999).

7 See for instance, PTI (2015) and *DNA* (2015).

8 See for instance, *Manoj Misra v Union of India* (2015); *Nicholas H Almeida v M/S Lenzing Modi Fibres India Pvt* (2013).

9 The Expert Appraisal Committee (EAC) is an advisory committee established by the MoEF in the EIA Notification 2006 to assist it in reviewing EIA reports submitted by project applicants and recommending projects for approval to the regulatory authority. The MoEF acts as the regulatory authority and decides on project approvals based on the advice given by the EAC.

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