

Environmental Courts in comparative perspective : preliminary reflections on the National Green Tribunal of India

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1. Making environmental law sustainable: the role of judiciary, subsidiary but essential.

Environmental law is undoubtedly one of the main pillars of environmental protection, but after many decades it is still suffering in most of the world from implementation. As it has been rightly noticed “almost all nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground”¹. Often the executive powers, unable to enforce it successfully tend to abdicate their responsibilities to the judiciary, regardless of the effectiveness of the penalties concerning environmental infringements and crimes and of the level of expertise of the judicial bodies concerned. As a result, the organization of the courts and their environmental sensibility, as well as the national systems of access to justice, have become crucial issues in the implementation of both the environmental law in general and the principle of sustainable development in particular. This evidence was fully emphasized in the 2002 Johannesburg Principles on the Role of Law and Sustainable Development affirming that “an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law; in the same declaration it was also stressed that “the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty ...”² Certainly, judges cannot replace the legislative and executive branches of government, which

¹ P. Stein, *Why judges are essential to the rule of law and environmental protection*, in T. Greiber (ed.), *Judges and the rule of law. Creating the links: environment, human rights and poverty*, IUCN, Gland, Switzerland and Cambridge, UK, 2006, p. 57.

² Johannesburg Principles on the Role of Law and Sustainable Development Adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002. It is interesting reporting two other principles of the same declaration, linked to the topic of this study: “We agree that the Judiciary has a key role to play in integrating Human

are in charge, respectively, for the elaboration of environmental laws (and regulations), and for their administrative implementation, in the light of the ‘preventive principle’³ still constituting the foundation of any legal environmental protection. To say that the optimal implementation of environmental law must rest on a balance between a comprehensive legislation, an active administration and a vigilant jurisdiction may be regarded as a “truism”, but if we consider the historical development of environmental law in the last fifty years, we will admit that presently the enforcement of the vast and articulated normative corpus of environmental legislation appears to be to be more important than the elaboration of new laws. In fact, in the first stage of the process of construction of environmental law the constitutional and legislative effort was essential to lay down the foundations of the discipline and to rationalize the often random and uncoordinated interventions based on laws of “emergency”. In this situation of “normative vacuum” an important role of the judiciary in was too risky and unjustified. In contrast, at the end of the twentieth century it was clear that the good environmental legislation already produced and stratified was encountering great difficulties in being implemented at the political and the administrative levels, especially in the so-called “developed world”, because of the strong impact it had on established economic activities and old administrative habits. On the contrary, in developing countries often environmental law was not considered as a “second comer” like in the west and was developed in a more organic way, being introduced as a pillar of the constitutional order since its beginning, or through overarching constitutional reforms, like, for example, in India.

At the present stage there are two factors favoring the relevance of the judiciary in environmental matters. On the one hand, the normative autonomy achieved by environmental law is guaranteed by the consolidation of principles which, coming from the international level (that produced mainly soft law), have moved to the national level, building a constitutional environmental order that represents the ground for the creation of Environmental Courts. On the other hand, the affirmation of environmental law as a “law of principles” makes it capable of guiding legislative and administrative powers, but especially the judicial power, both in the interpretation of environmental law and in the direct application of principles to practical cases.

While in the first stage of the development of environmental law the affirmation of a specialized judiciary was hindered by the risk of an excessive expansion of a merely judge-made law in a normative vacuum, presently environmental judges become essential actors for the implementation of an extraordinary vast corpus of environmental law, that encounters the risk of remaining unapplied.

From this perspective the debate on judicial activism appears outdated, because Environmental Courts, far from being substitutes for the legislative powers, provide authority to the environmental legislation through judicial enforcement and interpretation, ensuring consistency and stability to the environmental normative framework. Moreover, the stability guaranteed by a dedicated judiciary will facilitate the administration (often reluctant to apply new environmental norms or principles) but also the private actors, from both sides (economic actors, on which environmental law is having an increasing impact, and civil society organizations, pursuing the dissemination of environmental values, also through an easy access to environmental litigation).

Generally speaking, we can agree with those who say that at this stage of consolidation of environmental law “the all-important role Courts play in (re)shaping the environmental governance

Values set out in the United Nations Millennium Declaration: Freedom, Equality, Solidarity, Tolerance, Respect for Nature and Shared Responsibility into contemporary global civilization by translating these shared values into action through strengthening respect for the Rule of Law both internationally and nationally; We express our conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment.”

³ On the founding role of environmental principles, and, particularly of the preventive principle: N. De Sadeleer, *Environmental principles. From political slogans to legal rules*, Oxford University Press, Oxford, 2002.

landscape” it is reaffirmed.⁴ Keeping this in mind, we cannot be surprised that, especially in developing or recently developed countries, the current trend has been to build up specialized courts and tribunals to deal with environmental cases and to grant an easy access to justice for citizens, NGOs and disadvantaged groups. The 21st century has thus witnessed an astonishing growth of Environmental Courts and Tribunals. A recent comprehensive and updated study has considered that, as of September 2010, around 360 environmental courts and tribunals are in place all around the world, and the majority of them was created in the last 5 years.⁵

The Asian continent is not an exception to this tendency, with the recent creation of Environmental Courts or local Environmental Tribunals in China, India, the Philippines, and Thailand. In the 2010 Asian Judges Symposium on “Environmental Decision Making, the Rule of Law, and Environmental Justice” it was reported that, compared to the European or North-American contexts, “in developing Asia, a key advantage is that resources for capacity building and environmental law expertise may be concentrated upon a smaller number of judges who are specifically selected for their integrity and environmental expertise”.⁶ In this perspective the case of the new National Green Tribunal of India is of great importance, considering also the leading role that the Indian Union can play in the Asian context as a sixty-years long established democracy.

2. Judges and environment: general jurisdictions, green benches, Environmental Courts and Tribunals.

A general view of the way environmental matters are treated by the judiciary all over the world shows a vast quantity of different options, each country having its own specificity related to its legal system, history, and depending on the place assigned to environmental protection in the national normative order (constitutional relevance of the environment against simple legislative status, federal relations conveying unitary or fragmented competences, etc.). To simplify, it is possible to classify them in three categories: the systems handing over environmental matters to general jurisdictions, the systems relying on “internal specialization” of the judicial bodies (creating green benches or green judges without a formal change of the judicial structure), the systems creating innovative “Environmental Courts or Tribunals”.

The first system is widespread in the western countries, especially in Europe and U.S.A, where courts dedicated to the environment are an exception and environmental litigation is normally covered by the traditional courts, following a scheme of allocation of environmental cases to the different judicial bodies (civil, criminal, administrative or constitutional courts), depending on the specific matter treated in each case. The reasons for maintaining environmental litigation in traditional courts are somehow “systemic” : the development of environmental law as a new and ancillary discipline with a limited degree of autonomy, the absence of environment in the original

⁴ L. Kotze - A.R. Paterson (eds), *The Role of the Judiciary in Environmental Governance. Comparative Perspectives*, Preface, Kluwers Law International, London, 2009, p. 23.

⁵ G.Pring - C. Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 2010, available at www.law.uoregon.edu/org/oril/docs/11-2/Pring.pdf, p. 3; according to the authors the more recent examples are: “ Kenya, whose 2010 Constitution requires Parliament to “establish courts with the status of the High Court to hear and determine disputes relating to...the environment and the use and occupation of, and title to, land” (Kenya 2010, art. 10:162(2)(b)). Brazil has just added four new federal ECs in the four Amazon Basin states, and Chile’s legislature is currently considering a bill to create an ET Green Tribunal. England just created its first ET on April 6, 2010, and India’s Parliament passed a “National Green Tribunal” bill on May 1, 2010, in part to counteract the activist “Green Benches” of its Supreme Court”.

⁶ *Background Paper, Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice*, 2010, available at www.adb.org/.../asian-judges-symposium/asian-judges-symposium-background-paper.pdf, p. 9.

framework of constitutions, the reluctance towards a complete reassessment of the judicial system that would be required by the creation of new courts.

The establishment of “green benches” (or single green judges) is an intermediate solution easier to be applied to countries already having a consolidated and “heavy” judicial system, and relatively used in Europe and U.S.A (sometimes there is a trend of informal specialization of specific sections of courts, like for example certain benches of the administrative courts in civil law countries). Pring and Pring rightly noticed that “this model allows the court to manage a caseload where the number and complexity of environmental cases fluctuates, and still ensure that the workload of the court is spread evenly among all the judges. It does not require the public to file in a separate court, which may be in a different location, and it does not require special community education about what constitutes an environmental case. Nor does it necessarily require appointment of judges who are trained in or even interested in environmental law”.⁷

The third model is based on the constitution of Environmental Courts (or Tribunals), specialized Courts dealing only with environmental cases, that are an exception in Europe and USA, but widespread in the rest of the world, according to the increasing number of new Courts indicated by some recent analysis on this subject. Of course the environmental Courts present several advantages: speed in judgments, efficiency, trained and specialized judges accustomed to dealing also with non-judicial experts from the field. Normally this model is easier to apply to new democracies based on recent (or very much revised) Constitutions, where the legal system can be organized on the basis of a structural involvement of the environment within the constitutional rights or the fundamental values.

It is important to notice that the three models are not totally alternative but may coexist, considering for example, that in countries having a judicial review of laws or a Constitutional Court, there can be some Environmental Courts at the base and some Superior Courts having green benches inside them (this is the case of India, after the reform that will be treated in the following pages).

3. The reticence of Europe and USA towards Environmental Courts *versus* the “Australasian model”.

In Europe and USA, whose legal thought may be considered the “cradle” of environmental law, specialized Environmental Tribunals or Courts are exceptions. This is due to the “systemic” reasons listed above (the development of environmental law as a new and ancillary discipline, the absence of environment in the original framework of constitutions, the reluctance towards a reassessment of the judicial system) that have prevented the constitution of new judicial bodies and favored patterns of informal specialization of single judges or benches.

In an overall study on European judges and environment Lavrysen underlines that in countries, having “a dual structure in terms of jurisdiction in disputes, the administrative courts are developing a certain degree of specialization in environmental law, since the settlement of virtually all disputes between citizens and public authorities in environmental matters fall within their remit”.⁸ Some exceptions to this trend may be found, for instance, in Sweden and Austria. Sweden is the first

⁷ G. Pring - C. Pring, *Greening Justice, Creating and Improving Environmental Courts and Tribunals*, The Access Initiative, available at : moef.nic.in/downloads/public-information/Greening%20Justice.pdf, 2009, p. 21.

⁸ L. Lavrysen, *The role of National judges in environmental law*, 2006, available at <http://www.inece.org/newsletter/12/lavrysen.pdf>, p. 6; the author also specifies that in those countries the environmental disputes account for a substantial portion of the administrative disputes and that this leads to a certain kind of specialization as those cases are consistently referred, whether or not on the basis of a legal rule to the same court division or divisions (in Finland one third of the cases of the Supreme Administrative Court concern environmental matters: in Belgium nearly a quarter of the ordinary cases before the Council of State).

European country to create in 1999 an environmental code (followed in 2000 by France⁹), complemented by the institution of Environmental Courts at first and second instance (five Environmental Courts that are attached to five civil districts and one Court attached to a civil court of appeal). According to Pring and Pring, “Sweden’s Environmental Courts are an excellent example of first and second instance courts where the decision-makers include non-lawyer, scientific technical experts, with full judicial powers” where “technical expertise is required because the Swedish system assumes that the burden of investigation rests with the decision-making body, which takes an inquisitorial approach”.¹⁰ The Austrian system, based on a specialized environmental court, the Independent Environmental Senate (composed of 10 judges and 32 legal specialists) is less interesting because its jurisdiction is confined to cases concerning the Environmental Impact Assessment Act and its caseload is very limited.¹¹

The United States have not played a leading role having only one environmental Court (The State of Vermont Environmental Court) and a cluster of quasi-judicial institution disseminated in different States. The Environmental Court of Vermont is a quite established model of green jurisdiction, having extended powers (it takes appeals on a *de novo basis*¹² on a considerable number of environmental statutes), and competent to appoint independent experts responsible to the court.

While Europe and USA showed a considerable reticence in establishing independent green judges the first models of environmental courts came from Oceania, with the experience of the Land and Environment Court of New South Wales, Australia (established in 1979), and the New Zealand Environmental Court (1996). The “Australasian model” is very relevant for the study of the recent development of green justice in India because “both the Supreme Court and the Law Commission of India, which described these experiments as ‘ideal’, have heavily relied on them to define the proposed Environmental Courts system”.¹³

The Land and Environment Court of New South Wales (established under the *Land and Environment Court Act*, 1979)¹⁴ is a “mixed” model composed of judges and expert members (nine technical and conciliation assessors). It is a Court of record (comparable to the Supreme Court of New South Wales) having a jurisdiction that combines appeal, judicial review and enforcement

⁹ On the French environmental code: D. Amirante, *Codification and Technical Rules in Environmental Law: Reflections on the French Experience*, in A. Biondi- M. Cecchetti - S. Grassi - M. Lee (eds.), *Scientific Evidence in European Environmental Rule-Making. The Case of the Landfill and End-of-Life Vehicles Directives*, Kluwer Law International, London. 2003, p. 99.

¹⁰ G. Pring - C. Pring, cit., 2009, p. 56-57. Interestingly the authors underline that “the Swedish Environmental Code lays out general principles, policies, and goals rather than incorporating detailed and specific language, so having technical expertise on the bench is especially important when trying to apply a general law to the technical aspects of cases. Having science-technical expertise on the decision-making body also ensures that weaker parties are not entirely dependent upon technical consultants and lawyers in order to achieve fair, equitable, and affordable remedies. Thus, Sweden has science-technical experts at each court level below the Supreme Court. Expert judges (Environmental Court of Appeal) or technical advisers (Environmental Court) can have a wide variety of backgrounds, although most are chemical engineers, water engineers, or biologists. The lay experts who act as judges are appointed based on a background in industry or environmental management”. A general study on environmental courts in northern Europe is: H.T. Anker, *The role of Courts in environmental law, a Nordic comparative study*, available from: <http://www.nordiskmiljoratt.se/haften/NMT%202009.pdf>.

¹¹ For more information about the Austrian case, see: L. Lavrysen - L. De Geyter, *EU Forum des juges de l’environnement, Summary Report . Organization of the courts and tribunals and prosecution policy in the area of environmental crime*, at <http://www.eufje.org/uploads/documentenbank>, p. 6 ss.

¹² This means that the Court may decide the merits of the decisions it reviews on evidence that is adduced anew before the court, rather than on the evidence showed in the first degree of jurisdiction. According to Pring G - Pring C., cit., 2009, p. 30: “this is a feature criticized by both business and environmental interests because of its additive costs and lack of predictability. Conversely, some appellate courts are limited to review of the record of the lower court and do not take any additional facts into consideration, except in rare instances”.

¹³ R. Sharma, *Green Courts in India: Strengthening Environmental Governance?*, in *LEAD Journal (Law, Environment and Development Journal)*, 4/1., 2008, available at www.lead-journal.org, p. 61.

¹⁴ Australia, Land and Environment Court Act, 1979 (NSW), Section 20 (2).

functions, within the specific field of environmental and planning law. The access to the Court is very easy and open to anyone complaining for violation of the statutes related to environmental and planning law. According to a renowned judge as P. Stein the main results this experience has achieved are: a decrease in the quantity of environmental litigation, an important reduction of the costs of environmental actions, a greater degree of certainty in development projects and in the environmental impact evaluation of the projects.¹⁵

The New Zealand Environment Court is more recent, being established under the Resource Management (Amendment) Act, 1996.¹⁶ Like the New South Wales Court it is an independent specialized Court, composed by judges and environment commissioners, nominated by the government as technical experts.¹⁷ The functions and powers of this Court are more extended than in Australia, covering not only appeals (on a *de novo* basis)¹⁸, but also power to make declarations of law¹⁹, and powers to issue enforcement orders directing a person or an organisation that is causing a nuisance or environmental problem to fix it. The enforcement powers make the Court very effective, and are considered a great advantage because “the Court itself hears cases relating to enforcement and views breaches of environmental legislation seriously ... it can impose and does impose significant fines - enforcement is not at the discretion of the local authorities, as it is in the UK”.²⁰ In the perspective of enlarging the access to environmental justice two more features of this system are underlined by the Report of the Law Commission of India: the right of appeal and the powers of mediation. Concerning the right of appeal to the environmental court we must remember that it extends to any person who makes a submission on resource-consent decisions (i.e. to third parties) and to applicants; third parties may also apply to the Court for an order to enforce the Resource Management Act against anyone else. The function of mediation is very ample because, as it has been noticed, “with the consent of the parties, at *any* time after proceedings are lodged, the Court may ask one or more of its Environment Commissioners to conduct mediation or conciliation to resolve the dispute. The mediation service of the Court is regarded as ‘innovative’ and cost-effective, as its own technically oriented Commissioners act as mediators”²¹. It interesting to notice that the New Zealand Court with reference to this powers has been defined as the “adjudicator of sustainability”.²²

¹⁵ P. Stein, *New directions in the Prevention and Resolution of Environmental Disputes – Specialist Environmental Courts*, Speech at The South-East Asian Regional Symposium On The Judiciary And The Law of Sustainable Development 1999, Paragraph 11, available at http://www.bocsar.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399a

¹⁶ This Act was amending the 1991 Resource management Act, and the Environmental Court replaced the former Planning Tribunal.

¹⁷ In appointing the Judges and Commissioners, the Governor-General must have regard to the need to ensure a mix of knowledge and experience – including commercial and economic affairs; local government; community affairs; planning and resource management; heritage protection; environmental science; architecture; engineering; minerals; and alternative disputes resolution processes.

¹⁸ See the website <http://www.mfe.govt.nz/publications/rma/everyday/court-guide/>. Appeals are on: resource consents, proposed district and regional plans, proposed regional policy statements, designations, heritage orders, recommendations for water conservation orders.

¹⁹ As the cited website explains “the Environment Court can be asked to define or clarify a matter associated with the operation of the RMA. This is called a declaration. For example, a council may apply for a declaration that an activity is not allowed by the RMA or by a council plan. Individuals can also seek a declaration, such as in cases where they consider that they have existing use rights. The Court can declare that a person must adopt the best option to avoid or minimise adverse effects on the environment”.

²⁰ Law Commission of India, *186th Report on Proposal to Constitute Environment Courts*, September, 2003, available at: lawcommissionofindia.nic.in/reports/186th%20report.pdf, p.66.

²¹ R. Sharma, cit, p. 63 On this subject see also Stephen Higgs, *Mediating Sustainability: The Public Interest Mediator in The New Zealand Environment Court*, *Environmental Law*, n. 37, 2007, p. 61.

²² B. C. Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, *Ecology L.Q.* 1, 29, 2002, p. 38.

4. The origins of the National Green Tribunal of India : the centrality of the Supreme Court in a judge-driven reform.

The creation of the National Green Tribunal of India (NGT) has followed a long and faceted process and was determined by several factors: the attention paid by both the coalitions in power during the first decade of the third millennium (the NDA, guided by the BJP, in the first part and UPA, led by the Congress Party, later) and notably the “green turn” in the policy of the UPA government, the necessity to remedy the previous failures of other institutions designed for the enforcement of environmental legislation (like the National Environmental Tribunal, created in 1995 but never implemented and the National Environmental Appellate Authority, nearly unemployed), the international movement towards the creation of environmental courts, the ever growing need to facilitate the access to environmental justice to the average citizens. But interestingly the main factor of this process should be indicated in the judiciary itself, affirming, through several decades of judicial commitment to environment, notably by the Supreme Court, the relevance and necessity of a system of specialized Environmental Courts. It is very revealing that the political origin of this process, the 186th Report of the Law Commission of India (2003), dedicated to “Proposal to constitute Environment Courts”, states in its opening remarks that the proposal was prepared “pursuant to the observations of the Supreme Court of India in four judgments”²³ where “reference was made to the idea of a “multi-faceted” Environmental Court with judicial and technical/scientific inputs”. Without underscoring the weight of political will and the merits of the Parliamentary majority voting the NGT Act in 2010, we could define the establishment of a Green Tribunal in India as a ‘judge-driven reform’. This peculiar feature of the Indian reform is very important because the new green courts were designed according to the needs indicated by the judiciary (and the Supreme Court is undoubtedly one of the leading Indian institutions in the protection of the environment)²⁴ and not on abstract models, even if the reference to comparative law has guided the Indian legislator.

Indian scholars have highlighted the role of the Supreme Court in the foundation and the consolidation of environmental protection in India²⁵, but what is really peculiar is that the Court has been quite innovative, indicating new methods to implement environmental legislation and to resolve environmental disputes in India.²⁶ A not comprehensive list of them would include: “entertaining petitions on behalf of the affected party and inanimate objects, taking *suo motu* action against the polluter, expanding the sphere of litigation, expanding the meaning of existing Constitutional provisions, applying international environmental principles to domestic environmental problems, appointing expert committee to give inputs and monitoring implementation of judicial decisions, making spot visit to assess the environmental problem at the ground level, appointing *amicus curiae* to speak on behalf of the environment, and encouraging petitioners and lawyers to draw the attention of Court about environmental problems through cash award”.²⁷ It is worthwhile to report some of the cases that have pointed out to the legislators the

²³ The Law Commission explicitly quotes the judgments *M.C. Mehta vs. Union of India*, 1986 (2) SCC 176; *Indian Council for Environmental-Legal Action Vs Union of India*: 1996(3)SCC 212; *A.P. Pollution Control Board Vs M.V. Nayudu*:1999(2)SCC 718 and *A.P. Pollution Control Board Vs M.V. Nayudu II*: 2001(2)SCC62,

²⁴ Significantly, some critics have defined the judges of the supreme Court as the ‘Lords of Green Bench’ or ‘Garbage Supervisor’; see S.S. Prakash- P.V.N. Sarma, *Environment Protection vis-a-vis Judicial Activism*, 2 *Supreme Court Journal*, 2, 1998, p. 56.

²⁵ Among others S. Divan – A. Rosencranz, *Environmental Law and Policy in India*, Oxford University Press, Oxford, 2001; A.K. Tiwari, *Environmental Laws in India*, Deep and Deep Publications, New Delhi, 2006; S.C. Shastri, *Environmenta Law*, Eastern Book Company, Lucknow, 2008.

²⁶ M. K. Ramesh, *Environmental Justice: Courts and Beyond*, in *Indian Journal of Environmental law*, 3(1), 2002, p. 20.

²⁷ G. Sahu, *Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence*, *Law, Environment and Development Journal* , 4/1 , 2008, available at <http://www.lead-journal.org/content/08001.pdf>, p. 1.

path to follow to guarantee an open, accessible, technically fit environmental justice to Indian citizens, as indicated also by the Law Commission in its 186th Report.

The first case dates long back (1986) and refers to the need to involve non-legal experts drawn from the scientific field in the solution of environmental litigation. In *M.C Mehta Vs Union of India* the Courts suggests “to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental Courts on a regional basis with one professional Judge and two experts drawn from the ecological sciences research group keeping in view the nature of the case and the expertise required for adjudication. There would of course be a right of appeal to this court from the decision of the Environment Court”.²⁸ Reacting to this and other substantial judgments the Central government apparently took the challenge of the Supreme Court and created the National Environment Tribunal (with an Act passed in 1995, but never implemented) and the National Environment Appellate Authority (NEAA, created with an act passed in 1997) for the limited scope of revision of the administrative decisions on environmental impact assessment. Unfortunately, as stated by the Report of the Law Commission “both these tribunals are non functional and remain only on paper”.²⁹ The Supreme Court had somehow foreseen this result and already stated in 1999 that “it appears to us from what has been stated earlier that things are not quite satisfactory and that there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of Judicial and Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies could certainly undermine the very purpose of those legislations”.³⁰ In the same decision the Court indicates a model, identified in the Land and Environment Court of New South Wales (Australia), because “its jurisdiction combines appeal, judicial review and enforcement functions ... such composition in our opinion is necessary and ideal in environmental matters”.³¹

The need for a stable involvement of experts in judicial cases concerning the environment was underlined by the Court in several other cases, where it appointed some experts committee to have a scientific basis to apply the preventive or the precautionary principle, but the choice to involve such committee is discretionary. An example of the application of the precautionary principle, quoted by the Report of the Law Commission, is *A.P. Pollution Control Board vs. M.V. Nayudu* (2001)³²

²⁸ *M.C Mehta Vs Union of India and Shriram Foods and Fertilizer* [1986 (2) SCC 176]

²⁹ L.C. Report p. 6

³⁰ *A.P Pollution Control Board Vs Prof M.V Nayudu* [1999 (1) SC 140], Para 42 and 43]

³¹ *A.P Pollution Control Board Vs Prof M.V Nayudu* [1999 (1) SC 140], Para 42 and 43].

³² It is interesting to report the description of this case made by the Law Commission : “in *A.P. Pollution Control Board vs. M.V. Nayudu* 1999(2) SCC 718, the Court proceeded to have the claims of the party tested by experts. There the question was whether the industry was a hazardous one and whether, in case it became operational, the chemical ingredients produced would sooner or later percolate into the substratum of the earth, get mixed up with the underground waters which flow into huge lakes which are the main sources of drinking water to two metro cities. The issue was whether the oil derivatives such as hydrogenated castor oil, 12- hydroxystearic acid, dehydrated castor oil, methylated 12-HAS, DCO, fatty acids and by-products like glycerin, spent bleaching earth, carbon and spent nickel catalyst would enter the underground water streams flowing into the water lakes. Nickel, which was part of the residue, it was common ground, would be poisonous, if it percolated into the lakes. The industry filed a report of an expert which was accepted by the appellate authority constituted under sec. 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), which consisted of a retired Judge of the Supreme Court and other experts. The NEAA was permitted to take evidence and obtain technical help from other scientific institutions. The NEAA visited the site, took oral evidence, examined various technical aspects and gave an elaborate report, containing vast scientific data, as to why the industry should not be permitted to operate. It also consulted the Central Ground Water Board. The NEAA

where the Supreme Court set aside a judgment of the High Court (based on the expertise provided by the industry itself) and an order of the NEA Authority given under section 28 of the Water Act, refusing permission to an industry to operate, after considerations of a different opinion. For the Commission this case is “a clear example of the benefit of extensive scientific investigation: if this scientific investigation was not done, the life of millions of citizens in the two cities could have been endangered”. The Commission considers that the precautionary principle is 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 favor of the Industry. But, as the Supreme Court had the benefit of the Reports of these institutions, it could arrive at a different conclusion”.³³ Considering that in this like in many other cases the appointment of an expert body by the Courts was completely discretionary the Law Commission concludes that “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”.³⁴

Another important contribution of the Supreme Court to environmental protection concerns the enlargement of the access to environmental justice through an original development of the Public Interest litigation (PIL) consisting mostly in a liberalization of the traditional rules of *locus standi* in environmental matters. This gave massive opportunities to NGO's and civil society at large to approach the Court in public interest in cases where the aggrieved persons were disadvantaged or difficult to ascertain. The approach of the Court in such cases has emphasized that “any member of the public having sufficient interest may be allowed to initiate the legal process in order to assert diffused and meta-individual rights in environmental problems”.³⁵ Relying on this open approach by the Court PIL litigation has increased enormously, leading to severe criticisms concerning the misuse of this instrument and the risk of engulfing Courts and stopping governmental action. In response to such criticism the Court used corrective mechanisms restricting the access. In relation to environmental protection this recent trend of the Court is resulting in “judicial restraint towards environmental litigations especially challenging infrastructure projects”.³⁶ Like in the case of the

Report went against the industry. When the matter again came before Court, the industry relied upon an earlier order of the A.P. Pollution Control Board that the industry could be permitted to function if certain safeguards were complied with. The industry sought a further opportunity on this limited contention. The Court then referred the matter to the University Department of Chemical Technology, Bombay, to be assisted by the National Geophysical Research Institute, Hyderabad (NGRI). This was done. The reports of these institutions contained an exhaustive detailed discussion of the scientific data which they freshly procured. The NGRI which is the highest scientific body on geology examined the flow of the underground water streams, and its final conclusion “from results of multi-parameter investigations (i.e. field investigations, hydrogeological studies, geophysical investigations, electric resistivity investigation, magnetic survey and tracer studies) carried out in the areas, is that hydraulic connectivity exists across the dolerite dyke located between Choudergudi and Sirsilmukhi facilitating the groundwater movement.... In the post-monsoon scenario, the groundwater table will go up and thereby may result in more groundwater flow across the dyke.” It stated that there was sufficient scope for poisonous residual substitutes like nickel percolating underground and reaching the drinking water sources. On that basis, the Supreme Court set aside the judgment of the High Court and the order of the Authority given under sec. 28 of the Water Act and refused permission for the industry to operate”. (pp. 1

³³ Law Commission of India, *186th Report*, cit., p. 17-18; the case referred to is *A.P. Pollution Control Board vs. M.V. Nayudu*: 2001(2) SCC 62).Report

³⁴ Law Commission of India, *186th Report*, cit., p. 18

³⁵ G. Sahu, cit., p. 5; the case concerned is *RLEK v. State of Uttar Pradesh and Others*, Supreme Court of India, 19 December 1996. .

³⁶ G Sahu, cit., p. 7; it is interesting reporting the opinion of this author about the relations between environmental jurisprudence and development projects: “the subordination of environmental interests to the cause of development was also evident in Supreme Court’s judgment in the PILs challenging the construction of Tehri Dam and the construction of power plant at Dahanu Taluka in Maharashtra, where the government’s own expert committee had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance to the projects had been given by the Ministry of Environment and Forests. In such nature of environmental litigations challenging infrastructure projects, the Court held that in case of conflicting claims relating to the need and the utility of any development project,

appointment of expert members, the creation of environmental Courts open to Public Interest Litigation is aimed at reducing judicial discretionary powers in accepting these actions and to discharge the Supreme Court of a heavy burden of PIL cases that will go (in another form) to the new jurisdiction, making also these action more accessible to the public.

5. Outstanding features of the National Green Tribunal.

The 186th Report of the Law Commission (2003) did not result immediately in the approval of the reform, but was implemented only in 2009 by the freshly re-elected UPA government, that introduced in the Lok Sabha on July 29, through the Environment and Forest Minister Jairam Ramesh, the National Green Tribunal bill, 2009. The Bill was debated diffusely within the Parliament and by the public opinion, receiving several critiques, concentrated mostly on its “promotional” character and its narrow scope. A report from the Access Initiative-India, for instance emphasized that “the narrow and limited scope of jurisdiction, and the narrow scope of remedial orders, would confine the Tribunal's powers” and that it contained “crippling limitations on the claims that can be litigated”.³⁷

Substantial changes were made in the Parliamentary debate (through the introduction of several amendments), widening the access to the Tribunal, assuring appeal to the Supreme Court against its decisions and specifying the number of technical experts involved and the criteria for qualification of members (both judicial and technical). The text was passed in June 2010 and published as The National Green Tribunal Act (n.19 of 2010).

The National Green Tribunal is a federal judicial body whose specific mission is “the effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources”. Considering that the process of setting up the Tribunal will take some time and that for a comprehensive assessment of this institution it is necessary to wait for some practice to be carried on, here I will limit myself to consider three of the more interesting features of the new ‘green judge’ that are: the vast range of its jurisdiction (original and appellate), its composition (integrating judicial members and technical experts) and the open access it will allow to the individuals and the public at large.

The jurisdiction of the tribunal is determined by section 14 of the Act disposing that it covers “all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to the environment) is involved and such question arises out of the implementation of the enactments specified in Schedule I”.³⁸ The meaning of “substantial question relating to environment” is specified at section 2 (m), that determines a wide spectrum of application of the Act. In fact there are two groups of instances to access the NGT. The first is when “there is a direct violation of a specific statutory environmental obligation by a person by which the community at large other than an individual, or group of individual is affected or likely to be affected by the environmental consequences, or the gravity of the damage to the environment or property is substantial or the damage to public health is broadly measurable”. Here the references to “public at large” and “damage to public health” indicate the openness of the new system to public access to environmental litigation, that is in connection with the development of Public Interest Litigation accomplished by the Supreme Court. The second option concerns cases where “the environmental consequences relate to a specific activity or a point source of pollution”. It must be specified that

the conflict had to be resolved by the executive and not by the Courts”. On this subject see also V. Upadhyay, *Changing Judicial Power*, in *Economic and Political Weekly* 3789, 35 (43&44), 2000.

³⁷ 'The Access Initiative-India' Coalition [TAI-India], *How Green Will be the Green Tribunal?*, available at www.accessinitiative.org, p. VI.

³⁸ Schedule I lists the main environmental laws of the Indian union: 1. The Water (Prevention and Control of Pollution) Act, 1974; 2. The Water (Prevention and Control of Pollution) Cess Act, 1977; 3. The Forest (Conservation) Act, 1980; 4. The Air (Prevention and Control of Pollution) Act, 1981; 5. The Environment (Protection) Act, 1986; 6. The Public Liability Insurance Act, 1991; 7. The Biological Diversity Act, 2002.

the Act applies only to civil cases, excluding criminal offences³⁹. The National Green Tribunal will act also as an appellate jurisdiction, a faculty that will strengthen its role and power; at the same time we must remember that section 22 provides that “any person aggrieved by any award, decision or order of the Tribunal may file an appeal to Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal”.

A serious limitation is given by section 14 (3) restricting applications to the Tribunal “within a period of six months from the date on which the cause of action for such dispute first arose” (limit to be extended of a further 60 days period if requested for a valid motivation). According to the first commentaries of the Act “this time-limitation clause appears to be unduly restrictive in certain situation relating to health and pollution”⁴⁰ because the effects of pollution may take years to produce and, mostly, to be perceivable by the victims. Nevertheless it must be noticed that in the case of “application for grant of any compensation or relief or restitution of property or environment” the period is of five years from the date the cause for such compensation or relief arose”.

The most interesting feature of the new Green Tribunal is probably its composition. In fact the NGT Act meets the demand, illustrated by the Supreme court in the cases quoted above, for a Court constituted both of judicial members and experts from the scientific and technical disciplines. Indeed the minimum composition of the Tribunal, as per section 4, will vary from 21 to 41 members: a chairperson (judicial), 10 to 20 full time judicial members, 10 to 20 expert members, all chosen by the Central Government. In the Tribunal there will be a balanced mix of judges and technical experts, with strict qualifications: they have to be holders of a Master in Science (in the field of physical sciences, including five years or life sciences, with a Doctorate Degree) or a Master of Engineering or Technology, and must have, as per section 5 (2) (a) of the Act, a fifteen years experience in a relevant field, including five years of practical experience in the field of environment and forest. The experts may also come from the administrative field, with the requirement of “administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution”, including also members from civil society organizations (NGO’s and others).⁴¹ The limitation of the scientific experts to the field of Science Engineering or Technology, deserves some criticism, because, as it was rightly observed “environmental issues are broad and the issue with respect to 'substantial questions with respect to the environment' cannot be regarded as the sole domain of the Technologists and engineers”, and maybe the criteria for selection could have been broadened.⁴² It is interesting to note that section 4 (2) provides also for additional integration of the Tribunal to be decided on a case-to-case basis by the Chairperson having the power to “invite any one or more person having specialized knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case”.

The last feature to be mentioned in this short and preliminary illustration (the Act is not yet in action) is the quite open *locus standi* established by section 18, reaching the objective to create an accessible environmental justice. In fact the rules of access seem to be as extensive as in the case of the Public Interest litigation before the Supreme Court, admitting not only the persons directly concerned by the dispute, but also a wide number of subjects included in clauses (e) and (f) of section 18(2). Clause (b) grants the faculty to access the Tribunal to “any person aggrieved, including any representative body or organization”, leaving ample space for NGO’s to intervene. This clause will probably relief the Supreme Court of the burden of Public Interest Litigations

³⁹ This is the (pretended) reason why the wildlife act is not included in schedule I.

⁴⁰ G. Nain Gil, *A Green Tribunal for India*, in *Journal of Environmental Law*, 22:3, 2011, p. 470

⁴¹ Section 5(2)(b) of NGT Act.

⁴² The Access Initiative–India’ Coalition [TAI-India], cit., p. 8; the authors propose “to include social scientists and specifically sociologists, qualified social workers, ecologists and environmentalist” and suggest that “The criteria used for selection of non official members to the Forest Advisory Committee (FAC) may be adopted. It should specifically mention disciplines such as Hydrologist, Ecologist, Wildlife Scientist etc.”,

concerning the environment, but at the same time it will not reduce the possibility for disadvantaged subjects (having until now access only through PIL) to approach a jurisdiction that will be probably at a more convenient level.⁴³

6. Comparative conclusions.

The establishment of the National Green Tribunal confirms the commitment of the Indian legal system to environmental protection, pursuing a long-lasting engagement of the State (through several constitutional reforms and a panoply of legislative Acts)⁴⁴ and, first of all, of the judiciary. The Supreme Court, especially, has played a proactive role in the protection of the environmental rights enshrined in the Constitution, by means of an expansive jurisprudence that has determined a significant growth in the access of Indian citizens to environmental justice.

In the Asian context India has a leading role to play, being “the world's largest democracy” able to influence positively not only the other States of the sub-continent but the whole of Asian democracies. With reference to the judicial enforcement of environmental law, that should be considered, as we have seen in this paper, an important condition for sustainable development but also for the sustainability of the legal environmental order, the National Green Tribunal of India seems to be the most comprehensive and promising among the specialized environmental Courts created in Asia over the last decade. In the far East, while democracies like Japan and Korea have opted for the settlement of environmental disputes through administrative bodies (the Environmental Dispute Resolution Commissions), while China, in its ongoing institutional reform process, has set up an articulate system of Environmental Tribunals at the regional and local levels. Other Asian States have organized systems of internal specialization in environmental matters: this is the case of the Philippines, with an extremely articulate system of 117 local and regional trial (environmental) Courts, established by the Supreme Courts rules), or of Indonesia through an informal specialization of singles judges, dating long back. Other countries having developed a rich and interesting environmental jurisprudence, still rely on the ordinary Courts system and especially on proactive Supreme Courts (this is the case of Sri Lanka, Thailand and, to a lesser extent, Malaysia). The Indian subcontinent, having an established tradition of public interest environmental litigation⁴⁵, appears today to be a very active area, with the Environmental Tribunal and other Environmental Courts set up in Pakistan and some reforms still going on in Bangladesh (where the government announced in 2010 the intention to set up 64 Environment Courts at the local level).

In this comparative scenario the establishment of the National Green Tribunal of India in 2010 indicates some interesting achievements of the trend towards the affirmation of environmental courts and raises some interesting questions.

The first achievement concerns the relations between environmental law and scientific evidence. Environmental law scholars have underlined that in environmental matters often the use of technical evidence shelters behind a reference to its objectivity.⁴⁶ According to Romi, for instance, a major task of environmental law is the ‘revelation’ of this false objectivity and therefore the search for effective and transparent procedures aimed at integrating the diverse elements (scientific, political,

⁴³ The Act does not require the establishment of Regional or State Tribunal, as requested by the 186th Report of the Law Commission, but when the Act was passed the Minister Jairam Ramesh assured the Parliament (as it is reported by the press) that issues regarding access would be addressed by the government following a “circuit” approach for the benches of the Tribunal, i.e., the benches would travel around the area of their jurisdiction to hear complaints.

⁴⁴ On the consolidation of the Indian environmental law see also: D. Amirante, *Il consolidamento del diritto ambientale in India*, in E. Roza Acuna (a cura di), *Profili di diritto ambientale . Da Rio de Janeiro a Johannesburg*, Giappichelli, Torino, 2004, p.327.

⁴⁵ On this subject see J. Razzaque, *Public Interest Environmental Litigation in India Pakistan and Bangladesh*, Kluwers Law International, London, 2004.

⁴⁶ For a review of some legal theories on the relationship between law and science in environmental legislation, D. Amirante, cit., 2003.

administrative or legal, according to the public function performed) of normative and judicial decisions.⁴⁷ The recognition of the role of technical experts, becoming stable members of the judicial benches, meets this requirement of effectiveness and transparency. The composition of the National Green Tribunal, assigning to technical experts a substantial role on a 50% basis, appears satisfactory, even if the criteria for eligibility raise some doubts and, as it has been rightly noticed, “the protocol demands that only high placed experts with eminence must access the office”.⁴⁸ Moreover, for developing countries, another important aspect to underline is “that scientific expertise on the Tribunal itself produces an equality of arms and prevents powerful, corporate interests from outgunning claimants in producing expertise which claimants cannot match in what is often public interest litigation”.⁴⁹

Another important lesson to draw from the Indian experience is that the creation of the new Tribunal is not a reform “imposed” to the judiciary; on the contrary, it was requested by the Supreme Court itself. It is likely that this judge-driven reform will not be “rejected” by the judicial system already in activity and that the new judges will integrate with the other judicial authorities without major conflicts. The explicit reference to a list of environmental statutes to define the original jurisdiction of the Tribunal should avoid controversies regarding the definition of what are “environmental matters” (an argument often raised in the west against the establishment of environmental courts) and overlapping jurisdiction.

It is also very important that the Green Tribunal will have the Supreme Court at the top (as appellate judge), capable of playing the role of coordinator and supervisor of the entire system. This is a further element for the integration of Environmental Courts in the general judicial organization.

An additional achievement from the Indian experience concerns the necessity to liberalize the rules for the access to environmental courts, as it was made by section 18 of the Act (according standing to “any person aggrieved, including any representative body or organization”). Along with the reasonably fast time-frame to conclude the judgments, section 18 justifies the conclusion that this legislation “ensures the fundamental right to speedy environmental justice”.⁵⁰

The effective role of the National Green Tribunal can be fully assessed only after some actual experience and through the study of its judgments, elements that will also disclose “the extent to which environmental issues can be ring-fenced from wider social and economic concerns, in an era of sustainable development”.⁵¹ The new Indian system cannot be regarded as a “cookie cutter” or a “fit-for-all model”⁵², but it represents already a point of reference for other Asian democracies, in the perspective of an evolution of their system of environmental enforcement, and a challenge against the traditional reticence of Europe and USA towards “green judges”.

⁴⁷ R. Romi, *Droit et administration de l'environnement*, Montchrestien, Paris, 2001, p. 23.

⁴⁸ C.M. Jariwala, *National Green Tribunal: wither (in)justice?*, paper presented at the Workshop on the Role of Specialist Environmental Courts, University of Delhi, Delhi, Feb. 1-2, 2011; for this author “the non-judicial members' qualifications should be so reframed that only highly eminent experts with micro specialization are appointed rather than making mediocratic or bureaucratic justice” (p. 11 of the paper)

⁴⁹ G. Nain Gil, cit., p. 474.

⁵⁰ M.C. Jariwala, cit., p. 22.

⁵¹ G. Nain Gil, cit., p. 474.

⁵² In this sense G. Pring - C. Pring, cit., 2009, underline that is left to the (political and scientific) promoters of environmental courts and tribunals “to design an institution that fits the legal culture and specific environmental and developmental needs of that country or region” (p. XII).