

Thematic Session 2:

Brief Notes on Presentations and Discussions

Justice Shiranee Tilakawardane¹

- The role of the judge should be a facilitator in issues involving disputes of an environmental nature.
- The traditional approach to cases in disputes before the courts may not be suitable when environmental issues are involved. What is now required is a balancing between the needs of the environment and sustainable economic development.
- There is a dichotomy between judicial decisions and the ground realities if a traditional approach to decision making is taken by the judges.
- Judging environmental cases requires:
 - Interpreting environmental statutes while considering and keeping in mind scientific and economic considerations
 - Taking into account the differing needs of the stakeholders
 - Upholding the rule of law while balancing environmental economic and social/cultural factors
 - Developing innovative and appropriate remedies to meet the demands raised by environmental issues
- Judicial Sensitization to environmental issues is required at all levels which will necessitate appropriate training of judges in relation to all aspects of environmental issues. This may include technical training or appropriate support for the judge to help him understand any technical issues that may be involved.
- What is required is a new approach and perspective even on existing laws so that issues that may be dealt with even within the framework of existing laws by taking a new and novel look at the remedies provided by those laws.
- Regional interaction/meetings at appropriate levels in the SAARC group countries and exchange of data regarding developments taking place in the different jurisdictions.
- Judge-NGO partnerships should be encouraged in order to address environmental issues.

Justice Munib Akhtar²

- The presentation dealt with the scope of the Constitutional Judicial power in relation to addressing environmental issues and the limitations thereon.
- The relevant Constitutional provisions being Articles 184(3) and 199 were explained in the context of enforcement of Fundamental Rights and the foundational case law of the Supreme Court was touched upon as were other cases of the superior courts that served to illustrate the view taken by the courts of environmental issues in the context of Fundamental Rights especially the right to life enshrined in Article 9 and the dignity of man in Article 14.

¹ Judge, Supreme Court of Sri Lanka

² Judge, High Court of Sindh, Pakistan

- The limitations contained in Article 199 and 184(3) were also touched upon, such as the issue of standing and the requirement that the matter be of public importance, but it was clarified that these limitations did not prove as obstacles in the way of the courts while addressing environmental issues.
- More practical limitations on the effective redressal of environmental issues were highlighted and in particular, the following were touched upon:
 - The need to allocate limited judicial resources to serve the various demands on the courts which prevented the setting up of dedicated benches to deal with environmental issues.
 - The need to properly address the problem of implementation of decisions rendered to address environmental issues and mechanisms needed for this purpose was also stressed.
- Other than the superior courts, the possibility of training magistrate to use the existing provisions of Cr.PC to themselves take cognizance of offences under the general law (i.e. PPC) which resulted from acts damaging the environment was also mooted since this could address environmental issues at the purely local level enabling people to seek a remedy directly and immediately available to them.

Syeda Rizwana Hassan³

- Her presentation focused on Public Interest Litigation, its importance, successes and deficiencies.
- The promise of PIL included access to justice, strengthening of democratic government, bridging the gap between the law and the legal system on the one hand and common people on the other and dispelling the culture of impunity that previously enabled many environmental violations to go and remain unaddressed.
- However, it was stressed that PIL was not the only solution to environmental problems.
- PIL has laid down and established the parameters which can enable the judges to do justice in environmental issues. However, for the proper implementation of decisions rendered requires that the judges adopt innovative and robust methods and remedies and if necessary, not shy away from, and take the tough decisions that are sometimes required for this purpose. For example, shutting down industries in which big corporations may have interests.
- While generally satisfied with the development trends of PIL she nonetheless recognized that PIL could be more effective than it had been and there had been reversals from time to time which detracted from PILs effectiveness as a tool in the judicial armoury. The judges, having laid the foundations, needed to do more, and display proper judicial leadership in this regard. They could, for example, take into account the models developed by international law for sustainable and environment friendly development approaches.

³ Executive Director, Bangladesh Environmental Law Association

Mrs. Ashraf Jahan⁴

- She gave a detailed description of the environment tribunals' functioning in Pakistan and the jurisdiction that they exercised under PEPA. The role and importance of the EIA as the executing/prosecuting agency was highlighted.
- Her experience as Chairperson was recounted and the inability of the Sindh Environmental Protection Agency to adequately discharge its statutory duties was highlighted. When she assumed charge of the Tribunal, very few complaints had been filed; explanations were called for this which initially resulted in a lot of positive media coverage and enhanced public awareness, but eventually, the public coverage slowly died down.
- Great attention has been and is being paid to ensure implementation of decisions that are taken and a number of cases have been kept under supervision/observation to ensure proper implementation and follow up. Various examples were given of the dividend paid by a proactive approach in ensuring proper implementation. These examples included construction of a fly over by CDGK without a proper EIA, construction of a high rise building without an EIA, operation of an ice factory in a residential area, discharge of effluent by sugar mills without proper treatment and similar cases. In one case in particular, not only was the respondent convicted, but the business was ordered to be shut down which resulted in the respondent showing his willingness to rectify the mischief caused to the environment at his own expense.
- A number of specific proposals and suggestions were made including the grant of suo moto power to the tribunals' (under suitably controlled conditions), amendments to PEPA and the possibility of pre-trial negotiations in order to enable the respondent itself to come up, if possible, with a mechanism for resolving the acts complained against and thus eliminating the environmental violation. It was also recommended that the requirement of aggrieved person be removed from Environmental cases. As an alternative to penal punishment, it was recommended that the tribunal be able to direct that community services be performed. Environmental audit of companies and strengthening of provincial EPA's along specialized training programs for capacity building were also suggested. It was also proposed to enhance public awareness of environmental laws through appropriate publicity and general acceptance of the idea that pollution is a social crime.

Mr. Shiva Prasad Paudel⁵

- His presentation dealt with development of PIL in Nepal in relation to issues relating to the forest ecosystem. The different ecosystems in Nepal were briefly touched upon and then a number of cases taken to the Supreme Court dealing with various environmental issues were explained one by one. These included a case involving a company allegedly landing a helicopter on Mount Everest, cleaning up of the garbage left in the mountains by hikers, the removal of stone and sand from riverbeds, the defiling of the Gordawri area and the rights of tribal groups to manage forest areas where they lived. The repeated attempts to justify environmental violations on the ground that valuable revenue was being earned was exposed

⁴ Chairperson, Sindh Environmental Protection Tribunal

⁵ Staff Attorney, Pro Public, Nepal

before the Supreme Court as a hollow and false statement and the action taken by the Court in the various cases was explained.

- One aspect of the cases dealt with by the Nepalese Supreme Court which was highlighted was the difference between the approach taken by the Court in dealing with environmental issues on the one hand, and other equally pressing problems such as discrimination against religious minorities and women was also touched upon.

Mr. Ritwick Dutta⁶

- His presentation dealt with Green benches and Tribunals. He explained that although Green benches were introduced in the 1990's in the High Court and the Supreme Court, they subsequently ceased to exist as such. However, the Supreme Court did have a special bench dealing with the specific environmental issue of the forest. This bench assembles on a weekly basis and has made many detailed orders with regard to forest land all over India and is assisted by a special technical committee called the Central Empowered Committee. As a result of this bench, effectively all matters relating to forest land require clearance from the Supreme Court.
- The National Green Tribunal Act 2010 was also highlighted. This has led to the establishment of a National Green Tribunal which comprises of a Chairman and judges who must respectively be a retired Supreme Court judge and retired High court judges as well as technical members having expertise in different fields and disciplines. The Tribunal has both original and appellate jurisdiction in the sense that it can be petitioned directly in relation to environmental issues and is also empowered to entertain appeals against executive orders touching upon the environment. The Tribunal has a wide ranging jurisdiction to deal with substantial questions relating to the Environment. Appeals against its decision go directly to the Supreme Court, thus bypassing the need to go through the High Courts. Although there is a standing requirement in that only an aggrieved person can petition the tribunal, the Tribunal has taken an expansive view of who can qualify in this regard. And this has led to a huge increase in the number of cases that have been filed before the tribunal because its composition includes both judicial and technical members. The Tribunal is not limited merely to a judicial review of executive action but can itself go into the merits of the decision and effectively substitute its own decision for the one complained against.
- In view of the approach taken by the tribunal even in the short time that it has existed, and despite the fact that it is parliaments own creation, it is the State itself which is attempting to obstruct its functioning by, for example, not providing adequate accommodation to house the offices of the tribunal and residences for the tribunal members. The salary of the tribunal members is also much less than that given to members of other tribunals. These attempts appear to have backfired in as much as the Indian Supreme Court has directed that immediate remedial action be taken and has warned that if this does not happen, then the secretary and minister of the concerned ministry would be held liable and accountable.

⁶ Coordinator, Legal Initiative for Forest and Environment, India