

Recommendations from Thematic Session 2: Environmental Adjudication

Chair: Justice Asif Saeed Khan Khosa¹

Co-Chair: Justice Munib Akhtar²

Thematic Session 2, which was asked to consider issues relating to environmental adjudication, proved to be a fruitful venue at which a number of interesting presentations were made which were followed by a lively question and answer session and discussion amongst the panellists and the audience and which resulted in a number of recommendations being made that I have the pleasure and privilege of presenting to the closing session today. Before doing so however, I would very briefly like to touch upon some of the salient points that were placed before the Session by the speakers.

The question of environmental adjudication was approached from different angles and perspectives. Justice Shiranee Tilakawardane gave a riveting presentation on the need to fundamentally rethink the concept of justice in the context of the environment and sustainable economic development. She highlighted the importance of eschewing a traditional and hidebound approach when dealing with environmental issues and pressed the need for judges to be sensitive to the needs and requirements of social justice which required the adoption of innovative remedies and approaches. The role of the judge as the arbiter in balancing different and perhaps competing needs and goals was developed as was the need to take a fresh approach to the interpretation of environmental statutes, upholding the rule of law and balancing environmental, economic and socio-cultural factors. Justice Shiranee noted that judges needed to keep in mind the social impact of their judgments and therefor judicial sensitization to environmental concerns and issues at all levels was urgently required. What was needed was an 'activist' judge in the sense of the judge being able to view the law and to implement it by taking a fresh and different perspective and approach.

Justice Munib Akhtar dealt with the scope and extent of the Constitutional powers of the superior courts in relation to the enforcement of fundamental rights in the context of the environment. The relevant cases were highlighted and the development of environmental law jurisprudence was touched upon. Certain limitations to the exercise of judicial power were both formal and otherwise were also commented upon.

Syeda Rizwana Hasan presented her views on the importance, successes and deficiencies of PIL in the Bangladeshi context. She described the various factors that had made PIL so attractive for the resolution of environmental issues and the manner in which it had been deployed by the courts and to achieve a number of successes. However, certain

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shortcomings were also commented upon and the need for the judges to act proactively and provide judicial leadership was stressed.

Ms. Ashraf Jahan gave the session the benefit of her experience as Chairperson of the Environmental Protection Tribunal, the statutory framework was described and the steps taken by the Tribunal to play an effective role in enforcing environmental laws was described. However, the weaknesses and deficiencies of the executive agencies created by the statute were also highlighted. Illustrative cases were given and a number of detailed suggestions and proposals were made.

Mr. Shiva Prasad Paudel gave a presentation on Public Interest Litigation in the context of the Nepalese forest ecosystem. He referred to, and gave brief description of a number of decisions of the Nepalese Supreme Court which illustrated the sort of issues before the Supreme Court and required redressal.

Mr. Ritwick Dutta gave a talk on Green Benches and Tribunals, particularly the experience of the forest bench of the Supreme Court and the Tribunal set up by the National Green Tribunal Act 2010.

Finally, Mr. Justice Sangay Khandu gave the sessions the benefit of his comments on what had been presented by the panellists.

There then followed a lively discussion in which the various issues raised and highlighted by the panellists and suggestions and proposals made by them were debated. At the conclusion, the Session resolved that the following recommendations be placed before the closing session:

1. Judges and the judiciary at all levels need to be sensitized to environmental issues. This is not to say that judges should be biased or partial in any particular direction when confronted with an environmental issue. What is required is that while strictly adhering to the norms of judicial impartiality judges recognize that the concept of doing justice has undergone a sea change. Justice, in the sense of what judges do, now encompasses social justice and the resolution of environmental issues is an integral aspect of doing social justice.
2. In order for judges to do social justice in the framework of environmental law, Judges should be sensitive to the need to take an innovative approach to the resolution of environmental issues. Thus, they should not limit themselves or their vision to attempting to resolve environmental problems within the framework of traditional tried and tested remedies. Rather, their approach should be flexible and open minded. It should be recognized that the traditional adversarial approach may not be the most effective means to solving environmental problems; it may be necessary to take the inquisitorial approach.
3. While fully recognizing that each SAARC country must in the end act on the basis of its own experience and needs and a 'one size fits all' solution is neither possible nor desirable, it is generally to be accepted that some amount of judicial specialization may be necessary in order to adequately address environmental issues. This specialization may take the shape of green benches in the High Courts and/or the Supreme Court or the setting up of environmental tribunals or some combination of the two. If at all such specialist tribunals or benches are set up, then they must be

adequately resourced, i.e., be supported by proper expert technical assistance and also have their own procedures, which are tailored to the peculiar requirements and needs of environmental adjudication.

4. The jurisdiction of green benches and/or tribunals needs to be carefully determined so that it is, at one and the same time, broad enough to deal with environmental issues of all kinds and yet have adequate safeguards built in to eliminate or at least minimize the possibility of abuse. It is therefore suggested that while environmental tribunals, in particular, may be granted the power to take suo moto notice of and action on environmental law violations, such power must be carefully and properly controlled and conditioned. For example, the law may require that the tribunal give reasons for the exercise of such powers and simultaneously send copies of any notices issued by it to the High Court.
5. The mechanisms of implementation of orders made need to be strengthened. Here again, the need to take an innovative approach is to be emphasized. It is suggested that the tribunals should have the jurisdiction to allow the offending party to rectify or resolve the environmental issue in an acceptable manner, whether by offering restitution or other compensation or taking other suitable actions which may include, but are not limited to, compulsory environmental audits and rehabilitative community services acceptable to the tribunal and the aggrieved party. The High Courts can also take a similar approach in the exercise of constitutional jurisdiction, which in any case has an inherent flexibility in this regard.