

*This paper analyzes the viability of having green courts with dedicated environmental jurisdiction, separate from the general judicial system. In doing so, an effort has been made to take the National Green Tribunal (NGT) of India as a reference point for discussing the advantages and disadvantages of green courts. While acknowledging that both pros and cons of green courts may not specifically overlap with those of specialized courts, there are certain points having reasonable differentia as well as causal nexus between the two sets, given that Environmental Courts form a subset of specialized courts.*

*In this paper, advantages such as expertise, costs of litigation, and expeditiousness have been illustrated with the help of empirical data available in regard to the NGT. Similarly, as a point of comparison, examples from the US administration of justice have been taken to derive a nexus between generalized courts as well as green courts. Though such a comparison between the US judicial system and that of India, in this context, lacks the substantive nature of a natural experiment, the lack of definitive indices for comparison makes a strong case for establishing a relation between the two with the available data.*

*The paper then proceeds to conclude whether green courts, through the analysis, prove to be a feasible system of adjudication.*

## **I. INTRODUCTION**

In 1973, Scott Whitney, while considering the feasibility of setting up Environmental Courts in the US, drew an analogy with the United States Tax Courts<sup>[1]</sup>. While doing so, he noted how the Tax Courts were advantageous in respect to five basic aspects. First, he suggested, the complexities of tax adjudication require the special expertise that a specialized court could best provide. Next, he suggested that such a specialized tribunal would free the “regular” courts of a significant and steadily increasing workload. Third, he claimed that a specialized court would achieve a degree of uniformity or at least a consistency in its decisions that was lacking in the regular courts. Fourth, by relegating most tax litigation to a special court, it was anticipated that greater dispatch would be achieved in the resolution of controversies. Finally, it was predicted that an independent tax tribunal would allay public mistrust of a system that previously had combined tax assessment and adjudication within a single body.

40 years hence, the Tax Courts seem to have achieved their purpose. 40 years hence, however, Environmental Courts are still a topic of much debate and contemplation.<sup>[2]</sup> Since then, Environmental Courts have been established in more than 41 countries.<sup>[3]</sup> However,

this notion does not do justice to the more important questions that the interaction of Judiciary and Environmental disputes often raises. Though it has been noted before that almost all nations, including developing ones, have basic environmental protection laws in place, an enormous gap still exists between the letter of the law and what is actually happening on the ground.<sup>[4]</sup> To draw conclusions about the effectiveness of an environmentally-dedicated judicial system, one first needs to understand the workings of such a proposed system and to analyze the benefits it has on the adjudication process.

The National Green Tribunal (NGT), set up in India in 2010, gives a context to the questions that arise when discussing the topic and gives a contextual understanding of the answers sought through them. This paper analyses the pros and cons of having Green Courts and, with the example of the NGT, analyses the relevant statistics to understand whether such green courts are a way forward.

The three major questions this paper intends to answer, through a comparative analysis of the pros, cons and contextual answers from the NGT, can be summed up as follows: what is the capacity of the courts to make fair judgments in cases involving complex scientific issues?<sup>[5]</sup> Does the process correspond to the sense of public urgency associated with environmental cases, i.e., the time of adjudication? Does the existing procedural law create a hurdle in the need for simplicity in adjudication of environmental law cases?<sup>[6]</sup>

## II. ADVANTAGES OF GREEN COURTS

The advantages of specialization include improved judicial decision-making through the use of judicial expertise, counsels' familiarity with the subject matter and reduced backlogs in the generalist courts, and more efficient court processes because of judges' expertise.<sup>[7]</sup> In relation to the latter point, from a judicial system efficiency point of view, it can be argued that when jurisdiction for a specialized field of the law is assigned to a special court, judges in the general jurisdiction courts no longer have to wrestle with, or expend the effort to remain current on, the issues in that field of the law. With responsibility for remaining current in fewer fields of the law, their research efficiency is increased. On the other hand, from a legal system efficiency point of view, it has been argued that specialized courts are useful because lawyers who appear before a generalist judge, particularly in unusually complex cases involving subject matter or legal issues with which the generalist judge may be only marginally familiar, typically detail to excess all conceivably relevant and useful information on the record. They do so both to educate the judge and to lay the groundwork for an appeal if the judge's decision fails to grasp the nature of the dispute and the elements of the law that compel its resolution. These attorneys provide extensive background material and develop a comprehensive legal framework through numerous briefs and

motions to maximize the judge’s access to information that is favorable to their case. The costs to the litigants and to the judicial system typically are heavy, as is the impact on public access to the courts because of expense. Specialized court judges, by contrast, typically do not need to be educated by the bar and, given their expertise, are much more capable of reducing the scope of the legal framework to the vital issues on which resolution of the case depends. Because the litigants have more confidence in the abilities and expertise of the specialized court judges, counsel feels less compelled to establish a comprehensive record, and cost and delay are commensurately reduced.<sup>[8]</sup> While such judicial and legal efficiencies are generally associated with specialized courts, other advantages of such courts are aptly applicable to green courts, as discussed below.

#### A. EXPERTISE

“Substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable.”<sup>[9]</sup> Justice Bazelon’s opinion in the D.C. circuit case has been resounded by the scholars.<sup>[10]</sup> Law, science, and medicine are large and increasingly complex fields that require not only extensive education and training but also extensive practical experience. While some litigators and judges readily accept that they lack the basic scientific training necessary to decide technical issues that come before them,<sup>[11]</sup> many judges do not recognize it when decisions involve scientific issues.

The need for an environmentally dedicated judicial system with experts on the bench was felt long before the NGT was established in India—for almost 25 years. In 1986, in a case concerning Environment,<sup>[12]</sup> the Supreme Court of India stated as follows:

“[T]o 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”

Following a feeble attempt made by the then Government of India to create a body like the one envisioned by the Supreme Court, the Court in a later judgment again stressed the need for experts on the Bench. The Court asserted 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; the Court

additionally noted that defects in the constitution of these bodies could certainly undermine the very purpose of those legislations.<sup>[13]</sup> Finally, in 2010, the NGT was established as a federal judicial body with the specific mission of effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources. As Amirante points out,<sup>[14]</sup> 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 of the NGT Act, will vary from 21 to 41 members: a chairperson (judicial), 10 to 20 full-time judicial members, and 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, all of whom meet strict qualifications. As of today, the NGT consists of 8 Judicial members, including the Chairperson, and 8 Expert members,<sup>[15]</sup> with a steep demand for a larger quorum as the court's caseload increases by the day. Though expeditiousness as a virtue of such green Courts will be discussed at length below, one can safely assume the causal nexus between expertise at the bench and expeditiousness, given that instead of appointing Court expert committees the Green Courts can directly delve into the matter, saving precious time. Moreover, judicial activism can be lent greater credibility in case of specialized judges who are experts in the fields of environment and related subjects.

In the context of Sweden, it has been noted that having science-technical expertise within 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.<sup>[16]</sup>

Judge Brian J. Preston, while discussing the advantages of the Specialization from which Environmental Courts in the New South Wales, Australia, have benefitted, states that "Specialization was not seen to be an end, but rather a means to an end. It was envisaged that a specialist court could more ably deliver consistency in decision-making, decrease delays (through its understanding of the characteristics of environmental disputes) and facilitate the development of environmental laws, policies and principles. These aims have been realized in practice."<sup>[17]</sup>

As opposed to this, the *Chevron-deference doctrine*, established in the U.S. by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>[18]</sup> raises the issue of how courts should treat agency interpretations of statutes that require that agency to take some action. In that case, the Supreme Court held that courts should defer to agency interpretations of such statutes unless they are unreasonable. The lack of expertise on the bench thus favors the agency's construction of terms of a statute, often favoring its goals.

This becomes clear from the fact that in the above case, the Court itself noted that agencies have technical expertise in the field in which they are acting, and agencies are therefore in a better position to make appropriate policy decisions as part of a large and complex regulatory scheme. Courts, on the other hand, lack such expertise. The Court specifically acknowledged that “judges are not experts in the field” and thus judges “may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”

This issue of expertise is discussed further under the title of costs of litigation to elucidate how experts on the bench also work towards saving the costs judicial process.

## B. COSTS OF LITIGATION

While both the expeditiousness and accessibility aspects of green courts, discussed below, reduce the costs of litigation to a great extent, other features go a long way to decrease litigation costs and save citizens’ tax dollars.

A case in point is the availability of expert members on the Bench. Usually courts devoid of expert judges on the panel are forced to appoint expert committees that take much of the time of the Court and lengthen the judicial process, increasing costs for the litigants. Increased availability of such expert members lends efficiency to the adjudicatory process, thereby making the justice delivery system more coherent and less time-consuming. This aspect curbs the costs of litigation to a great extent.

Also, while non-green courts are forced to appoint such expert committees, the committees need to be compensated either from funds of the Court or by the Parties themselves, which also affects the litigation costs. Rule 706 under the Federal Rules of Evidence, in the US, in regard to compensation of expert witnesses, lays down as follows:

“Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

1. in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
2. in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.”

Under the first option, the funds allocated to Courts are through tax-payer dollars, thus indirectly charging the nation’s population with the cost of appointing expert witnesses.

Under the second option, litigants are charged directly for appointing such expert witnesses. Appointment of expert witnesses has other issues plaguing the process. Deason, in her article titled “Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference,” argues that “this [expert] testimony is likely to receive more weight even when all things are *not* equal, when it does not necessarily deserve more weight”.<sup>[19]</sup> Of particular concern is the potential that partiality and deference will operate in tandem—that the appointment of an expert with views favoring one party will be combined with a tendency on the part of the decision-maker to defer to that expert. Deason lays out different kinds of issues that are faced by appointment of expert witness, ranging from expert partisanship to influence of social and individual context.

While it is impossible to remove the human element of bias, even from judges, it can be assumed that impartiality would, if at all, be more stubbornly kept while an expert is on the bench as a part of the justice delivery system than by someone appointed as an expert by the Court. Costs are further decreased when fora are readily available to the population at large, with wide locus standi and division into five zonal benches. This saves the litigators important money, as well as time that would otherwise have been spent in traveling from one place to another. It is a legitimate argument against such zonal benches that district courts and civil courts available in every district could well be a more convenient replacement to such zonal benches. However, the level of expertise available with such zonal benches in environmental matters can hardly be compared with no non-judicial expertise available to general courts on the bench at the district/state level.

### C. UNIFORMITY

“Better that they (lawyers and judges) should stray as they are straying in the wilderness of precedents with all the snares and entanglements of dicta, than that they should lose the divine impulse to move forward and upward in the slow and toilsome process of renewing the foundations and structure of Justice upon earth.” The vice of law uniformity was thus elucidated by Mr. Justice Cardozo of the New York Court of Appeals.<sup>[20]</sup> Uniformity in laws has been the bedrock of equality of laws and equal protection of laws. Authors have argued that a lack of uniformity among statutes dealing with the same problems is further compounded by overlapping enforcement efforts and corresponding lack of coordination and uneven enforcement of existing laws. Uniformity in available laws and enforcement eliminates any competitive advantage that an enterprise might find in locating in one State rather than another. It assists State’s lacking strong environmental provisions from becoming dumping grounds for waste. In addition, uniformity facilitates cooperation among the States and between the States and the Federal Government.<sup>[21]</sup> Having structured Green

Courts with specific hierarchy will help inculcate this uniformity.

A case in point is when, on February 18<sup>th</sup>, 2015, the Central Zonal Bench of the NGT was faced with a dispute relating to illegal mining and collusion between the various actors in the process.<sup>[22]</sup> The matter seemed of utmost concern both to the public and the judiciary—the cause was plaguing the economy of the state. Moreover, the case concerned the Pandora’s box claim of the petitioners relating to the mining leases of minor minerals. Instead of giving rise to a multiplicity of litigation and applying another set of laws and rules, the Zonal Bench cited a decision of the Principal Bench of the NGT, which had already dealt with a similar issue and disposed of the petitions. Similarly, on a procedural question involving the limitation period to challenge an environmental clearance granted to a central effluent treatment plant, the Western Zonal Bench of the NGT in *Variya Gandabhai v. Union of India and Ors.*,<sup>[23]</sup> citing the earlier judgment<sup>[24]</sup> of the Principal Bench, dismissed the petition on grounds of lacking sufficient cause for condoning delay.

In the U.S., a lack of structured hierarchy often leads to contradicting decisions from different Courts in different states. In 2007, the Sixth Circuit Court of Appeals held that the five-year statute of limitations does not apply to violations of New Source Review (“NSR”) requirements.<sup>[25]</sup> While the vast majority of district courts that have addressed this issue to date have held that the statute of limitations applies to penalty claims for NSR permitting violations,<sup>[26]</sup> the Sixth Circuit is the second federal appellate court to reach the opposite conclusion. Interestingly, the Sixth Circuit’s decision also departs from the reasoning of those few courts that have found that the failure to obtain an NSR permit is a continuing violation. These minority courts have typically held that the failure to obtain a preconstruction permit is a continuing violation, but they have not overtly distinguished between the obligation to obtain a construction permit and the obligation to comply with the terms of a permit once it is issued.<sup>[27]</sup> The Sixth Circuit, on the other hand, explicitly conflates these two distinct requirements, finding that the obligation to obtain a construction permit implicitly includes the obligation to obtain and comply with legally-required permit terms.<sup>[28]</sup>

The above examples, detailing the application of laws by different civil and green courts, help us delve into the dynamics of the uniformity of application of laws as applied by the green courts in contradistinction to other courts.

#### D. EXPEDITIOUSNESS

Comparing expeditiousness between two sets of judicial systems is not a natural experiment, and this analysis needs to be qualified with the fact that many tangible and

intangible determinants affect the urgency with which a judicial process takes place: some of these factors include funding, caseload of the Court, public participation, and support for a particular case. However, in the absence of a comparative index, an attempt is made here to give a point of comparison to realize the timeline in green courts and non-green courts considering similar facts and law.

In the U.S. case *Save the Plastic Bag Coalition v. Save the Manhattan Beach*,<sup>[29]</sup> the California Supreme Court upheld the City of Manhattan Beach's decision to ban plastic bags on the basis of a negative declaration. The case was admitted for judicial review on April 21<sup>st</sup>, 2010, and was finally disposed of on July 14, 2011. In India, the NGT was faced with a similar ban on plastics in *Goodwill Plastic Industries & Anr. V. UT of Chandigarh & Ors.*<sup>[30]</sup> This, however, was not merely a judicial review, and the Court had to make findings of facts as well as of law while arriving at a decision. Still, owing partly to the expert opinion available with the Bench itself and partly to the provision under Section 18 (3) of the NGT Act, which envisages that the NGT shall deal with a case as expeditiously as possible and shall endeavor to dispose of the same within *six months* from the date of the institution of the case, the Court was able to dispose of the matter within six months—on August 8, 2013—of the date of institution of the case (i.e., February 20, 2013).

Of course, dedicated environmental courts, like the NGT, benefit from adhering to a legislature-imposed timeline, which allows for expeditious decision making and keeping the case pendency rate in check. In general courts, it is difficult to adhere to a timeframe on a subject-based scrutiny, since the courts need to devote time equally to cases under all subject matters. In the NGT, for example, 168 cases were instituted in 2011, out of which 79 cases [47% of the total] were disposed of in the year 2011 itself. 503 cases were instituted in the NGT in the year 2012, 1703 cases in 2013, and 1517 in 2014; out of such cases, only 3%, 13%, and 37% of the cases, respectively, are pending as of today.<sup>[31]</sup> As opposed to this, according to data available with the apex court, the number of pending cases with the Supreme Court of India is 64,919 as of December 1, 2014. The data available for the 24 High Courts and lower courts up to the year ending 2013 showed pendency of 4.5 million and a whopping 26 million, respectively.<sup>[32]</sup>

Of the over 4 million cases pending in the 24 high courts of the various Indian states 3,432,493 are civil and 1,023,739 criminal. This shows the stark contrast between the environmental judiciary and normal Courts in India, and highlights how dedicated jurisdiction has been effective in keeping the pendency comparatively negligible and in maintaining speedy disposal of cases. Though the comparison discounts the case load and already existing pendency on the general courts in India, the statistics indicate the relative

efficiency of green Courts in the context of the country. Some experts, for example, have estimated that at the current rate, it would take 350 years for the courts in Mumbai, India, to hear all the cases on their books. According to the UN Development Program, India has eleven judges for every one million people. There are currently more than thirty million cases pending in Indian courts, and cases remain unresolved for an average of fifteen years.<sup>[33]</sup> Restoring the rule of law is as important to democracy in India as restoring its environmental conservation laws is to ensuring the public's right to potable drinking water and environmental rights. Environmental law disputes relating to pollution and hazardous substances, among other things, require expeditious redressal by the mere nature of the dispute. In more cases than fewer, the disputes concern the health and safety of a community that could be helped through the urgent adjudication of the dispute. In the context of the NGT, this issue of case pendency can be resolved with a definite step toward a timely disposal of cases.

#### E. VISIBILITY

Justice Swatanter Kumar, the Chairperson of the NGT, spoke about the importance of access to Justice in the context of Environmental law soon after taking up the position of the Chairperson:

"In an ideal world, in a world that is healthy, whose inhabitants are in the pink of health, in a world where flowers blossom and rivers run their course to meet the oceans, we would not need environment justice or, consequently, access thereto. But our race, while treating life as a trade off between environment and development, somewhere along the line let go off the environment. We cut trees, built dams, polluted the rivers that we drink from, the air that we breathe. Somewhere along the line, we forgot what was so aptly described by the great American revolutionist, Martin Luther King, that *"For in the true nature of things, if we rightly consider, every green tree is far more glorious than if it were made of gold and silver."* Consequently, today we are at the brink of ominous harm to our race. It is regretful that Environmental Justice and its access thereto, has become the need of the hour. In India, the Constitution, under various articles stresses upon the need for environment. The Supreme Court, besides exercising jurisdiction under Article 32 in specific cases, also entertains Public Interest Litigations where the issue relates to larger Public Interest. More particularly in cases of environmental degradation, it further expands the scope of its extraordinary jurisdiction. Similarly, there are various legislations which are dedicated to the various facets of Environmental Law. In order to streamline the justice delivery system in this aspect, India also has a dedicated forum i.e. the National Green Tribunal with 5 benches all over the country to make environmental justice more accessible."<sup>[34]</sup>

The NGT proposes twofold solutions to the solution proposed by the NGT regarding the issue of the enhancing the accessibility of the courts is the establishment of 5 benches covering five zones across India, environmental litigants do not need to go across the country to have their disputes redressed. Though it can be argued that for a country with a population of over 1.2 billion people, five environmental courts hardly suffice, however, it certainly can be seen as a step in the right direction, and the disposal of cases and related statistics mentioned above substantiate the point. Recently, the NGT ordered the state Government of Delhi to ban usage of diesel vehicles which are 10 years or older on the roads of Delhi.<sup>[35]</sup> Approximately 40,000 diesel cars were affected by the court's ban in the capital and more than 90,000 in adjoining towns, daily.<sup>[36]</sup> The said order got immense coverage in the media<sup>[37]</sup> and drew the attention of the public at large towards the air pollution problem that the city of New Delhi faces today. An excerpt from the daily FirstPost is reproduced below after the above order of NGT was passed:

“According to Delhi traffic police, around 80,000 vehicles travel through Delhi every day between from 8 pm and 6 am – just over two per second. Environmentalists believe that these diesel-operated vehicles contribute 60 percent of the main air pollutants spewed because most of them do not adhere to the vehicular emission standards. Some of them are 10 years old, some 20. A majority of them run on a mixture of kerosene and diesel to save money.

The deadly respirable suspended particulate matter (RSPM or PM10) in the capital's air has been recorded at 316 µg/m<sup>3</sup> (micrograms per cubic meter) this year – way above the permissible limit of 40 µg/m<sup>3</sup> Studies conducted since 2007, suggest that the presence of RSPM rises in the city late at night and it corresponds with the timing of the entry of trucks. Its effects remains till early morning.”<sup>[38]</sup>

This excerpt is an example of how the NGT, with its orders affecting the public in general, raises awareness about other environmental issues. It also sheds light on the fact that, given the nature of environmental issues, strict action often leads to a trickle-down effect that affects individuals not related to the dispute per se. Equally important is the point of view that awareness of environmental violations and rights is at the centre of development and industrialization.<sup>[39]</sup> Such decisions of the NGT have been rewarded with unprecedented media coverage that relates to positive visibility and awareness, often transcending into greater accessibility for the population in general.

It might thus not be out of place to mention that since the establishment of the NGT in 2010, there was a 199% increase in institution of cases from 2011-2012, 239% in 2013 in comparison to 2012, and a decline of 11% in 2014, in comparison to 2013.<sup>[40]</sup> This suggests

an increase in public awareness about the avenues to exercise their environmental rights through the NGT and the increased access to environmental justice to the public by the means of this organization.

Though it is difficult to establish a causal nexus between the visibility that orders of the NGT lend to environmental issues and the increase in institution of cases, one can safely assume that the two aspects are intertwined. The question that needs to be raised in respect to visibility, however, is whether and to what extent do non-environmental courts contribute to the visibility of environmental disputes. In 1991, the Supreme Court of India had passed a judgement similar to the one later passed by the NGT to ban diesel vehicles in Delhi. The Supreme Court of India declared the ban interpreting the Directive Principles and the right to life in Article 21 broadly so as to include the right to clean air in dealing with the effect of diesel pollution in New Delhi.<sup>[41]</sup> Initially, the Court ordered the Central and Delhi state governments to file affidavits on the status of government policies and actions, establish fact-finding commissions to analyze air quality in Delhi, and issue recommendations for improving air quality.<sup>[42]</sup> In two orders issued in 1986 and 1990, the Court found that heavy vehicles such as trucks and buses were the main sources of air pollution in Delhi, and ordered the Delhi Administration to file an affidavit detailing the measures that the government had taken to regulate vehicle emissions.<sup>[43]</sup> However, despite such orders of the apex court of India, the air quality standards deteriorated steeply over the next few decades until the NGT passed the aforementioned orders. The above analysis endeavors to reflect on the visibility that the NGT orders lend to the current issues plaguing the environmental scenario in India. One must consider the advent of the digital media and the percolation of press into more households in this age of information; still, the public awareness and exposure have benefited a great deal in the sphere of environmental justice and its access through orders of the NGT.

#### F. HEIGHTENED ENFORCEMENT, GOVERNMENT ACCOUNTABILITY AND LOCUS STANDI

As a corollary to the above, as the enforcement of environmental rights having percolating effects on the lives of the people indirectly related to the issue, the execution of judicial orders of the green courts inspires more confidence in the public. This heightened enforcement thus leads to greater vigilance on the part of the government, as well as polluters, to adhere to rules and regulations under environmental laws. In 1992, while discussing the Environment Protection Agency's [EPA] policy of environmental auditing in the US, Hunt, Terrell and others noted as follows:

“Environmental auditing is a relatively new phenomenon, but it has become the source of

intense interest for industry. Auditing helps corporations identify environmental violations and achieve compliance with environmental laws. The growing threat of environmental enforcement, with heightened penalties for violators, is creating an enormous impetus for corporations to comply.”<sup>[44]</sup>

It can be argued that a justice delivery system through dedicated environmental Courts creates a similar system of auditing, though, through courts. The industry can no longer rely on the delaying tactics otherwise used in litigation, due to the expeditiousness clause mentioned above in the NGT Act. Moreover, heightened penalties (proportional to the violations caused by the industry) serve as a deterrence, as discussed later in the paper, creating the impetus for industry to comply with environmental laws and regulations.

The heightened enforcement of the environmental laws is further helped by the fact that such green courts are vested with the powers to enforce their orders by issuing a show-cause notice to authorities for not having enforced them. For instance, the Delhi Metro Rail Corporation, the All India Institute of Medical Sciences, the Delhi Jal Board, the Forest and the Irrigation Department, and the Central Public Works Department have in the past faced the wrath of the NGT for failing to set up rainwater harvesting systems. These entities have been issued show-cause notices as to why they should not be ordered and directed to pay compensation varying from Rs. 500,000 to 1,000,000 for not harvesting rainwater, polluting the environment, and not discharging their duties in relation to the environment or maintaining the wholesomeness of water on the basis of the “Polluter pays” principle depending upon their activity.”<sup>[45]</sup> In a similar order, the NGT also issued show-cause notices to persons violating the sand-mining laws in the district of Haridwar in northern India.<sup>[46]</sup> Such enforcement techniques force authorities to be more vigilant while executing the orders of the NGT. In addition to the above, the NGT often nominates local commissioners to follow up on its order when one of the violators is the government itself. This system developed by the NGT is an example of how the powers of the court can be creatively used to place checks upon the execution of its orders leading to heightened enforcement and caution in the government and the industry alike.

This heightened enforcement, however, is aided in the context of the NGT by the wide ambit of the locus standi that is granted to the public in general. Section 14 of the NGT Act enables the court to have jurisdiction over all civil cases, raising a substantial question relating to environment. While such substantial questions must arise out of the statutes enlisted under the Act, being environmental statutes that govern related laws in India, the need of the hour was to give the provision such an interpretation that it would not create obstacles for the public to approach the court in relation to environmental disputes. This

was categorically done by the NGT in the cases of *Goa Foundation v. Union of India*<sup>[47]</sup> and *Kalpriksh & Ors. v. Union of India*.<sup>[48]</sup> The Court in the latter decision held that, under Section 14, it is not only that the Tribunal can try all civil cases where a substantial question relates to environment and arises out of the implementation of the enactments specified in Schedule I of the Act (environmental statutes), but the court can also try cases where enforcement of any legal right relating to environment arises. Section 14 specifically refers to a substantial question relating to 'environment' which itself has been defined and accepted in Section 2(m) of the NGT Act. The definition under Section 2(m) is an inclusive definition and thus it has to be construed in a liberal manner in order to give it a wider connotation. The NGT has specifically dealt with the need for a wide connotation to be denoted to locus standi in the case of *Kehar Singh v. State of Haryana*, wherein the court went on to hold as follows:

“The essence of the legislation, like the NGT Act, is to attain the object of prevention and protection of environmental pollution and to provide administration of environmental justice and make it easily accessible within the framework of the statute. The objects and reasons of the scheduled Acts would have to be read as an integral part of the object, reason and purposes of enacting the NGT Act. It is imperative for the Tribunal to provide an interpretation to Sections 14 to 16 read with Section 2(m) of the NGT Act which would further the cause of the Act and not give an interpretation which would disentitle an aggrieved person from raising a substantial question of environment from the jurisdiction of the Tribunal.”<sup>[49]</sup>

This object of making justice available to all aggrieved persons is the pivot on which rest the environmental justice and accessibility doctrines in India. Such wide ambit connoted to locus standi under environmental disputes goes a long way in making justice under environmental laws more accessible, thereby helping the enforcement aspect of it.

## G. DETERRENCE

Dedicated Courts, like the NGT, might be bestowed with a special provision for deterrence, but before delving into the crux of the aspect of deterrence it is worthwhile to relate visibility, access and public perception with deterrence. Deterrence as a rationale owes its being to the idea that public is to know the legal statutes at large. For instance, people owning diesel vehicles for 10 years or longer, after the visibility and awareness explained above, shall be deterred from using their diesel vehicles in the streets of Delhi.

But the issue does not end here. Dedicated judicial systems, like the NGT, are armed with a clause that might deter violations. The NGT Act, for instance, empowers the court to

imprison an offender and further to punish him or her with a fine of Rs. 1,00,000,000; moreover, continued violation amasses fines on a per-day basis, designed to provide additional deterrence for potential offenders.

While the strength of such deterrence might rely on underlying statutes that empower the courts to deal with matters relating to environmental laws, it must be seen that environmental courts, with the visibility and the expeditiousness mentioned above, shall be better placed than non-green courts when dealing with issues relating to deterrence, and thus shall have effects that might not be felt by those other courts. Given the fact that the NGT is capable of exacting penalties of the magnitude specified above, offenders may be more skeptical of committing an offence under the statute.

This issue is accentuated by the role of the statute and the advantages of early disposal and uniformity, since an offender might be further deterred by the judicial process and its effectiveness at dealing with offenses.

On the other hand, in cases before non-green courts, given the above issues with non-expeditiousness and non-uniformity, even the offenders in violation may not be deterred while committing a crime, given the non-efficiency of the general courts and the fact that they might not be subjected to special penalties like those exacted by the NGT. In a research done by Dorothy Thornton, Neil Gunningham and Robert Kagan, under the heading 'General Deterrence and Corporate Environmental Behavior,' when respondents cited examples of penalty-inducing non-compliance by other firms, their accounts were often judgmental in tone, suggesting support for underlying social norms condemning harm to the environment and complying with law.<sup>[50]</sup> Thus, in business scenarios, industries are affected by penalties to environmental harms and such harms, as enunciated above, are more prevalent in environment-dedicated courts.

#### H. ISSUE AND REMEDY INTEGRATION

In 1992, then Lord Chief Justice of England, Lord [Harry Kenneth] Woolf, gave an annual environmental law lecture with the provocative title, 'Are the Judiciary

Environmentally Myopic?' Part of his analysis concerned the role of an unelected judiciary in dealing with politically-sensitive environmental cases, and he concluded that the British judiciary had rightly refrained from becoming over-involved in policy-making, which was best left to the politically accountable. He noted that one distinctive feature of environmental law is the possibility of a single pollution incident to give rise to many different types of legal actions in different fora— a coroner's inquest if deaths are involved;

criminal prosecution, civil actions, and judicial review if public authorities are involved. Under such circumstances, Lord Woolf concluded that there was a strong case for a single environmental court — which might deal with all the legal consequences arising from an environmental incident or problem.<sup>[51]</sup> He further went on to say that an environmental court is “a multi-faceted, multi-skilled body which would combine the services provided by the existing courts, tribunals, and inspectors in the environmental field. It would be a ‘one-stop shop’ which should lead to faster, cheaper, and more effective resolution of disputes in the environmental area.”<sup>[52]</sup>

Further, when urgent decisions are required, there are often no easy options for preserving the *status quo* pending the resolution of the dispute. If the project is allowed to go ahead, there may be irreparable damage to the environment; if it is stopped, there may be irreparable damage to an important economic interest.<sup>[53]</sup> Lord Robert Carnwath<sup>[54]</sup> advocated the constitution of a unified tribunal with a simple procedure which looks to the needs of customers which takes the form of a Court or an expert panel, the allocation of a procedure adopted to the needs of each case - which would operate at two levels - first tier by a single Judge or technical person and a review by a panel of experts presided over by a High Court Judge - and *not* limited to ‘*Wednesbury*’ grounds.<sup>[55]</sup>

The NGT fulfils almost all of the considerations of Lord Carnwath. At the level of zonal benches, the bench is headed by a retired High Court Judge, while at the Principal Bench, having both original and appellate jurisdiction, the bench is presided over by a retired Supreme Court Judge, the Chairperson of NGT. However, the important point in this part of the discussion is Lord Woolf’s idea of a one-stop shop. The NGT serves as a forum to handle the various facets that an environmental dispute may entail, comparable to the proverbial “one ring to rule them all.” From administering examinations and cross examinations<sup>[56]</sup> under the Evidence Laws to issuing civil penalties, the NGT acts as an integrated court, equipped with managing all the facets concerned with environmental litigation. Though the Court can be criticised for jurisdictional impediments, such as the lack of jurisdiction over wildlife laws and energy laws, the same could be left at the better judgment of the legislature, with the hope that such jurisdiction might be bestowed upon the NGT in the future. However, the convenience of adjudication over various issues still gives the NGT an edge over non-green Courts, under which issues might have to be divided over pecuniary, subject matter, and territorial jurisdiction—the court simplifies the litigative process and making the same more cost effective for the public at large.

### III. DISADVANTAGES OF GREEN COURTS

The concept of specialized Courts in practice is susceptible to shortcomings. Dreyfuss

suggests that removing a field from the regional courts' purview is a benefit from the standpoint of those courts' dockets, but it also means that the thinking of generalists no longer contributes to the field's development.<sup>[57]</sup> Cross-pollination among legal theories is a significant source of change in the law, since important patterns of reasoning sometimes emerge rather naturally in one field yet can be meaningfully applied to other areas."<sup>[58]</sup> It is further suggested that repeat players have an advantage over one-time litigants in courts of general jurisdiction.<sup>[59]</sup> This problem would be exacerbated on a specialized bench, where repeaters would be more likely to know all of the judges, be acquainted with the eccentricities of the court's rules and specialized law, and be positioned to find suitable vehicles for arguing the changes in the law that they desire.

Moreover, it has been argued that the efficiency with which specialized courts operate may sometimes be disadvantageous. Percolation of ideas cannot occur in a court that has exclusive jurisdiction over its field.<sup>[60]</sup> And even if some cases in the specialized field remain in the regional circuits, these courts might tend to defer to the expertise of the special bench. If conflicts between the regional and specialized courts fail to develop, Supreme Court activity in the specialized field will diminish. As a result, pronouncements of the specialized court will establish new law immediately, and with a fairly high degree of finality.<sup>[61]</sup>

While such disadvantages may be generic in nature, applicable to all specialized courts, environmental courts are faced with disadvantages which might overlap, or be exclusively limited to them, as are discussed below.

#### **A. OTHER SUBJECT MATTERS NEEDING EXPERTISE**

It can be argued that other areas, apart from environmental law, require as much expertise as one does in environmental law. However, in such a case, the same principle could be stretched to set up, for instance, public health tribunals that deal with medical negligence, and other human health-related cases. A federal government, especially that of India, would find it hard to cope with the expenditure that setting up various specialized judicial systems would entail and this approach might then open a Pandora's box where activists from different fields, including public health and employment, might demand similar separate judiciaries.

#### **B. COST OF SETTING UP SEPARATE JUDICIAL SYSTEM**

Furthermore, costs of setting up a dedicated environmental judiciary are immense. The process does not simply entail time-consuming drafting of bills and getting them passed

through Congress, but it also requires huge executive costs of establishing courthouses, salaries of judges and staff including stenographers, administrative division, stenographers and peons. Apart from the above, the costs associated with new litigation and with executing orders of the Tribunal come out to be overwhelming for a nation.

### C. MULTIPLICITY OF LITIGATION

Setting up of specialized courts as an approach can also be seen to undermine the legitimacy and degree of control of the current judicial structure over environmental and other issues that a specialized judiciary might deal with. Though, in the case of NGT, the appeal lies to the Supreme Court of India from the principal Bench of the Tribunal, in other contexts the high courts whose jurisdictions have been ousted might be a blind spot in environmental litigation with jurisdiction over environmental legislations under both procedural and substantive statutes. There may also be an issue in a country like India where the High Courts and the Supreme Courts are Courts of record with a duty to eradicate violations of citizens' fundamental rights. Given that the right to a healthy environment is a part of the right to life under Article 21 of the Constitution of India,<sup>[62]</sup> these courts have a duty to enforce such a fundamental right if the issue is raised before them. In such cases, bound by their duties the general courts would not be able to put a stop to registering cases related to specialized matters as they may, in some form or the other, be tied to a fundamental right. This might give rise to multiplicity of litigation before different fora.

### D. MARGINALISATION

There is an associated fear of the marginalization of environmental issues if they are excluded from mainstream judiciary. A lot of the litigants rely on the media coverage and deterrence value that their litigation incurs in the eyes of the authorities. It can be assumed that some litigation, even when unsuccessful, solves its purpose of directing the attention of the authorities towards the issues when before the High Courts or the Supreme Court. However, with all environmental law-related cases being transferred to green courts, the public could fear being sidelined from the mainstream dispensation of justice and thus marginalized from the greater scheme of the justice delivery system. Some environmentalists feel that separating environmental cases from the mainstream will result in their getting less attention, less-qualified decision-makers, and inadequate budgets, thus diminishing green courts' effectiveness.<sup>[63]</sup>

### E. JUDICIAL BIAS

Apart from concerns about marginalization, judicial bias is considered a serious impediment in the success of green courts. With a court specifically set up to eradicate environmental disputes and with expert judges on a panel to deal with issues of environmental degradation and deterioration, it can be feared that such a system would unduly favor the environmental lobby and might breed anti-developmental sentiments. The NGT has been careful in striking a balance between development and environment, holding in favour of industries on a few occasions. Indeed, this sentiment of fear has been specifically addressed by the Court in the case of *M/s. Hindustan Coca Cola Beverages Pvt. Ltd., Mehdiganj, Rajatalab, Varanasi And M.C. Mehta v. Union of India & Ors.*,<sup>[64]</sup> where the court stated that “Balance have [sic] to be struck and we would not hesitate in striking of that balance between the development and the environment.” However, over-protection of the environment by green courts is a justifiable apprehension that needs to be handled with care while setting up such justice delivery systems.

While the above disadvantages could be qualified as substantive in nature, one could also argue that green courts can be plagued by procedural disadvantages as well.

#### F. JURISDICTIONAL LIMITATIONS

For instance, the Indian High Courts and Supreme Courts often have all encompassing jurisdiction covering all the statutes in existence, unless explicitly ousted. Green courts, however, being creature of statutes, are often given specific jurisdiction through legislations. In the case of NGT, the tribunal can deal with issues relating to seven environmental statutes mentioned in Schedule 1 of the NGT Act. However, such limited jurisdiction can pose problems during the justice delivery process. For instance, the Wildlife Protection Act, 1972, and the Atomic Energy Act, 1962, have been explicitly left out of the list of applicable statutes to the jurisdiction of the NGT. This can pose problems when an issue is so intertwined that it not only involves problems relating to air pollution<sup>[65]</sup> but also energy and wildlife. Thus, green courts such as the NGT are often faced with the problems of limited jurisdiction owing to their being a creation of a statute.

#### G. LIMITATION PERIOD AND GOVERNMENTAL DISCONCERT

The issue of legislative inefficiency could transcend into the realm of limitation periods as well. The NGT specifically has been faced with the issue of limitation. When challenging administrative orders under Section 16 of the NGT Act, litigants are allowed only thirty days to apply. Though the Court can condone delay of up to another sixty days, the legislature has given the Courts very little to work with in the case of period of limitation. As mentioned above, being a creature of statute, the green courts have to work at the behest of the

legislature, even in instances where the period of limitation has been narrowly set by Congress. Moreover, since in most of the cases relating to environment the administrative agencies and/or the Ministry of Environmental Affairs are parties for enforcement of the solution, it is feared by the government officials that that such amplitude of litigation might leave a sour taste in the mouth of the involved agencies. In response to this, the legislature can curb the powers of the green courts through amendments to the statute crating them.

In a news article published last year, titled “Government planning to clip National Green Tribunal’s wings,” it was claimed that “On several occasions in the past two years, the tribunal has hauled up several environment ministry officials, as well as state authorities, for falling foul of law. In a recent judgment, the tribunal even criticized the environment minister for non-application of mind in a case... The Ministry of Environment & Forests (MoEF) plans to amend the National Green Tribunal Act, which was passed during the United Progressive Alliance (UPA) regime. The move will result in dilution of the powers of the body.”<sup>[66]</sup>

Such knee-jerk reactions out of spite against the court orders are always a hovering fear over judicial systems set out of legislative enactments.

#### IV. CONCLUSION

Though most of the advantages and disadvantages discussed above need to be qualified with the fact that such comparisons, with the NGT or otherwise, are not natural experiments conducted in airtight compartments, nevertheless an attempt has been made to establish a nexus between the operational efficiencies and inefficiencies of green courts and general courts. The discussion above, given the empirical data available in relation to the NGT, tilts the balance in favor of green courts; however, more research needs to be done to see the changing trends in India in relation to environmental litigation.

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