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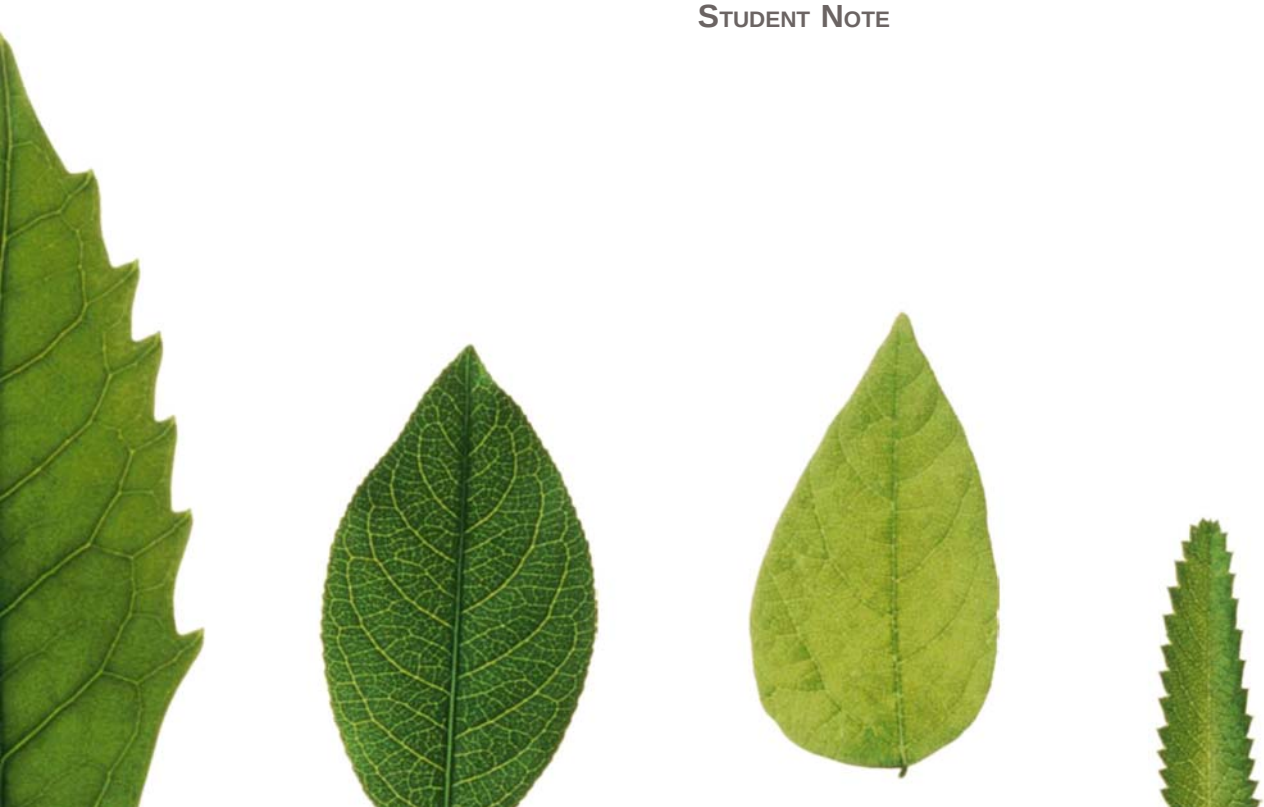
GREEN COURTS IN INDIA: STRENGTHENING ENVIRONMENTAL GOVERNANCE?

Raghav Sharma

STUDENT NOTE



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Student Note

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1 INTRODUCTION

The Indian judiciary is set to turn 'green' with the Law Commission of India (hereafter 'LCI') recommending, in its 186th Report, the constitution of specialised Environmental Courts to strengthen and revitalise environmental governance.[1] The proposal has its roots in the call that emanated from the corridors of the apex Constitutional Court, that is, the Supreme Court of India, in numerous significant cases.[2] The Law Ministry has formulated the required draft legislation which awaits legislative sanction.[3] The Supreme Court has elevated the 'right to healthy environment' to the status of a fundamental human right under Article 21[4] of the Constitution in the process of progressive enrichment of the environmental jurisprudence with principles like sustainable development, polluter pays, public trust doctrine, precautionary principle and intergenerational equity. This extension of constitutional umbrella over environmental issues through dynamic judicial activism has augured well for environmental governance in India. The constitution of a 'green' branch of judiciary to adjudicate environmental matters will be a further significant step towards improving the quality of environment at a time when India has been caught in a tussle between developmental and sustainability issues. Improvement in institutional arrangements to provide easily accessible environmental justice to people is a part of the international agenda highlighted in instruments like Rio Declaration on Environment and Development, 1992 and the Aarhus Convention, 1998. Such institutional changes carry a greater significance in case of emerging market economies like India where trade and development issues are set to clash with environmental imperatives.

Keeping the development of environmental jurisprudence in India as the background, this article highlights the problems afflicting the Indian judicial system which have led to a call for a specialised judiciary. I propose to showcase the LCI's significant recommendations regarding various dimensions of the 'green' court project in light of the international experience concerning such courts in Australia and New Zealand. In light of this appraisal, I argue that the Law Commission Report (hereafter '186th LCR'), though exhaustive and comprehensive on familiar dimensions of the issue, fails to comprehend and explore the relatively obscure anomalies that plague the idea of having Environmental Courts in the recommended form - a lacuna which renders the proposed institutional arrangements *myopic* and *status quoist*. This article highlights that the constitution of a new court system may not be such a '*green*' plan after all, unless it is made capable of adjudicating in an atmosphere independent of dominating political interests plaguing such specialised courts and thus, as an alternative, it advocates for the establishment of specialist divisions within the existing Indian High Courts.

2 INDIA'S GREEN CONSTITUTION: FROM 'ENVIROMYOPICITY' TO 'ENVIROSENSITIVITY'

Environment related rights were conspicuously absent from the original version of the Constitution of India, which was prominently dominated by

1 Law Commission of India, '186th Report on Proposal to Constitute Environment Courts', September 2003, available at http://lawcommissionofindia.nic.in/reports/186th%20report.pdf and Dewan Vohra, 'Special 'Green' Courts Set up to Rule over Environmental Disputes', *Financial Express*, 2 June 2007.

2 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 17 February 1986, (1986) 2 SCC 176, 201-202, *Indian Council for Enviro Legal Action v Union of India*, Supreme Court of India, Judgement of 13 February 1996, (1996) 3 SCC 212, 252, *A.P. Pollution Control Board v Prof. M.V. Nayadu (Retd.) & Ors,* Supreme Court of India, Judgement of 27 January 1999, (1999) 2 SCC 718,730-731[hereafter *A.P. Pollution Control Board I* case] and *A.P. Pollution Control Board v Prof. M.V. Nayudu (Retd.) & Ors.*, Supreme Court of India, Judgement of 1 December 2000, (2001) 2 SCC 62, 84-85 [hereafter *A.P. Pollution Control Board II* case].

3 Kalpana Sharma, 'Who will benefit from 'green' courts?', *The Hindu*, 23 March 2007.

4 Article 21 reads as: **Protection of life and personal liberty** -No person shall be deprived of his life or personal liberty except according to procedure established by law.

business and property rights. Consequently, environmental jurisprudence was also an unknown appellation for the Indian judiciary. The 42nd constitutional amendment, made in 1976, changed this landscape by inducting Article 48-A[5] and Article 51A (g)[6] into this 'enviromyopic' document. Simultaneously, the Supreme Court of India embarked on a 'creative' activist phase of constitutional interpretation in the aftermath of the fiasco in *A.D.M. Jabalpur v Shivakant Shukla*[7] where it found itself helpless in defending the basic civil liberties of the citizens against executive excesses.[8] Starting from early 1980s, the Court has developed a body of 'green constitutional law' to safeguard the citizens' health from the deleterious affects of environmental degradation. In *M.C. Mehta v Union of India*[9] (Oleum Gas Leakage case), the Supreme Court propounded the standard of 'absolute liability' for payment of compensation to those affected by the accident in case of industries engaged in hazardous or inherently dangerous activities as opposed to the prevalent notion of 'strict liability' under the *Rylands* v. *Fletcher*[10] standard. The Court has adopted an expanded view of 'life' under Article 21 and enriched it to include environmental rights by reading it along with Articles 47[11], 48-A and 51A(g) and declaring:

> Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21.[12]

By 1990s, it categorically declared that 'issues of environment must and shall receive the highest attention from this court'.[13] India's 'Green Constitution' now guarantees a right to healthy environment,[14] right to clean air,[15] right to clean water,[16] enjoins the State and its agencies to strictly enforce environmental laws[17] while disclosing

5 Article 48-A reads as: **Protection and improvement of environment and safeguarding of forests and wild life-** The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

6 Article 51A(g) reads as: **Fundamental Duties-** It shall be the duty of every citizen of India- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

7 Supreme Court of India, Judgement of 28 April 1976, (1976) 2 SCC 521.

8 S.P. Sathe, 'Judicial Activism: The Indian Experience', 6 *Wash. U. J.L. & Pol'y* 29, 40 (2001).

9 Supreme Court of India, Judgement of 20 December 1986, (1987) 1 SCC 395.

10 Court of Exchequer Chamber, Judgement of 14 May 1866, (1865-66) L.R. 1 Ex. 26.

11 Article 47 reads as: **Duty of the State to raise the level of nutrition and the standard of living and to improve public health-** The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

12 *Virender Gaur & Ors. v State of Haryana & Ors.*, Supreme Court of India, Judgement of 24 November 1994, (1995) 2 SCC 577 [hereafter *Virender Gaur's* case].

13 *Tarun Bharat Sangh, Alwar v Union of India*, Supreme Court of India, Judgement of 11 October 1991, 1992 Supp (2) SCC 448.

14 *Subhash Kumar v State of Bihar*, Supreme Court of India, Judgement of 9 January 1991, (1991) 1 SCC 598, 604 [hereafter *Subhash Kumar's* case]; *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 15 May 1992, (1992) 3 SCC 256, 257 and *Virender Gaur's* case, note 12 above.

15 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 12 May 1998, (1998) 6 SCC 60 & Judgement of 18 November 1998, (1998) 9 SCC 589, *M.C.Mehta v Union of India,* Supreme Court of India, Judgement of 16 April 1999, (1999) 6 SCC 9 [matter regarding diesel emissions] and *Murli S. Deora v Union of India*, Supreme Court of India, Judgement of 2 November 2001, (2001) 8 SCC 765.

16 *A.P. Pollution Control Board II* case, note 2 above, at 82, *Mrs. Susetha v State of T.N. & Ors.*, Supreme Court of India, Judgement of 8 August 2006, (2006) 6 SCC 543, *Narmada Bachao Andolan v Union of India*, Supreme Court of India, Judgement of 18 October 2000, (2000) 10 SCC 664[hereafter *Narmada Bachao Andolan* case] and *Subhash Kumar's* case, note 14 above.

17 *Indian Council for Enviro Legal Action v Union of India*, Supreme Court of India, Judgement of 18 April 1996, (1996) 5 SCC 281 [The Court took upon itself the duty to intervene in all such cases] and *N. D. Jayal v Union of India*, Supreme Court of India, Judgement of 1 September 2003, (2004) 9 SCC 362 [hereafter *N. D. Jayal's* case].

information in respect of decisions which affect health, life and livelihood[18] and disallows inadequacy of funds and resources as a pretext for the evasion of obligations by the State.[19] Significant environmental principles like polluter pays,[20] precautionary principle,[21] sustainable development,[22] public trust doctrine[23] and intergenerational equity[24] have become entrenched in the Indian law without explicit incorporation in any legislative framework. In *Vellore Citizens' Welfare Forum v Union of India & Ors.*,[25] the Court employed the 'precautionary principle' to invent the special principle of burden of proof in environmental cases where burden as to 'the absence of injurious effect of the actions proposed, is placed on those who want to change the status quo' viz. polluter or the industrialist. In the process, the apex Court has gone beyond the statutory texts to refer extensively to international conventions and obligations of India[26] and even to the historical environmental values reflected in the edicts of Emperor Ashoka[27] and verses of *Atharva Veda*.[28] The Supreme Court has, in clear terms, advised the State to shed its 'extravagant unbridled sovereign power' and to pursue a policy to maintain ecological balance and hygienic environment.[29] The activist attitude ranges across a gamut of environmental issues viz. banning aquaculture industries in coastal areas to prevent drinking water from becoming saline,[30] issuing directions for improving quality of air in the National Capital Territory of Delhi[31] and protecting Taj Mahal,[32] prohibiting cigarette smoking in public places,[33] addressing issues of solid waste management[34], proscribing construction activities in the vicinity of lakes[35] and directing the lower courts to deal strictly with environmental offences.[36] In respect of forest governance, the Supreme Court has made an enormous contribution through the case of *T.N. Godavarman Thirumulpad v. Union of India*.[37] The case was set in the backdrop of critical state of national forest cover, appalling apathy of governments towards forest management and

18 *Essar Oil Ltd. v Halar Utkarsh Samiti & Ors,.* Supreme Court of India, Judgement of 19 January 2004, (2004) 2 SCC 392.

19 *Almitre H. Patel v Union of India*, Supreme Court of India, Judgement of 16 January 1998, (1998) 2 SCC 416 and *B.L. Wadhera v Union of India*, Supreme Court of India, Judgement of 1 March 1996,(1996) 2 SCC 594.

20 *M.C. Mehta v Kamal Nath*, Supreme Court of India, Judgement of 12 May 2000, (2000) 6 SCC 213.

21 *Vellore Citizens' Welfare Forum v Union of India*, Supreme Court of India, Judgement of 28 August 1996, (1996) 5 SCC 647.

22 *Narmada Bachao Andolan* case, note 16 above, *Goa Foundation v Diksha Holdings Pvt. Ltd.*, Supreme Court of India, Judgement of 10 November 2000, (2001) 2 SCC 97 and *N. D. Jayal's* case, note 17 above.

23 *K.M. Chinnappa & T.N. Godavarman Thirumulpad v Union of India*, Supreme Court of India, Judgement of 30 October 2002, AIR 2003 SC 724 and *Intellectuals Forum, Tirupathi v State of A.P. and Ors.*, Supreme Court of India, Judgement of 23 February 2006, (2006) 3 SCC 549.

24 *State of Himachal Pradesh v Ganesh Wood Products*, Supreme Court of India, Judgement of 11 September 1995, (1995) 6 SCC 363.

25 Supreme Court of India, Judgement of 28 August 1996, (1996) 5 SCC 647 and *A.P. Pollution Control Board II* case, note 2 above.

26 *K.M. Chinnappa & T.N. Godavarman Thirumulpad v Union of India*, Supreme Court of India, Judgement of 30 October 2002, AIR 2003 SC 724.

27 *State of Bihar v Murad Ali Khan*, Supreme Court of India, Judgement of 10 October 1998, (1988) 4 SCC 655.

28 *Rural Litigation & Entitlement Kendra v State of UP*, Supreme Court of India, Judgement of 30 August 1988, 1989 Supp (1) SCC 504.

29 *Virender Gaur's* case, note 12 above.

30 *S. Jagannath v Union of India*, Supreme Court of India, Judgement of 11 December 1996, (1997) 2 SCC 87.

31 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 14 February 1996, (1998) 8 SCC 648 [Introduction of lead free petrol] and *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 12 September 1998, (1998) 8 SCC 206 [Phasing out commercial vehicles older than 15 years].

32 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 10 May 1996, (1996) 8 SCC 462 [Taj Trapezium Case].

33 *Murli S. Deora v Union of India*, Supreme Court of India, Judgement of 2 November 2001, (2001) 8 SCC 765.

34 *Almitre H. Patel v Union of India* and *B.L. Wadhera v Union of India*, note 19 above.

35 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 11 October 1998, (1997) 3 SCC 715 [matter relating to Badkal and Surajkund Lakes].

36 *U.P. Pollution Board v Mohan Meakins Ltd.*, Supreme Court of India, Judgement of 27 March 2000, (2000) 3 SCC 745.

37 *T.N. Godavarman Thirumulpad v Union of India & Ors,* Supreme Court of India, Judgement of 12 December 1996, (1997) 2 SCC 267 [The Court interpreted the word 'forest' under the Forest Conservation Act, 1980, to have a dictionary meaning and thus, included all forests irrespective of their notification as Reserved or Protected forests under the Indian Forest Act, 1927. This has brought all such tracts under the government approval window in respect of non-forest purposes].

conservation and open violations of forest legislations by illegal felling in North-Eastern States.[38] A three judge bench of the Court, known as the 'Green Bench' or the 'Forest Bench', issued a 'continuing mandamus',[39] operative for past twelve years,[40] and has been using it to deal with prominent issues including conversion of forest land for non-forest purposes,[41] illegal felling,[42] potentially threatening mining operations,[43] afforestation and compensation by private user agencies for using forest land.[44] In pursuance of the orders, the Government has constituted several High Powered Committees, a Compensatory Afforestation Management and Planning Authority and a Central Empowered Committee.[45] The enormous significance of this single writ petition is evident from the fact that about 2000 interlocutory applications relating to forest issues have been disposed under it.[46]

Of late, the apex Court has been confronted with intricate cases requiring resolution of the tension between the 'right to development' and the 'right to environment'.[47] The anxiety to resolve this tension and adopt a balanced approach is apparent in *N.D. Jayal v Union of India*,[48] a case involving construction of a large dam at Tehri in Himalayan foothills, where the Court refused to interfere by emphatically declaring the symbiotic relation between both these rights in the following words:

> Right to environment is a fundamental right. On the other hand, right to development is also one. Here the right to 'sustainable development' cannot be singled out. Therefore, the concept of 'sustainable development' is to be treated as an integral part of 'life' under Article 21. Weighty concepts like intergenerational equity, public trust doctrine and precautionary principle, which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.

38 *See* Armin Rosencraz & Sharachchandra Lele, 'Supreme Court and India's Forests', Vol. XLIII, No.5, *Economic & Political Weekly* 11, 12 (February 2-8, 2008).

39 Where the mere issue of a one-time mandamus would be futile against a public agency guilty of continuous inertia in failing to perform its public duties, then a continuing mandamus can be issued by the court. *Vineet Narain v Union of India*, Supreme Court of India, Judgement of 18 December 1997, (1998) 1 SCC 226.

40 The orders of the Court are available at http://www.forestcaseindia.org//f2/.

41 *T.N. Godavarman Thirumulpad v Union of India & Ors,* Supreme Court of India, Judgement of 17 September 1998, AIR 1999 SC 2420 [hereafter *Godavarman* case].

42 The *Godavarman* case, note 41 above, Supreme Court of India, Judgement of 12 December 1996, (1997) 2 SCC 267, Judgement of 15 January 1998, (1998) 2 SCC 59, Judgement of 23 February 1998, (1998) 9 SCC 660, Judgement of 10 December 1998, (1999) 9 SCC 151 and *M.C. Mehta v Union of India & Ors*., Supreme Court of India, Judgement of 18 March 2004, (2004) 12 SCC 118.

43 The *Godavarman* case, note 41 above, Supreme Court of India, Judgement of 7 January 1998, (1998) 2 SCC 341, Judgement of 15 April 1998, (1998) 6 SCC 190, Judgement of 13 January 1998, (2000) 10 SCC 579, Judgement of 3 April 2000, (2002) 10 SCC 641, Judgement of 15 December 2006, (2006) 10 SCC 491 and *K.M. Chinnappa & T.N. Godavarman Thirumulpad v Union of India.,* Supreme Court of India, Judgement of 30 October 2002, AIR 2003 SC 724.

44 The *Godavarman* case, note 41 above, Supreme Court of India, Judgement of 26 September 2006, (2006) 1 SCC 1.

45 The Central Empowered Committee has been constituted by the Government of India through a Gazette Notification dated 17 September, 2002. Its functions include monitoring the implementation of Court's orders and placing reports of non-compliance before the Court in respect of encroachments, removals, working plans, compensatory afforestation, plantations and other conservation issues and to examine pending interlocutory applications in the said Writ petitions.

46 *See* 'SC forest panel has heard 2,000 cases till date', *The Times of India*, 20 March 2008 and *See* Armin Rosencraz & Sharachchandra Lele, note 38 above [The authors have criticised the Supreme Court for assuming 'the roles of policy maker, law maker and administrator' by progressively indulging into micromanagement of forest issues which should have been done by the executive and by centralising the forest management through widening of the government approval window in respect of non-forest uses and working plans for timber felling].

47 *Narmada Bachao Andolan* case, note 16 above, *Goa Foundation v Diksha Holdings Pvt. Ltd.*, Supreme Court of India, Judgement of 10 November 2000, (2001) 2 SCC 97 [The case dealt with construction of a hotel in Goa for a sea-beach resort] and *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 5 April 2002, (2002) 4 SCC 356.

48 Supreme Court of India, Judgement of 1 September 2003, (2004) 9 SCC 362.

However, a gamut of recent cases seemingly projects an impression of Court's growing pro-industry tilt while dealing with intricate issues of sustainable development. In *Deepak Nitrite Ltd. v State of Gujarat & Ors.*,[49] a case dealing with determination of standard of compensation in respect of industries which had flouted the norms laid down by the State Pollution Control Board, the Court held that mere non-compliance with these norms does not imply that environmental damage would result thereby; a strange and inexplicable conclusion indeed.[50] Confronted with the issue of oil pipeline construction through Jamnagar Marine National Park and Sanctuary, the apex Court in *Essar Oil Ltd. v Halar Utkarsh Samiti & Ors.*,[51] permitted such laying of pipelines on the ground that it cannot invariably lead to the destruction or removal of the wild life in these ecologically sensitive areas. The Court, instead of taking independent expert evidence on the issue like it has done in all other cases, deferred to the State's judgment of possible damage and the failure of respondent to place any contrary reports before it.[52] Furthermore, given a choice between environment and development, in *Research Foundation for Science Technology and Natural Resource Policy v Union of India & Ors.*,[53] the Court seemed unequivocal of its choice to err on side of development. It clearly displayed that it was in favour of continuance of hazardous industry subject to safeguards being followed and seemingly took India's economic growth rate of 9 per cent and economic interests in ship wrecking industry as overriding considerations. Lastly, in *Karnataka Industrial Areas Development Board v Sri. C. Kenchappa & Ors.*,[54] the Court overturned a direction by the Karnataka High Court to the appellant to leave a land of one kilometer as a buffer zone to maintain a 'green area' around the periphery of a village.[55] In the absence of any evidence, it adjudged that these directions would have hindered land acquisition for industrial development.

Justice P.N. Bhagawati once made a insightful observation: 'We need judges who are alive to the socio-economic realities of Indian life'.[56] This statement explains the gradual shift in the judicial approach while dealing with the issues of sustainable development. These new cases have been set against the backdrop of a radically different socio-economic background of national life. The annual GDP growth rate of the Indian economy has catapulted to the levels of 8 to 9 per cent against a meager 5 to 6 per cent in the previous two decades[57] and the annual growth rate of the industrial sector has skyrocketed from the range of 5 to 7 per cent to 11.6 per cent during the period of 2002 to 2007.[58] Thus, industrial development has become a pressing need in the current phase of economic transformation. In such a scenario, it is impossible for the higher judiciary to remain oblivious of this critical facet of national life[59] and therefore, there is an increased probability of a pro-development bias creeping into the judgments where courts are required to review choices made between environment and development.

49 Supreme Court of India, Judgement of 5 May 2004, (2004) 6 SCC 402, 407.

50 Later, in *Research Foundation for Science Technology and Natural Resources Policy v Union of India & Anr.* Supreme Court of India, Judgement of 5 January 2005, (2005) 13 SCC 186, the Court has held *Deepak Nitrite's* case to be confined to its own facts.

51 Supreme Court of India, Judgement of 19 January 2004, (2004) 2 SCC 392, 408.

52 Id, at pp. 409-415.

53 Supreme Court of India, Judgement of 11 September 2007, 2007 (11) SCALE 75.

54 Supreme Court of India, Judgement of 12 May 2006, (2006) 6 SCC 371.

55 The directions were on lines of *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 11 October 1996, (1997) 3 SCC 715, following the precautionary principle.

56 Supreme Court of India, Judgement of 30 December 1981, (1981) Supp SCC 81, 223.

57 Economic Survey 2007-2008, State of Economy, Chapter 1, p.1, available at http://indiabudget.nic.in/es2007-08/chapt2008/chap11.pdf.

58 Economic Survey 2007-2008, Industry, Chapter 8, p.182, available at http://indiabudget.nic.in/es2007-08/chapt2008/chap81.pdf.

59 *State of Punjab & Anr. v Devans Modern Breweries Ltd. & Anr.*, Supreme Court of India, Judgement of 20 November 2003, 2003 (10) SCALE 202, 289-294, *Research Foundation for Science Technology and Natural Resource Policy v Union of India & Ors.* Supreme Court of India, Judgement of 11 September 2007, 2007 (11) SCALE 75, 80, *J.K. Industries Ltd. & Anr. v Union of India & Ors.*, Supreme Court of India, Judgement of 19 November 2007, 2007 (13) SCALE 204, 290 and *Maharashtra Agro Industries Development Corporation Ltd. & Ors. v State of Maharashtra & Anr.*, High Court of Bombay, Judgement of 25 October 2005, (2006) 3 LLJ 102, 121.

An important ingredient of environmental litigation is the element of procedural convenience. On the procedural side, *locus standi* requirements have been diluted in environmental actions and courts allow citizens to file Public Interest Litigation (hereafter 'PIL') for addressing violations of statutory mandates by the executive and private parties or situations where legal lacunae still persist.[60] PILs have emerged as the most potent tool in the hands of Indian judiciary. The Court has the power to refer scientific and technical aspects for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act, 1997[61] and the power to direct the Central Government to determine and recover the cost of remedial measures from the polluter under Section 3 of the Environment (Protection) Act, 1986.[62]

To sum up this section, despite all its downsides the long journey of environmental jurisprudence in India, when viewed in a holistic manner, can be best described in Supreme Court's own words as: 'This has been an interesting judicial pilgrimage for the last four decades. In our opinion, this is a significant contribution of the judiciary in making serious endeavour to preserve and protect ecology and environment, in consonance with the provisions of the Constitution'.[63]

3 'GREEN' COURTS: THEORETICAL JUSTIFICATIONS AND PRACTICAL NECESSITY

The theoretical foundations of the advocacy for Environmental Courts can be traced in the arguments proposed by the proponents of specialised courts in the renowned *generalist* versus *specialised* courts debate. Specialised forums, it is contended, are able to evolve superior procedural norms and develop better quality of jurisprudence through expert judges who have greater exposure to a homogeneous legal policy regime. They bring uniformity, consistency and predictability in decision making which enhances public confidence and helps in development of a rich body of jurisprudence. Incidental benefits include time and cost savings as the requirement of massive documentation for understanding technical points of law in the special field is averted and streamlined procedures make litigation easier and quicker.[64]

Though there are pitfalls like tunnel vision[65] and capture by interest groups,[66] yet, in view of the practical necessity, specialisation appears to be an inevitable phenomenon and the field of environmental law has produced two excellent examples of successful forums in Australia and New Zealand.

60 *See Subhash Kumar's* case, note 14 above.

61 *A.P. Pollution Control Board I* case, note 2 above.

62 *Indian Council for Enviro Legal Action v Union of India*, Supreme Court of India, Judgement of 18 April 1996, (1996) 5 SCC 281.

63 *Karnataka Industrial Areas Development Board v Sri. C. Kenchappa & Ors.*, Supreme Court of India, Judgement of 12 May 2006, (2006) 6 SCC 371.

64 *See* The American Bar Association Central and East European Law Initiative (CEELI), 'Concept Paper on Specialised Courts', 25 June 1996, Edward K. Cheng, 'The Myth of the Generalist Judge: An Empirical Study of Opinion Specialisation in the Federal Courts of Appeals', available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=edward_cheng and Jeffrey W. Stempel, 'Two Cheers For Specialisation' 61 *Brook. L. Rev.* 67, 88-89 (1995) [The benefits are documented as: improved precision and predictability of adjudication; more accurate adjudication; more coherent articulation of legal standards; greater expertise of the bench; economies of scale that flow from division of labor, particularly including speed, reduced costs and greater efficiency through streamlining of repetitive tasks and wasted motions].

65 Edward K. Cheng note 64 above, Yu Wang, 'The Impact of Specialised Courts on the Federal Judicial System 1925-1981: A Study of Federal Circuits' Decision of Reversal', available at http://law.bepress.com/expresso/eps/1977, Simon Rifkind, 'A Special Court for Patent Litigation? The Danger of a Specialised Judiciary', 37 *A.B.A. J.* 425(1951) and Sarang Vijay Damle, 'Specialise The Judge, Not The Court: A Lesson From The German Constitutional Court', 91 *Va. L. Rev.* 1267 (2005) [A related problem is a lack of 'cross- pollination' of ideas in the common law when relying on specialised judiciaries. Common-law judges benefit from their broad exposure to legal problems in a variety of fields because insights from one area of the law can be used in other areas of the law].

66 Id.

The practical need for a 'Green' Court has been best articulated by Lord Woolf, in his Garner lecture to United Kingdom Environmental Law Association, on the theme 'Are the Judiciary Environmentally Myopic?',[67] based on the extreme inadequacy of the general courts to deal with increasing specialisation in environmental law[68] and the need to move beyond their traditional role of detached Wednesbury review. Thus, he proposed a 'multi-faceted, multi-skilled body which would combine the services' provided by existing forums in the environmental field to act as 'one stop shop' for faster, cheaper and more effective resolution of environmental disputes because scientifically unsound or delayed decisions may wreak havoc in terms of irreversible environmental damage and irreparable economic loss.

The objective of securing 'environmental justice' through adoption of flexible and people oriented procedures offers another justification for such forums. Internationally, the concept of easy access to a fair, equitable, timely and inexpensive justice system has been recognised as an important facet of environmental governance.[69] In the Indian context, the Constitution guarantees the right to speedy access to justice;[70] a facet of which is necessarily related with environmental rights.[71] The most significant facets of environmental justice are 'equal justice' and 'social inclusion',[72] that is, simplification of structures and procedures for potential claimants in order to improve access to justice to those who are socially excluded due to the labyrinthine complexity of the present system. Article 39A[73] mandates the Indian State to secure a legal system which is socially inclusive and equally accessible to all people and the jurisprudence of PIL stems from this recognition of the rights of the deprived, illiterate and the poor.[74] The constitution of environmental courts is thus a sacred constitutional obligation upon the Indian State.

Furthermore, it has also been argued that environmental law has grown as a specialised area of law requiring separate adjudication due to certain unique features[75] viz. (1) existence of complex technical/scientific questions; (2) overlapping of civil and criminal remedies as well as public and private interests in any environmental adjudication; (3) rapid evolution of a substantial body of international environmental instruments spanning across a gamut of issues like trade in endangered species, ocean and marine pollution , transnational shipments of hazardous wastes and global climate change; and (4)

67 4 *J.Envtl. Law* 1(1992).

68 *See* Whitney, 'The Case for Creating A Special Environmental Court System-A Further Comment', 15 *WM. & Mary L. Rev.* 33 (1973).

69 Article 9, Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998, Johannesburg Principles on the Role of Law and Sustainable Development (adopted at the Global Judges Symposium, Johannesburg, South Africa) 18-20 August 2002 [hereafter 'The Johannesburg Principles on the Role of Law and Sustainable Development'] and Principle 10, Rio Declaration on Environment and Development; Agenda 21, *in* Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex II (1992), Chapter 8, Paragraph 2.

70 *Salem Advocates Bar Association v Union of India*, Supreme Court of India, Judgement of 2 August 2005, (2005) 6 SCC 344.

71 The Indian Parliament has already included various Citizens' Initiative Provisions viz. Section 49 of Water (Prevention and Control of Pollution) Act, 1974 and Section 43 of Air (Prevention and Control of Pollution) Act, 1981.

72 *See* The Johannesburg Principles on the Role of Law and Sustainable Development, 2002, note 69 above ['We recognise that the people most affected by environmental degradation are the poor, and that, therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy their right to live in a social and physical environment that respects and promotes their dignity'].

73 Article 39A reads as: **Equal justice and free legal aid-** The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

74 *Guruvayur Devaswom Managing Committee v C.K. Rajan***,** Supreme Court of India, Judgement of 14 August 2003, (2003) 7 SCC 546 and *People's Union for Democratic Rights & Ors. v Union of India & Ors.,* Supreme Court of India, Judgement of 18 September 1982, (1982) 3 SCC 235.

75 Professor Richard Macrory & Michael Woods, 'Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal', 2003, p.20, available at http://www.ucl.ac.uk/laws/environment/tribunals/index.shtml.

development of fundamental environmental principles such as the precautionary approach, polluter-pays, sustainable development, prevention at source, and procedural transparency.

However, the present efforts in India have been triggered by the call from the Supreme Court to constitute such courts. The practical necessity stems from (1) lack of expertise with the courts, including the Constitutional Courts, to judge merits of an environmental issue plagued with scientific uncertainty;[76] and (2) labyrinthine routes provided for review and appeals under the statutes to non-expert bureaucrats leading to delay in adjudication. The Supreme Court has, at least in three landmark cases, expressed the difficulties arising out of lack of expertise with the judges,[77] which is best expressed in the following words:

> The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies.[78]

This inexpertise has thwarted judicial review as the Court has started paying increased deference to the opinion of expert bodies. In cases involving Fundamental Rights under Article 21, the appropriate standard has always been 'primary review' of the merits of State action.[79] However, of late, the Court has started moving towards the 'secondary review' standard[80] of *Provincial Picture Houses v Wednesbury Corporation*.[81] Primary review by an expert judicial body is a necessity in view of the shoddy nature of Environment Impact Assessment in India[82] where the authorities under the statute tend to favour big industrial houses.[83] Professor Richard Macrory explains the importance of such a merits appeal in the following words worth reproducing here: 'A regulatory appeals system which can deliver effective, consistent, and authoritative rulings on the interpretation and application of regulatory requirements can therefore be seen as an essential building block - though not the only one - in ensuring improved compliance with, and the enforcement of environmental legislation'.[84]

The second significant factor, contributing to the 'practical necessity' argument, is the fragmented

76 The Johannesburg Principles on the Role of Law and Sustainable Development, 2002, note 69 above ['We express our conviction that the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law'].

77 *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 16 February 1986, (1986) 2 SCC 176, 202, *Indian Council for Enviro Legal Action v Union of India*, Supreme Court of India, Judgement of 13 February 1996, (1996) 3 SCC 212 and *A.P. Pollution Control Board I* case, note 2 above.

78 *A.P. Pollution Control Board I* case, note 2 above.

79 *Bachan Singh v State of Punjab*, Supreme Court of India, Judgement of 9 May 1980, (1980) 2 SCC 684, *Om Kumar & Ors v Union of India*, Supreme Court of India, Judgement of 17 November 2000, (2001) 2 SCC 386 and *Union of India & Ors. v Ganayutham*, Supreme Court of India, Judgement of 27 August 1997, (1997) 7 SCC 463.

80 *Tehri Bandh Virodhi Sangarsh Samiti & Ors. v State of U.P. & Ors.*, Supreme Court of India, Judgement of 7 November 1990, 1992 Supp(1) SCC 44, *Narmada Bachao Andolan* case, note 16 above and *N.D. Jayal's* case, note 17 above.

81 English Court of Appeal, Judgement of 7 November 1947, [1948] 1 KB 223.

82 Sanjay Jose Mullick, 'Power Game in India: Environmental Clearance And The Enron Project', 16 *Stan. Envtl. L.J.* 256 (1997) and Aruna Murthy & Himansu Sekhar Patra, 'Environment Impact Assessment Process In India And The Drawbacks', September 2005, available at http://www.freewebs.com/epgorissa/ [Highlighting the poor quality of EIA Reports which are generally incomplete due to omission of significant information and provided with false data].

83 P. Devarajan, 'Is nature not worth any notice?', *Hindu Business Line*, 8 June 2007.

84 Professor Richard Macrory & Michael Woods, Paragraph 4.4, note 75 above.

nature of remedies under the current dispensation which provides for multiple appeal routes under different statutes.[85] The proposed Environmental Courts would act as 'one stop shop' or single window for all environmental adjudication. Rationalisation of such fragmented and diversified jurisdictions of a number of authorities has been an important aim of such courts in New South Wales, Australia and New Zealand. In the United Kingdom, the idea has been toyed with mainly because the system has grown 'too complex, unintelligible to the general public, lacking any underlying coherence and thus failing to reflect contemporary developments in environmental law'.[86] Moreover, the existing authorities, in the Indian context, lack the combination of judicial and technical expertise, for example, the qualifications of the persons to be appointed as appellate authorities under section 28 of the Water (Prevention and Control of Pollution) Act, 1974, section 31 of the Air (Prevention and Control of Pollution) Act, 1981 and under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989, are not clearly spelt out. The Supreme Court has noted regional disparities created by such open provisions viz. while the appellate authority under section 28 in the State of Andhra Pradesh as per the notification of the Andhra Pradesh Government is a retired High Court Judge with no expert to help him in technical matters and the same authority as per the notification in State of Delhi is the Financial Commissioner who is neither a regular judicial member nor a technical expert.[87] Going further, under the National Environmental Tribunal Act, 1995, the Tribunal may either have a Judge/ retired Judge of the Supreme or High Court or a Secretary to Government or Additional Secretary who has been a Vice-Chairman for two years as Chairman of the Tribunal. This involvement of executive authorities deprives the process of procedural fairness due to lack of public hearings, restricted procedural rights and lack of transparency and consequently, such a system fails to contribute to the development of a body of legal principles which is indispensable for the development of efficient environmental governance system.[88]

To crown it all, the Constitutional Courts are faced with the Sisyphean task of clearing a burgeoning docket of cases reaching them through multifarious appellate routes under the Constitution and other statutes. The 124th Report of the LCI describes the pendency of cases in the High Courts as 'catastrophic, crisis ridden, almost unmanageable, imposing an immeasurable burden on the system'.[89] Thus, they are not able to devote requisite time and attention to pressing issues of environmental concern in the face of a manifold rise and high visibility of environmental litigation. Lastly, the presence of a specialist court will also increase public, government and industry awareness of environmental issues as witnessed in New South Wales.[90] From a holistic perspective, the rational for a 'green' court can be best articulated in the following words:

> The costs and administrative changes involved in setting up such a Tribunal to handle the majority of existing appeals would be modest compared to the policy gains to be made. Such a Tribunal would bring a greater consistency of approach to the application and interpretation of environmental law and policy. The improvements in authority and specialist knowledge would also foster increased confidence in those subject to environmental regulation, the regulatory authorities, and the general public. The Environmental Tribunal would lead to the better application

85 Robert Carnwath, 'Environmental Enforcement: The Need for a Specialist Court', [1992] *J.P.L.* 799.

86 Professor Richard Macrory & Michael Woods, note 75 above.

87 *A.P. Pollution Control Board I* case, note 2 above and *A.P. Pollution Control Board II* cases, note 2 above.

88 Justice Paul L. 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.

89 Law Commission of India, '124th Report on a Fresh Look at High Court Arrears', available at http://lawcommissionofindia.nic.in/101-169/Report124.pdf [herafter 124th LCR].

90 Professor Richard Macrory & Michael Woods, note 75 above.

> of current environmental law and policy, a more secure basis for addressing future challenges, increased public confidence in how we handle environmental regulation, and the improved environmental outcomes which should follow.[91]

4 AN OVERVIEW OF ENVIRONMENTAL COURTS IN OTHER JURISDICTIONS

Two important precedents of Environmental Courts are furnished by the Land and Environmental Court (hereafter 'LEC') in New South Wales, Australia and the New Zealand Environment Court (hereafter 'NZEC'). A brief description of the structure, powers and procedure of both these courts is indispensable for a critical understanding of LCI's recommendations as both the Supreme Court[92] and the LCI, characterising these experiments as 'ideal', have heavily relied on them to define the proposed Indian system.

4.1 The Land and Environment Court, Australia

The LEC, established under the Land and Environment Court Act, 1979, is a superior court of record having same jurisdiction as the Supreme Court of New South Wales[93] and is composed of Judges and nine technical and conciliation assessors. The Judges and Commissioners are appointed by the Governor and the Commissioners are required to have the widest possible qualifications viz. special knowledge or qualification in town planning, environmental planning, environmental science including matters relating to protection of the environment and environmental assessment, architecture, engineering, surveying or building construction, management of natural resources and urban design or heritage.[94]

The Court exercises a combinatorial appellate jurisdiction[95] under planning and production statues and a 'reviewing and enforcement jurisdiction' in relation to environmental and planning statutes. Its jurisdiction extends to matters ancillary to a matter that falls within its jurisdiction;[96] thus enabling it to adjudicate matters which incidentally affect environment. The Court's doors are open to anyone complaining of violation of the relevant statutes. Section 22 empowers the Court to grant all remedies of any nature, conditionally or unconditionally, so that all controversy is completely and finally determined and multiplicity of proceedings is avoided.[97] On the procedural plane, the Court is not bound to follow rules of evidence and may obtain assistance of any person having professional or technical qualifications relevant to any issue.[98] Justice Paul Stein, Judge, LCE, has highlighted the following benefits arising out of the Court's integrated jurisdiction over the last 20 years:[99]

(1) Decrease in multiple proceedings arising out of the same environmental dispute;

(2) Reduced litigation with consequent savings to the community;

(3) A single combined jurisdiction is administratively cheaper than multiple separate tribunals;

(4) A greater degree of certainty in development projects;

(5) Reduction in costs and delays may lead to cheaper project development and cost for consumers;

91 Id, at Paragraph 17.1.
92 *A.P. Pollution Control Board I* case, note 2 above.
93 Australia, Land and Environment Court Act, 1979 (NSW), Section 20 (2).
94 Id, Section12.
95 Id, Sections 17 and 18 [appeals under statutes relating to local government], Section 21A (class 6) [appeals from convictions relating to environmental offences] and Section 2IB (class 7) [other appeals relating to environmental offences].
96 Id, Section 16.
97 Id, Section 22.
98 Id, Section 38.
99 Justice Paul L. Stein, Paragraph 91, note 88 above.

(6) Greater convenience, efficiency and effectiveness in development control decisions.

The efficient and timely disposal of cases by LEC is a well recognised fact and the available figures[100] reveal that the Court has an ideal clearance ratio[101] of 100 per cent. It has established consultative committee in form of 'Court Users Group' whose main function is to recommend to the Chief Judge improvements in the functioning and services provided by the Court and act as a communication channel to disseminate court related information. The Group has a wide range of membership across engineering, architectural, planning, surveying streams along with representatives of the legal profession.[102] In overall terms, the LEC has been an outstanding success in terms of efficiency and effectiveness.[103]

4.2 The New Zealand Environment Court

The NZEC, established under the Resource Management Act, 1991 (hereafter 'RMA'), is an independent specialised court consisting of Environment Judges and Environment Commissioners acting as technical experts. The Governor-General appoints them for a period of five years on the recommendation of the Minister of Justice, while ensuring 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.

The RMA enjoins the Court with a general duty of promoting sustainable management in accordance with the Act and the duty of avoiding, remedying or mitigating adverse effects on the environment. The Court exercises a wide spectrum of powers over environmental issues[104] which include three prominent areas viz. (1) power to make declarations of law;[105] (2) power of appellate review on a *de novo*[106] basis of resource consents and proposed district and regional plans/ policy statements;[107] and (3) power to enforce duties under the RMA through civil and criminal proceedings.[108]

The Court can make declarations on questions regarding division of authority between regional authorities and conformance of policy plans/ statements and acts of government entities with RMA or the policy plans.[109] Under its appellate jurisdiction, it reviews planning instruments like regional policy statements/ plans and resource consents on merits. It has the power to either confirm or direct the local authority to modify, delete, or insert any provision referred to it and such authority is enjoined to effectuate the decision of the Court.[110] Lastly, it can issue 'enforcement orders' on application of any person on any of the four grounds specified underneath, that is:[111]

100 The Land and Environment Court of NSW, 'Annual Review, 2005', available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_annualreviews.

101 A measure of whether the Court is keeping up with its workload. It is the number of finalisations divided by the number of lodgments/registrations (multiplied by 100 to convert to a percentage).

102 Dennis A. Cowdroy, 'The Land and Environment Court of New South Wales - A Model For The United Kingdom', [2002] *J.P.L*. 59.

103 Justice Paul L. Stein, Paragraph 91, note 88 above.

104 *See* Ministry of New Zealand, 'Your Guide to Environment Court: An Everyday Guide to the RMA Series 6.1', available at http://www.mfe.govt.nz/publications/rma/everyday/court-guide-jun06/html/page2.html.

105 New Zealand, Resource Management Act, 1991, Sections 310- 313.

106 A *de novo* review entails that not only does the Court decide the ultimate merits of the decisions it reviews, but it does so based on evidence that is adduced anew before the court, rather than on the evidence that was before the Council from which the appeal or reference is made to it. Section 290 (1) specifies that in exercising its appeal powers, the Environment Court 'has the same power, duty, and discretion . . . as the person against whose decision an appeal or inquiry is brought'. This can be contrasted with the Indian standard of review wherein the Court determines only the legality and propriety of the decision making process without interfering with merits of the decision itself.

107 RMA, Sections 120, 292, 293.

108 Id, Sections 314-321 and 338 -343.

109 Id, Section 310 (b) and (c) and Bret C. Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court', 29 *Ecology L.Q.* 1, 26-38 (2002).

110 Id, Sections 120 and 290 (2).

111 Id, Sections 314 and 316.

a. Injunction against actions contrary to the provisions of the RMA, regulations, rules in regional or district plans, or resource consents; or

b. Injunction against action that 'is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment'; or

c. Directing a person affirmatively to comply with the RMA and other instruments or to avoid, remedy, or mitigate adverse effects on the environment caused by or on behalf of that person; or

d. Compensating others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource consents.

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.[112] The mediation service of the Court is regarded as 'innovative' and cost-effective as its own technically-oriented Commissioners act as mediators.[113] On the procedural side, limitations on rules of evidence are non-existent[114], proceedings are less formal and it encourages individuals and groups to represent themselves. Third parties may also apply to it for an order to enforce the RMA against anyone else. Its decisions may be appealed to the High Court on questions of law only.[115] In view of its overarching powers, it has been rightly characterised as the 'adjudicator of sustainability'.[116]

Initially, the Court was confronted with delays in disposal of mounting caseload. However, in 2003, the Government provided additional financial resources after a thorough review of this issue.[117] Since then, the case pendency has halved and the 'clearing ratio' has improved to a level above 90 per cent which speaks volumes about its efficiency.[118]

5 AN OVERVIEW OF LAW COMMISSION OF INDIA'S RECOMMENDATIONS

The LCI undertook the study of Environmental Courts in pursuance of the call by the apex Court to do so. It has proposed a structure in which Environmental Courts will be established at the state level with flexibility to have one Court for more than one State.[119] The 186th Report summarises the major recommendations relating to the composition, powers and procedures of the proposed courts which can be delineated systematically under the following heads:

5.1 Composition of the 'Green' Court

The Court shall consist of three Judicial Members, who are either (a) sitting or retired Judges of a High Court or (b) experienced Members of the Bar with not less than 20 years standing.[120] In the appointment process, it is proposed to provide preference to those who have had experience in environmental matters as judges or lawyers. The judges will be appointed by the Central Government

112 Id, Section 268.
113 Stephen Higgs, 'Mediating Sustainability: The Public Interest Mediator in The New Zealand Environment Court', 37 *Envtl. L.* 61 (2007).
114 New Zealand, Resource Management Act, 1991, Sections 274 (1) and 276.
115 Id, Section 287.
116 *See* Birdsong, note 109 above, at p. 38.
117 Ministry for the Environment, 'Reducing the Delays: Enhancing New Zealand's Environment Court', March 2003, available at http://www.mfe.govt.nz/publications/rma/reducing-the-delays-mar03.pdf.
118 New Zealand Environment Court, 'Annual Report of the Registrar, 2005', at p.8, 'Annual Report of the Registrar, 2006', at p.9, and 'Annual Report of the Registrar, 2007', at p.8, available at http://www.justice.govt.nz/environment/reports/default.asp.
119 186th LCR, at p.142.
120 Id, at p.142.

in consultation with the State Government, the Chief Justice of the State/Union Territory concerned and the Chief Justice of India.[121]

In respect of each court, the judicial members will be assisted by three environmental experts, to be known as the 'Commissioners'. Without being a part of the bench itself, they will constitute a statutory panel for proffering independent advice and assistance to the court in analysing and assessing scientific or technological issues. It has been recommended to have a mandatory presence of such experts during the course of the hearings. Each Commissioner must have (1) a degree in environmental sciences together with at least five years experience as an environmental scientist or engineer; or (2) adequate knowledge of and experience to deal with various aspects of problems relating to environment, and in particular the scientific or technical aspects of environmental problems, including the protection of environment and environment impact assessment. The appointment will be made by the concerned State Government in consultation with the Chief Justice of the State High Court and Chairman of the concerned Environmental Court. The tenure of both the Judges and Commissioners will be five years.[122]

5.2 Jurisdiction and Powers of 'Green' Court

The proposed court will have jurisdiction over all environmental issues with specific inclusion of the following:[123]

a) protection of the right to safe drinking water and the right to an environment that is not harmful to one's health or well being; and

b) power to have the environment protected for the benefit of present and future generations so as to:

   i) prevent environmental pollution and ecological degradation;

   ii) promote conservation; and

   iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Such jurisdiction shall specifically extend to the following matters:[124]

a) the protection of natural environment, forests, wild life, sea, lakes, rivers, streams, fauna and flora;

b) preservation of natural resources of the earth;

c) prevention, abatement and control of environmental pollution including water, air and noise pollution;

d) enforcement of any legal or constitutional rights relating to environment and pollution under the Constitution of India or under any other law for the time being in force; and

e) protection of monuments and places, objects of artistic or historical interest of national importance as declared by the law made by Parliament.

It has been proposed that the new Act should incorporate the definition of 'environment' and 'environmental pollution' as provided in Section 2(a) and Section 2(c) of the Environment (Protection) Act, 1986 respectively. The proposed court shall have original jurisdiction on environmental disputes with all powers of a Civil Court and shall have the power to grant all reliefs which the latter can grant under the Code of Civil Procedure, 1908 or other statutes like the Specific Relief Act, 1963.[125] It will have all appellate powers now conferred under the Water (Prevention & Control of Pollution) Act, 1974, the Air (Prevention & Control of Pollution) Act, 1981, and on the appellate authorities constituted under the various Rules made under the

121 Id, at pp. 153-154.
122 Id, at pp. 154- 155.
123 Id, at p. 146.
124 Id, at p. 146.
125 Id, at p. 145.

Environment (Protection) Act, 1986.[126] In addition to this, the jurisdiction of the tribunal under the National Environment Tribunal Act, 1995 and the authority under the National Environmental Appellate Authority Act, 1997, is proposed to be transferred to the Environment Court.[127]

The Law Commission has not proposed any review role for the Court and has shunned the method of extensive classification of cases into different classes adopted in New Zealand. In addition to the strictly judicial functions, the Court will be bestowed with wide 'policy making' powers to frame schemes, monitor them and modify them suitably.[128] However, these powers are distinct from executive policy making powers and limited to directions for shifting or closure of polluting industries, workmen compensations schemes, making provision for water in new localities or securing justice *inter partes*. They will have power to mould relief like Constitutional Courts according to facts and circumstances of the case as opposed to civil courts which grant only the relief asked for.[129]

However, the LCI has thought it fit to deprive the 'Green' Courts of the writ powers exercised by the High Courts under Article 226 of the Constitution of India. The recommendation has been in view of the judgment of Supreme Court in *L. Chandra Kumar v Union of India*[130]; an issue which has been discussed in detail underneath. Similarly, criminal jurisdiction has been excluded from the court's purview solely because of lack of precedent in terms of any special law where the appellate criminal jurisdiction of the High Court has been transferred to another court at the state level, manned by retired judges.[131] The decisions of the Court may be appealed against in Supreme Court only on points of law and the LCI argues that the presence of this efficacious remedy will make the High Courts refrain from interfering with the new courts in exercise of their powers under Articles 226 and 227.[132]

126 Id, at pp. 142-144.
127 Id, at p. 149.
128 Id, at p. 150.
129 Id, at p. 151.
130 Supreme Court of India, Judgement of 18 March 1997, (1997) 3 SCC 261.
131 186th LCR, at pp. 155-156.
132 Id, at p. 157, 159.

5.3 *Locus Standi* and Procedural Aspects

The *locus standi* requirements in case of original petitions will be as flexible and wide as in case of PIL before the Constitutional Courts. Any person or organisation who or which is interested in the subject matter or in public interest may approach the court subject to the exception that the courts may inflict exemplary costs in case of frivolous or vexatious litigation.[133] On the procedural side, 'Green' Courts will not be bound by rules of evidence laid down in Indian Evidence Act, 1872, and would be able to formulate their own procedural norms. They will be able to consult experts outside the statutory body of Commissioners. The Judges and Commissioners will have the necessary powers to make spot inspections and record oral evidence.[134] Conciliation and mediation at any stage of the proceeding, original or appellate, shall be encouraged.[135] However, in all cases, the fundamental principles of natural justice will be adhered to.

6 THE DARK SIDE OF LAW COMMISSION OF INDIA'S RECOMMENDATIONS

John S. Hammond, in his seminal work titled 'The Hidden Traps in Decision Making', has enumerated various psychological clogs and prejudices, called 'traps', which subtly operate to cloud the mind of a decision maker and prevent him from adopting the best course amongst the possible alternative choices.[136] Though originally applied in context of business decision making, the 'trap hypothesis' extends even to recommendatory bodies and law makers in the legal field. The LCI does not seem to be an unaffected decision maker while endorsing the need for constitution of specialised Environmental Courts as though the aforesaid recommendations

133 Id, at p. 152.
134 Id, at p. 148.
135 Id, at p. 148.
136 John S. Hammond et al., 'The Hidden Traps in Decision Making' (September-October 1998) *Harv. Bus. Rev.* 47.

combine the essential attributes of comprehensivity and clarity, yet they fail to (a) secure the independence of courts from executive and; (b) ensure potent enforcement powers to them by making them a part and parcel of the lower judiciary.

Specialised judicial authorities for environmental adjudication have already been created in India. The National Environment Tribunal Act, 1995, was enactment to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of the Tribunal for effective and expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property and the environment. However, the Act has not been notified by the executive government and thus, during the last twelve years, no Tribunal is in existence. The LCI itself has expressed anguish over the gross failure of the Act noting that if a tragedy like the Bhopal Gas Disaster reoccurs today, there is no Tribunal which would grant damages expeditiously.[137] The National Environmental Appellate Authority Act, 1997, intended to provide for the establishment of a National Environmental Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operation or process or class of industries, operation or processes shall be carried out or shall not be carried out subject to safeguards under the Environmental (Protection) Act, 1986. However, the LCI has noted that the narrow jurisdiction of the authority was ineffectual and there have been no appointments after the retirement of the first Chairman to the Authority.[138]

Thus, both the Tribunals have been rendered non-functional due to the laxity of the executive Government. However, even in face of such gross failures, the LCI has failed to envisage a scheme for total independence of the future 'Green' Courts from government control. The reasons for chartering a new course and treading a new path in respect of 'Green' Courts have been articulated in the following section with suggestions of appropriate modifications and it is necessary to emphasise that the broader premises articulated apply to all national systems which genuinely desire such an overhaul of judicial administration.

137 186th LCR, at p.101,104.

138 Id, at p.104.

6.1 Executive Interference in Functioning of 'Green' Courts

The makers of the Indian Constitution never sought to leave the judiciary at the mercy of the other branches.[139] Independence of judiciary is the bulwark of the Indian democratic system[140] and forms a part of the basic structure[141] of the Constitution.[142] The

139 M. P. Singh, 'Securing The Independence of The Judiciary-The Indian Experience', 10 *Ind. Int'l & Comp. L. Rev.* 245 (2000).

140 *Union of India v Sankal Chand Himatlal Sheth & Anr.*, Supreme Court of India, Judgement of 19 September 1977, (1977) 4 SCC 193 [The Court declared that '.. the independence of judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document....'].

141 The Basic Structure doctrine was propounded by the Supreme Court in *Keshavananda Bharati v Union of India*, Supreme Court of India, Judgement of 24 April 1973, (1973) 4 SCC 225 and postulates that elemental or basic features like democratic governance, secularism, federalism, independence of judiciary, separation of powers, fundamental rights like right to life, the harmonic balance between fundamental rights and Directive Principles of State Policy, cannot be abrogated by the Parliament through a constitutional amendment. Any constitutional amendment which runs contrary to these principles is unconstitutional and void. *See Indira Gandhi v Raj Narain,* Supreme Court of India, Judgement of 7 November 1975, (1975) Supp SCC 1, *Minerva Mills v Union of India*, Supreme Court of India, Judgement of 9 May 1980, (1980) 3 SCC 625, *Waman Rao v Union of India*, Supreme Court of India, Judgement of 13 November 1980, (1981) 2 SCC 362, *L. Chandra Kumar v Union of India*, Supreme Court of India, Judgement of 18 March 1997, (1997) 3 SCC 261 and Andreas Buss, 'Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India', 19 NO. 2 *Can. J.L. & Soc'y* 23, 38-39 (2004).

142 *Sub-Committee of Judicial Accountability v Union of India*, Supreme Court of India, Judgement of 24 October 1991, (1991) 4 SCC 699, *All India Judges Association & Ors. v Union of India & Ors*, Supreme Court of India, Judgement of 24 August 1993, (1993) 4 SCC 288, *Supreme Court Advocates on Record Ass'n v Union of India*, Supreme Court of India, Judgement of 6 October 1993, (1993) 4 SCC 441, *Registrar (Admn.), High Court of Orissa, Cuttack v Sisir Kanta Satapathy*, Supreme Court of India, Judgement of 16 September 1999, (1999) 7 SCC 725 and *State of Bihar & Anr. v Bal Mukund Sah & Ors.*, Supreme Court of India, Judgement of 14 March 2000, (2000) 4 SCC 640.

Indian Constitution specifically directs the state 'to separate the judiciary from the executive in the public services of the State'.[143] The concept of independence signifies lack of powers of the government to 'abolish this institution, replace it, or make significant changes in its structure'.[144] The Supreme Court has wrestled back power of appointment of judges of the superior judiciary from the executive despite a clear constitutional mandate entrusting wide powers with the executive.[145] The Court has struck a resounding note in this aspect:

> Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself.[146]

Thus, the basic concern is to obtain a more effective and vital judicial system so as to secure and strengthen the imperative confidence of the people in the administration of justice. The Constitution provides recognition and constitutional protection to the subordinate courts[147] in respect of recruitment and appointment of judges through a complete code in form of Chapter VI of Part VI- an impenetrable insulation from the interference of any other outside agency.[148] The power of appointment to subordinate judiciary belongs to High Courts and neither the Parliament of India nor the Executive (President or Governor) can usurp this function through either legislation or executive orders.[149]

In view of this, it is important to visualise the positioning of the proposed Environmental Courts which, though equivalent to civil courts in all other respects, will be set up under a statute of the Parliament. They will adjudicate on matters relating to crucial Fundamental Rights of the citizens but will still be denied of constitutional protection and guarantee of independence.[150] The status, as I perceive it, will not be more than that of a statutory tribunal under the guise of a 'court'. It is an open secret that the entrustment of powers of appointment of judges of any court/tribunal with the executive has led to hindrance in the functioning of those institutions by a spate of improper and illegal appointments which have eventually been challenged in the Constitutional Courts. The plight of these tribunals in respect of their judicial manpower is better left unsaid. In view of this bitter experience, it is necessary to ensure that the 'Green' Courts should not meet the same fate by failing to inspire public confidence. The reason is crystal clear: the inferior status of such courts/tribunals.

Environment laws are an area in which the Government of India has been indulging in mere platitude as is evident from the fact that over the past six decades of independence precious little has been done at the ground level. From the recent events in respect of the *Godavarman* case, it is evident that the executive branch reckons environmental governance as its sole domain.[151] The

143 India, Constitution of India, 1950, Article 50.

144 Eli M. Salzberger, 'A Positive Analysis of The Doctrine of Separation of Powers, or: Why Do We Have An Independent Judiciary?', 13 *Int'l Rev. L. & Econ.* 349, 351 (1993).

145 M. P. Singh, 'Securing The Independence of The Judiciary - The Indian Experience', 10 *Ind. Int'l & Comp. L. Rev.* 245 (2000) and *Supreme Court Advocates on Record Ass'n v Union of India*, Supreme Court of India, Judgement of 6 October 1993, (1993) 4 SCC 441.

146 *All India Judges' Association & Ors v Union of India & Ors.*, Supreme Court of India, Judgement of 24 August 1993, (1993) 4 SCC 288.

147 India, Constitution of India, 1950, Articles 233-237.

148 *State of Bihar & Anr. v Bal Mukund Sah & Ors.*, Supreme Court of India, Judgement of 14 March 2000, (2000) 4 SCC 640.

149 Id.

150 Laifan Lin, 'Judicial Independence in Japan: A Re-Investigation for China',13 *Colum. J. Asian L.* 185, 191, 198 (1999) ['The most important aspect in the independence of the judiciary is its constitutional position....The constitution must ensure a constitutional position of dignity to the judiciary'].

151 *See* Dhananjay Mahapatra, 'Centre wants Green Bench disbanded', 21 July 2007, available at http://www.forestcaseindia.org/f9/document.2007-08-13.2179904688.

Central Government has vehemently urged the Supreme Court to wind up its Forest Bench.[152] The government has opined that the *ad hoc* orders passed by the Forest Bench, on basis of the opinion of persons not qualified in scientific forestry, have led to usurpation of executive's powers and have contributed to growing poverty, social unrest and spurt in *Naxal* activities.[153] Furthermore, the Ministry of Environment and Forest has been at loggerheads with the apex Court over the composition of the Forest Advisory Council[154] and has refused to include persons recommended by the Court in the Council.[155] The Ministry is also trying to overturn Court's wide definition of 'forest' by restricting it to 'legally notified forests'.[156] Over the past twelve years, the authorities have consciously violated the orders of the Court regarding ban on sawmill licencing.[157]

Such attitude of Government puts a big question on the independence of the proposed Environment Court. The Law Ministry is already surreptitiously tampering with the LCI's proposal to induct retired bureaucrats onto the 'green' benches.[158] The Bill is under wraps but news reports reveal that it proposes to establish a two-tier structure, a National Environment Tribunal (NET) at the Centre and Regional Environment Tribunals (RET) for groups of states. The NET will have a chairperson and nine members. Besides the chairperson and one member, who are judicial members, eight experts from the fields of physics, chemistry, botany, zoology, engineering, environmental economics and social sciences (either sociology or cultural anthropology) and forestry would form the NET. Such a shift from 'court' to 'tribunal' will erode the whole efficacy of the exercise.

The independence of the judiciary from political pressures is an essential aspect of justice at any level.[159] It is advisable to scrap the proposal of statutory constitution of Environmental Courts in the present form. The more appropriate way is to constitute them in form of a specialised division of the existing High Courts. To make, environmental justice more people-oriented, the existing District Courts should also have such divisions from which the appeal will lie to the High Court divisions. It is highly significant, at this juncture, to stop repeating the mistake of executive involvement is judicial appointments. It will be beneficial to entrust the power of appointment to the Higher Courts which will at once ensure the quality of appointment and the independence of judiciary.[160]

152 *See* J. Venkatesan, 'Wind up Forest Bench: Centre', *The Hindu*, 21 July 2007, 'Centre Urges Apex Court to Wind Up "Forest Bench"', available at http://www.forestcaseindia.org/f9/document.2007-08-13.2788121453 and *See* Honorable Justice Sobchock Sukharomna, 'Establishing Green Bench within the Supreme Court of Thailand', Asia Pacific Regional Conference on the Environmental Justice and Enforcement, January 2008, available at http://www.roap.unep.org/program/Documents/Law08_presentations/Day1/Green_Bench_THA.pdf [On the contrary, Thailand has formally established a Green Bench within its Supreme Court].

153 Dhananjay Mahapatra, note 151 above and Armin Rosencraz & Sharachchandra Lele, note 38 above, at pp. 13-14.

154 FAC is the highest Government-appointed advisory body constituted under Section 3 of the Forest (Conservation) Act, 1980, which is responsible for all clearances related to any diversion of forest land for non-forest purposes.

155 *See* 'Govt, SC disagree over forest panel members', *Indian Express,* 6 January 2007 and Sonu Jain, 'We need experts, not activists, said Govt, rejecting all 9 names proposed by SC panel', *Indian Express,* 10 January 2007.

156 Sharachchandra Lele, ''Defining' Moment for Forests', Vol. XLII, No.25, *Economic & Political Weekly*, 2379 (23 June 2007).

157 Armin Rosencraz & Sharachchandra Lele, note 38 above, at p 12.

158 Kalpana Sharma, note 3 above.

159 J. Clifford Wallace, 'An Essay on Independence of The Judiciary: Independence From What And Why' 58 *N.Y.U. Ann. Surv. Am. L.* 241 (2001).

160 Maria Adebowale, 'Using the Law: Access to Environmental Justice Barriers and Opportunities', available at http://www.defra.gov.uk/environment/enforcement/pdf/ejureport.pdf [stressing on transparency in judicial appointment to environmental courts to enhance public confidence], Jeffrey W. Stempel, 'Two Cheers For Specialisation', 61 *Brook. L. Rev.* 67 (1995) ['Regardless of whether the critics or proponents of specialisation are correct, specialised courts will work best if they are not granted second-class status. Insofar as possible, specialised courts should have parity with the generalist bench'.] and The American Bar Association Central and East European Law Initiative (CEELI), Concept paper on Specialised Courts, 25 June 1996 [arguing for minimisation of the potential for reduced judicial stature and importance to make specialised court effective].

Furthermore, even the most pious utterances for the establishment of an independent and effective judicial system are mere empty rhetoric without a 'guaranteed source of funding to carry out those tasks'.[161] Hamilton has argued that '[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will'.[162] Countries like Japan have secured financial independence of the judiciary through a budget allocation system specifically designed for the judiciary.[163] Under the Indian system, the Government controls the finances through the legislature without any say of the judiciary.[164] Given the necessity of collection of independent expert evidence through spot investigations coupled with the duty of these new courts to settle environmental disputes in a time bound manner and actively promote settlement through conciliation and mediation, it is an axiomatic truth that adequate and guaranteed finances will be *conditio sine qua non* for them to function efficiently. Court fees cannot be used to finance the system as it will restrict access and, thus, defeat the very rationale behind such an exercise. Hence, it is imperative to make a constitutional commitment of adequate funds for the functioning of 'green' benches. Though it may seem to place a little constraint on the maneuverability of government finances, but this little sacrifice is worth making for the huge benefit people will reap transcending current generations.

Lastly, the constitution of these courts should not be delegated to the Government by means of a conditional legislation clause as the government may keep the power in suspension even forever and the proposal may never materialise just like the National Environment Tribunal. Undeniably, the independence of 'green' benches from the executive branch is an essential and indispensable requirement.[165]

6.2 Why Create Toothless Institutions?

The main reason for creation of Environmental Courts is the lack of expertise with the Constitutional Courts in cases involving scientific issues. However, the proposal seeks to constitute them in form of civil courts and thus leave them vulnerable to greater interference by these inexperienced forums. The power to issue writs under Article 226 is the most potent weapon in the hands of the High Courts and these new courts, if not equipped to exercise these powers, will be toothless. The history of environmental cases is replete with instances where the Governmental agencies and Government have not been interested in cooperating even with the superior courts.[166] In such a scenario, how much deference will such a *Sovereign* pay to a civil court where the government is often a party to litigation in such cases? The attitude of Central Government to Supreme Court's forest bench, alluded to above, is a clear indication of its intention to avoid judicial monitoring of its discretion under environmental legislations.

The example of National Information Commission shows how the Government Ministries refuse to agree with the special forums in order to subserve

161 Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Held at Milan (26 August to 6 September 1985), Paragraph 7.

162 Alexander Hamilton, 'The Federalist No. 79'.

163 Laifan Lin, 'Judicial Independence in Japan: A Re-Investigation for China', note 150 above.

164 Even the Supreme Court has found itself powerless to do anything in respect of provision of finances for the judiciary. *State of U.P. & Ors. v Jeet S. Bisht & Anr.*, Supreme Court of India, Judgement of 18 May 2007, (2007) 6 SCC 586.

165 Justice Paul L. Stein, Paragraph 91, note 88 above and The Johannesburg Principles on the Role of Law and Sustainable Development, 2002, note 69 above ['We affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law'].

166 *D.D. Vyas v Ghaziabad Development Authority*, Allahabad High Court, Judgement of 13 April 1992, AIR 1993 All. 57 [The Government intentionally omitted to submit counter affidavits], *Ashok v Union of India*, Supreme Court of India, Judgement of 2 May 1997, (1997) 5 SCC 10 and *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 21 April 1998, AIR 1999 SC 1501.

their political interests.[167] In view of this arm twisting, it is required that the new courts should be given a constitutional status and should be constituted as divisions of the High Courts. The purpose of creating modern 'green' judiciary will be defeated if the 'green' courts do not have adequate mechanisms like issuance of writs to ensure compliance with their directions. The instance of *Godavarman* petition is particularly instructive wherein the apex Court has been using its extensive power under Article 32 through a *continuing mandamus* to ensure management of forests according to the existing forest legislations and the principle of sustainable development, to prevent the rapid deforestation and its concomitant environmental impact and to promote afforestation. The Court has been able to ensure compliance of its orders through the Central Empowered Committee. Further, under Article 144, all government authorities are constitutionally bound to assist the Court and it exercises extensive powers of contempt to discipline them. It is unimaginable that Environmental Courts, in their proposed form, will ever be able to ensure such compliance from even regional or local authorities.

In respect of the New South Wales Environment Court, Honourable Justice Paul L. Stein has pointed out that its greatest strength lies in its position as a part of the superior judiciary by virtue of which it is able to secure obedience to its orders through contempt procedures, thus enhancing its ability to protect the environment.[168] In that country as well, there has been a temptation for Governments to seek to overrule court decisions or exclude the Court's jurisdiction but this has resulted in a public backlash-mainly because the court occupies the position in the superior judiciary.[169] He further notes:

> The court's wide-ranging jurisdiction enables it to administer social justice in the legislative scheme of environmental laws, which travel far beyond justice *inter partes*. Its status as a superior court, with an integrated jurisdiction, means that it can, as far as is possible, completely resolve all matters in controversy between the parties and avoid multiplicity of litigation……Indeed, the establishment of a specialist superior court (with judicial independence) has, I have no doubt, served as a bulwark against political attack.

The substance of environmental law cases is indubitably that of Public Law and the judicial pronouncements have implications, not only for the immediate parties, but for the broader community and the environment itself and only a superior court can perform this function effectively. The courts in their proposed forms cannot be given writ powers as ultimately, they will again be subject to the writ jurisdiction of High Courts as declared by the Supreme Court in *L. Chandra Kumar*'s case;[170] thus resulting in more delays due to the two tier system and providing a relevant and germane ground to the Governments to eventually abolish them.[171]

Secondly, in the model proposed here, there should be no reason for exclusion of criminal jurisdiction relating to environmental offences as the division of High Court could act as appellate body without any

167 The National Information Commission has come at loggerheads with the Government over the issue of allowing public access to file notings in Government Departments and cabinet papers. The Government is arm-twisting the Commission in order to maintain secrecy and has proposed to amend the Right to Information Act, 2005, to overcome its decision. *See* Siddharth Narrain, 'The Information Commission's Role is to act as a Non-Government Arbiter', *The Hindu*, 4 November 2005, Siddharth Narrain, 'Government flayed on file notings' *The Hindu*, 9 December 2005 and Vidya Subrahmaniam, 'A Commission under Siege', *The Hindu*, 31 March 2007.

168 Justice Paul L. Stein, Paragraph 93, note 88 above.

169 Id.

170 The Supreme Court declared the power of judicial review vested in High Courts under Article 226 to be an integral and essential feature of the basic structure of the Indian Constitution. The Court held, in respect of Administrative Tribunals, that they should entertain and decide upon constitutional issues involved in service matters as the exclusion of such issues from their jurisdiction will defeat the purpose of their constitution viz. reduction of the mounting caseload of High Courts. However, tribunals cannot exercise power of issuing writs to the exclusion of High Courts and will be subject to the latter's powers under Article 226.

171 *M.P. High Court Bar Association v Union of India & Ors.*, Supreme Court of India, Judgement of 17 September 2004, (2004) 11 SCC 766 [The case presented a situation wherein Administrative Tribunals were abolished by the State on the pretext of increased delay and this move was held to be constitutional by the Apex Court].

controversy. The 'green' benches will be better able to appreciate the environmental policy behind the offences and would raise the standard of regulatory compliance through proper sentences. The New South Wales

Court is exercising such an integrated jurisdiction and there is no reason why such an ideal practice[172] should not be adopted in India. In the words of Professor Richard Macrory, the vesting of criminal jurisdiction in the green court would '...also command greater confidence from those charged with enforcement responsibilities, as well as providing greater assurance to the majority of industries and individuals who comply with environmental requirements, that transgressors are being treated in an effective and consistent manner'.

Another significant objection relates to the composition of the proposed forum. It is essential to ensure more public participation in the process and the panel of judges should include activists working in the field of environment protection, understanding and monitoring the environment and the inter-linkages between different aspects of the environment and who have manned many expert committees. The proper bench composition should be two members of judiciary and one environmental activist assisted by three expert Commissioners as proposed.

7 CONCLUSION

In the proposed form, the 'Green' Courts will be nothing more than tribunals under disguise. The recommendation for institutional changes in the existing High Courts as proposed here is not a new proposition. The LCI in its 124th Report had proposed for constitution of separate divisions of the High Courts for different branches of law and appointment of more Judges to man the separate divisions while using the existing infrastructure.[173]

A very significant example of specialisation within the Constitutional Court is that of the Federal **Constitutional** Court of Germany which is divided into two Senates- both handling different issues of constitutional law and thus the dual-Senate system is akin to creating two constitutional courts of limited and exclusive jurisdiction.[174]

The proposed model will bring greater advantages and efficiencies. Firstly, it will enhance the reputation of the Environmental Courts by making them effective instruments of environmental governance. Secondly, it will solve the problem of boundary disputes, such as determining the point at which a tangential or peripheral environmental issue in a pending case becomes sufficiently important to suggest that the case be litigated in an Environmental Court. In recent years, some Governments have also begun to make significant changes in the institutional structures of government in order to enable more systematic consideration of the environment when decisions are made on economic, social, fiscal, energy, agricultural, transportation, trade and other policies, as well as the implications of policies in these areas for the environment.[175] In such cases there cannot be any 'slicing of issues' as such an approach has already been frowned upon by the Supreme Court in *L. Chandra Kumar*'s case. A High Court division is the best competent forum to adjudicate all such mixed disputes.

The environmental justice scenario in India presents a picture of near anarchy except for the rare interventions by the Supreme Court itself. The irony is that more than at any other time, India now needs clarity of thinking, farsighted policies and an efficient regulatory and judicial framework in the area of environment as the Indian economy is growing at a rate of 8 to 9 per cent annually and is evolving as one of the fastest growing Emerging Market Economies of the world riding on wave of extensive industrial growth. The need for effective, powerful and technically expert 'superior' Green Courts is too obvious to be distinctly emphasised.

172 *See* Dennis A. Cowdroy, 'The Land and Environment Court of New South Wales - A Model For The United Kingdom', [2002] *J.P.L.* 59.

173 124th LCR, note 89 above.

174 *See* Sarang Vijay Damle, 'Specialise The Judge, Not The Court: A Lesson From The German Constitutional Court', 91 *Va. L. Rev.* 1267, 1298 (2005).

175 Agenda 21, *in* Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex II (1992), Chapter 8, Paragraph 2.

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