

RIGHT TO CLEAN AIR, A BASIC HUMAN RIGHT A Glimpse at the Legal and Regulatory Frameworks

*Swapna Jha**

Aren't poverty and need the greatest polluters? Asked the then Indian Prime Minister Mrs Indira Gandhi at the first global United Nations Conference on Human Environment held in 1972 at Stockholm, Sweden. The question rings true even today and the situation has not changed much. The environmental challenges and concerns we face today are a result not only of industrialisation and modernisation, but also of persistent poverty. India agreed, despite stark poverty, to the draft of the Declaration on the Human Environment which directed the signatory nations to develop laws regarding liability and compensation for the victims of pollution and other environmental damages.

Influenced by this declaration, the National Council for Environmental Policy and Planning was set up within the Department of Science and Technology in 1972. It was expanded in 1985 as the Ministry of Environment and Forests. The ministry is responsible for planning, promotion and coordination of national policies, standards and regulations for the conservation of flora, fauna, forests and wildlife. It is also in charge of the prevention and control of pollution as well as protection of environment.

Thereafter, the Water (Prevention and Control of Pollution) Act, 1974 constituted the statutory organisations known as Central Pollution Control Board (CPCB) with the mandate of reducing water and air pollution. The powers and function of CPCB was further enhanced by Air (Prevention and Control of Pollution) Act, 1981. CPCB also started the National Air Monitoring Programme for determining air-quality status and to control and regulate pollution from industries and other sources. In 1976, constitutional sanction was given to environmental issues by way of the 42nd amendment, which incorporated them into the Directive Principles of State Policy (Article 48A) and Fundamental Duties [Article 51 A (g)], casting constitutional obligation upon both the "State" and the "citizen" to protect and improve the environment.

International Developments

While India was taking baby steps in the area of environment protection, the international community was taking giant leaps. In 1987, the Brundtland Commission, formed to examine environmental issues resulting from rapid industrialisation, published its report titled *Our Common Future*. The report emphasised the complementarity and interdependence between economic growth and environmental conservation. It stated that humanity has the ability to make development sustainable, so as to ensure that it meets the needs of the present without compromising the ability of future generations to meet their requirements. As a result, the concept of sustainable development, reflecting the rights of the future generation, took precedence over "growth at all costs".

Subsequently, the Earth Summit held in Rio in 1992 re-emphasised the creation of sustainable development strategies, integrating social and environmental policies with the help of precautionary and polluter-pays principle. Principle 15 of the Rio Declaration states that precautionary approach should be widely applied to save the environment against serious damage, using cost-effective measures to prevent environmental degradation. Principle 16 states that national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments. This should take into account the fact that the polluter should, in principle, bear the cost of pollution, with due regard to public interest and

without distorting international trade and investment. Therefore, the principle made it incumbent upon the signatory nations to have appropriate legislation to support it.

Judicial Activism and Environment Protection

The Indian tryst with environment protection was thereafter supplemented by judicial interventions. The Supreme Court (SC), through a series of cases, tried to evolve and incorporate the polluter-pays principle, the precautionary principle, sustainable-development principle and recently the concept of intergenerational equity as part of the law of the land.

For the first time in *Indian Council for Enviro-Legal Action vs. Union of India and Ors.*, SC applied the polluter-pays principle along with the principle of strict liability. In this case, the SC, after analysing all the provisions of law, held that compensation be recovered under the provisions of Environment Protection Act. In *Vellore Citizens' Welfare Forum* case, the apex court held that in view of the constitutional and statutory provisions discussed in the judgment, the precautionary principle and the polluter-pays principle were part of the environmental law of the country.¹

In *Narmada Bachao Andolan vs. Union of India* 2000(10) SCC 664, it was pointed out that when the effect of a project is known, then the principle of sustainable development would come into play. This will ensure that mitigative steps are and can be taken to preserve the ecological balance. The court said: "Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation."

The 'public trust' doctrine was referred to by the SC in *M C Mehta vs. Kamal Nath*: 1997 (1) SCC 388. The doctrine extends to natural resources, including rivers, forests, sea shores and air in order to protect the eco-system. The state is holding the natural resources as a trustee and cannot commit breach of trust. In the above case, the state's order for a lease grant to a motel located on the Beas river bank, had proved to be harmful for the environment. The motel interfered with the natural flow of water, and hence the lease was quashed. The public company which got the lease was directed to compensate the cost of restitution of environment and ecology in the area.

The SC in several of its judgements advocated the setting up of specialised-environmental courts to deal with cases on this specific issue. The Law Commission in its 186th Report of 2003 has referred to three such cases by the apex court. In *M.C. Mehta vs. Union of India* (SCC 176), the SC said that since much of environment cases involve assessment of scientific data, it was desirable to set up environmental courts on a regional basis with a professional judge and two experts, keeping in view the expertise required for such adjudication.²

In *Indian Council for Enviro Legal Action vs. Union of India*, 1996(3) SCC 212, the SC observed that environmental courts having civil and criminal jurisdiction must be established to deal with environmental issues in a speedy manner.³

Once again in *A.P. Pollution Control Board vs. M.V. Nayudu*: 1999(2) SCC 718, the court referred to the need for establishing environmental courts. These would benefit from expert advice from environmental scientists/technically qualified persons, as part of the judicial process, after an elaborate discussion of the views of jurists in various countries.⁴

The SC referred the issue of formation of environmental courts to the Law Commission. The Commission in its 186th Report, recommended the formation of environmental courts, in view of the complex scientific and specialised issues relating to environment.

These should be manned only by individuals having judicial or legal experience and assisted by experts with scientific qualification and environmental experience.

The role of the SC in emphasising on an exclusive forum to deal with environmental cases has resulted in the National Green Tribunal (NGT) Act, 2010. The object to this act states that in the judicial pronouncement in India, the right to healthy environment has been construed as a part of the right to life, under Article 21 of the Constitution. Thus, the apex court's pivotal role in addressing environmental issues and the setting up of the NGT is established.

Creation of the NGT:

In the year 2010, the NGT Act was passed for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources. The Act also aimed to include enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. The statutory body established under NGT Act, would have only civil jurisdiction and not be bound by Code of Civil Procedure, 1908 but by the principles of natural justice and shall apply the precautionary principle, polluter pays principle and principles of sustainable development in arriving at a decision. New Delhi is the principal seat of the Tribunal and Bhopal, Pune, Kolkata and Chennai have zonal benches.

The good work done by the NGT can be gauged from few news reports below:

- **NGT imposes Rs one crore fine on Barmer plant for pollution:** "NGT on October 4 (2017) ordered the Water Pollution and Research Foundation at Balotra in Barmer district to deposit ₹1 crore with the Rajasthan Pollution Control Board; the Jasol treatment plant has been ordered to deposit ₹50 lakh. This order comes in the course of hearings on the discharge of polluted water from cloth dyeing units in the area into River Luni, causing what is widely regarded as irreversible damage."⁵
- **NGT announces ₹10,000 fine for throwing solid waste in public places in Delhi:** "Terming solid waste as a major pollutant affecting the city, the tribunal said that civic authorities were under a 'statutory' obligation to ensure that waste was 'collected, transported and disposed' of in accordance with the Solid Waste Management Rules-2016. All major sources of municipal solid-waste generation — including hotels, restaurants, slaughterhouses and vegetable markets — should be directed to segregate their waste before handing it over to the corporation, the bench headed by NGT chairperson Justice Swatanter Kumar added."⁶
- **NGT slaps ₹195 crore fine on Pune developer for environmental damage:** "Pune NGT imposed a fine of ₹195 crore on city-based Goel Ganga Developers for causing environmental damage at its Ganga Bhagyodaya, Amrut Ganga and Ganga Towers projects on Sinhagad road."⁷
- **NGT holds Sri Sri's Art of Living responsible for damage to Yamuna floodplains:** "The NGT held Sri Sri Ravi Shankar's Art of Living responsible for the damage to the Yamuna floodplains caused by the holding of the World Culture Festival in 2016. However, it did not levy any additional penalty on the organisation... Last year, the NGT imposed rupees five crore as interim-environment compensation on the Art of Living Foundation for the event's impact on the environment. It held that if the amount required for the restoration was above ₹5 crore, then the urban body had to recover the money from the organisation."⁸
- **Take 10-year-old diesel vehicles off roads:** "NGT has raised concern over 10-year-old diesel taxis operating in the national capital and directed the Aam Aadmi Party government to seize them without any delay as they cause air pollution."⁹

Are the Orders by NGT Taken Seriously?

Despite these comprehensive directions by NGT, there has been no improvement in the quality of air we breathe. Most of these orders have either been ignored or are being flouted with impunity. The quoted text from the media report “NGT orders impossible to enforce” reveals the inefficacy of the panel’s orders: “An investigation by The Sunday Guardian in Kirti Nagar, Kidwai Nagar, Govindpuri, and Nehru Place revealed that none of the previous orders of the NGT, such as the ban on diesel generators, construction activities, industrial activities causing emissions, usage of polythene bags and entry of trucks older than 10 years, was being implemented.

Even on November 11, 2017, when the Air Quality Index (AQI), which measures the concentration of pollutants in the air, clocked more than 450 in some parts of the city, construction activities were still underway in several parts of the national capital.

Construction activity at the redevelopment site of Kidwai Nagar in south Delhi, which is being undertaken by the National Buildings Construction Corporation Limited (NBCC), was going on in full swing and construction workers remained unaware of any such ban. Delhi Metro construction work was also going on at different locations. Even the ban on diesel generators, which contribute nitrous oxide to the air, was not being implemented seriously. Banquet halls and even the city’s shopkeepers continued to use diesel generators. Also, authorities were doing little by way of vacuum cleaning the roads or sprinkling water to arrest dust pollution....

In addition, despite NGT’s 2015 order banning crop burning in paddy fields, there has been a dramatic rise in stubble burning in Punjab, Haryana and Uttar Pradesh. According to National Aeronautics and Space Administration (NASA) data, crop burning intensified on October 27, 29 and 31, particularly in Punjab.¹⁰

Despite judicial interventions, we continue to breathe in toxic air. The magnitude of the problem in India is reflected in the following figures.

Data Presents a Grim Picture

An estimated 62,000 million litres per day (MLD) sewage is generated in urban areas, while the treatment capacity across India is only 23,277 MLD, or 37 per cent of sewage generated, according to data released by the government in December 2015. That means 70 per cent of sewage generated in urban India is not treated.¹¹

“The CPCB has instituted the National Air Quality Monitoring Programme (NAMP). Under the NAMP, three air pollutants viz., Sulphur Dioxide (SO₂), Nitrogen Dioxide (NO₂) and particulate matter size equal to or less than 10 micron (PM10), have been identified for regular monitoring in all the locations. Out of 630 million Indians covered by the data, 550 million live in areas exceeding national standard for PM10, and 180 million live in areas where the air pollution levels are more than twice the stipulated standards. This includes 47 million children under five years of age, living in areas where the standard is exceeded and 17 million in areas where the air pollution levels are more than twice the stipulated standards,” a Greenpeace report says.¹²

According to the report, "India: Health of the Nation’s States - Disease Burden Trends in the States of India 1990 to 2016", air pollution was the second leading-risk factor in India as a whole. This risk factor encompassed both outdoor-air pollution from a variety of sources as well as household-air pollution that mainly results from burning solid fuels in the home for cooking and heat.

Outdoor-air pollution caused 6.4 per cent of India's total Disability-Adjusted Life Year in 2016, while household air pollution caused 4.8 per cent. Combined, they make a substantial contribution to India's burden of cardiovascular diseases, chronic respiratory diseases, and lower respiratory infections.¹³

Addressing the Challenges

The situation is alarming but all is not lost yet. We may look at a few solutions which may aid in mitigating the problem.

- All legislation related to degradation of the environment should have criminal provisions too. In the case of M.P. Pollution Control Board Commissioner, Municipal Corporation Bhopal, the NGT has observed, "Once the legislature restricts the jurisdiction of the Tribunal only to civil cases, then that jurisdiction is incapable of being expanded to the cases which are patently and substantially criminal in nature and are controlled or have been instituted under the provisions of the CrPC.....". Hence, the NGT should be authorised to impose criminal penalty in addition to fines. This will be a major deterrent as polluting companies mostly think of financial penalty as a business cost.
- The following suggestions, given by the National Conservation Strategy and Policy Statement on Environment and Development in 1992, if implemented would have yielded good results and should be looked into:
 - a) Use of clean fuels and clean technologies, energy-efficient devices and air and noise-pollution control systems;
 - b) Setting up of source-specific and area-wise air-quality standards and time-bound plans to prevent and control pollution;
 - c) Proper location of projects to minimise the adverse impact on people and environment;
 - d) Incentives for environmentally-benign substitutes, technologies and energy conservation;
 - e) Raising of green belts with pollution-tolerant species;
 - f) Developing coping mechanisms for future climatic changes as a result of increased emission of carbon dioxide and greenhouse gases; and
 - g) Appropriate action to control adverse impact on the Indian continent due to ozone depletion and other gaseous effects in the atmosphere at global level.
- More effective NGT: The decisions of the NGT are being challenged under Article 226 in the High Courts. Professor Geetanjoy Sahu of Tata Institute of Social Studies too expressed concern on lack of any tool in the hands of the NGT in effectively supervising and implementing its orders or to reverse its orders if they were found unworkable or required modification. Pointing towards a shift in the attitude of the SC from its usual prioritisation of green concern on the environmental appeals to a defensive one, he illustrated the outcomes of the Tehri Dam case, Narmada Dam case, construction of the thermal power plant at Dahanu Taluka, the Akshardham temple, and Commonwealth Games Village cases as some of the examples of the judicial defensive approach which favours infrastructure and huge investment projects over environmental concerns.¹⁴
- Lack of support: The Finance Act, 2017 and the Tribunal, Appellate Tribunals and Other Authorities (Qualifications, Experiences and Other conditions of service of members) Rules, 2017 was an attempt by the executive to render the NGT ineffective in its quest to ensure to the citizens a clean, healthy and

pollution free environment under Article 21 of the Constitution. These rules were an attempt at strengthening the executives and reducing the judiciary's involvement in the process of selection and removal of members to the NGT. The SC has once again stepped in and by its order of February 9, 2018, stayed parts of amendments to the Finance Act, 2017, and said appointments to all the tribunals would be made as per earlier rules, until the challenges to the provisions of the bill was decided. The law makers and the executive should strengthen the NGT rather than dilute its powers.

- Replacing coal with more eco-friendly alternatives for power generation may help as several pollutants are released when coal is burnt.
- Improving public transport and thereafter making strict rules for the plying of vehicles are wise ideas. Encouraging car sharing and discouraging people from using personal vehicles may be effective in checking vehicular pollution.
- Engaging the village and district level of governance in dialogue and empowering them to report and combat polluting industries and pollution may be considered. Procuring permission of the village panchayats prior to setting up of any polluting industry in the vicinity may help improve the situation.
- Creation of a committee of experts at the state level who would identify, explore, analyse and develop measures for checking the air pollution level may work. The local authority would then be required to implement these measures as well as report violation. The unemployed youth may be roped in to infuse new ideas into the system.
- The penalty for pollutant emission should be increased phenomenally. This should be coupled with strict supervision by the local, district, state and national authorities.
- The Brundtland Report recommends adoption of the agroforestry programmes, citing that the same had been adopted enthusiastically by many farmers in India. The National Agroforestry Policy of 2014, which deals with the practice of integrating trees, crops and livestock on the same plot of land, has several benefits if implemented. It helps cope with climate change by storing carbon. Also, trees buffer weather-related production losses, reducing climate impacts. In addition, they provide income and a diversity of food sources through tree-based products. The government should initiate similar programmes, leading to sustainable development .¹⁵

Adoption of International Best Practices:

We may also draw inspiration from some of the measures/steps taken to curb air pollution in other countries. A few such examples of best practices are given below:

Germany: Berlin has systematically introduced car-emission zones, resulting in more than 50 per cent soot reduction. Additionally, the comprehensive strategy addressing high-pollution emitters and aimed at significantly decreasing car use has also played a role in improving the city's overall air quality.

It also has an efficient public-transportation system. This is complemented by a decade-long cycling trend that's supported by constantly-improving bicycle infrastructure.

UK: Manchester has reshaped its busiest road into a pedestrian-friendly environment, favouring buses, hackney carriages, bicycles and emergency vehicles. Improved-cycling infrastructure as well as a free city-centre bus service linking all the city's main railway stations, car park, various bus and Metrolink tram stops along with key shopping and employment districts are added bonuses. Metrolink is the UK's largest tram network. It boasts 60 miles of track, with 120 trams serving 93 stops at key destinations across Greater Manchester, and accounts for more than 37 million passenger journeys a year. Trams encourage people to leave their vehicles at home, easing congestion on local roads.

The Way Forward

It is clear that legislations, institutions, fines and other efforts by the executive have failed to usher in the desired change. We know that industrial-chimney waste, coal-powered industries and vehicular pollution are majorly responsible for the deteriorating air quality in the country. The waterbodies continue to be choked with sewage and industrial waste. As per the Global Burden of Disease, 3,283 citizens died every single day due to outdoor-air pollution in 2015. Though this data has been countered by the executive, stating that "extrapolating techniques" have been used in surveys, it concedes that the situation is grim. The SC-appointed Environment Pollution (Prevention and Control) Authority for the National Capital Region has formulated a draft comprehensive-action plan in March 2017 for air pollution control. Prior to this, in 2016, the Centre, under orders from the SC, had framed a graded response action plan to check extreme pollution, laying out measures and actions to be taken based on levels of daily pollution. It also provided for actions to be taken when pollution reaches public-health emergency levels. These policies have suggested the use of less-polluting Bharat Stage VI fuels, restrictions on use of pet coke as well as cleaning up industrial fuels through fiscal and policy interventions. They also call for fixing and implementation of national-emission standards for nitrogen and sulphur oxide-releasing industries and constant monitoring of policy implementation.

***Swapna Jha is a Senior Legal Consultant with Common Cause.**

Endnotes:

1. Law Commission of India 186th Report
2. Ibid
3. Ibid
4. Ibid
5. <https://timesofindia.indiatimes.com/city/jaipur/ngt-imposes-rs-1-cr-fine-on-barmer-plant-for-pollution/articleshow/61210408.cms>
6. <https://www.hindustantimes.com/india-news/ngt-announces-fine-of-rs-10-000-for-throwing-solid-waste-in-public-places/story-kBbi2O8dglJFmzEmTXzCRP.html>
7. <https://www.hindustantimes.com/pune-news/ngt-slaps-195-cr-fine-on-pune-s-goel-ganga-developers-for-environmental-damage/story-eHVI8micvPT7X3Bp58ZEco.html>
8. <http://www.thehindu.com/news/national/ngt-holds-sri-sris-art-of-living-responsible-for-damaging-yamuna-floodplains/article21289249.ece>
9. <http://www.dailypioneer.com/city/take-10-year-old-diesel-vehicles-off-roads-ngt.html>
10. <http://www.sundayguardianlive.com/news/11632-ngt-orders-impossible-enforce>
11. <http://www.indiaspend.com/cover-story/70-of-urban-indias-sewage-is-untreated-54844>
12. http://www.greenpeace.org/india/Global/india/2018/Airpocalypse_II_29Jan18.pdf
13. http://icmr.nic.in/publications/India_Health_of_the_Nation's_States_Report_2017.pdf
14. <http://www.thehindu.com/news/cities/mumbai/news/challenges-to-ngt-orders-in-courts-a-growing-concern/article8387736.ece>
15. https://www.researchgate.net/profile/Sangram_Chavan5/publication/307608846_Innovative_Agroforestry_for_Environmental_Security_in_India/links/57cd79e708aed67896ffb6bf/Innovative-Agroforestry-for-Environmental-Security-in-India.pdf