PAST, PRESENT AND FUTURE OF THE NATIONAL GREEN TRIBUNAL IN INDIA

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entitled
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ABSTRACT

The National Green Tribunal has been a platform to realize the right to access to environmental justice in India from 2011 onwards. However, lately, the functioning of the Tribunal has been crippled majorly due to the lack of commitment towards keeping this institution alive. This has led to the temporary closure of the four zonal benches leaving only the principal bench in New Delhi alive. This thesis will trace the history of this Tribunal and reflect it on its present and future; the implications of the temporary closure and its impact on the right to access to environmental justice. The right to access to environmental justice is constructed in the light of right to environment and the right to access to justice. The value of this research is that it helps us see the dynamics of commitment towards environmental protection and justice through the lens of affected parties like lawyers. The argument is that the right to access to environmental justice will be dented when the will towards keeping the institution alive decreases. The results are based on a qualitative research undertaken by the researcher. Six lawyers associated to the National Green Tribunal were interviewed in person to answer the questions raised. The researcher has also relied on existing secondary data to trace the timeline of the Tribunal. The research has led to the conclusion that there is visible lethargy in keeping the institution alive; however, the commitment is not completely absent. The current scenario has further affected the right to access to environmental justice. Finally, the researcher explores possible solutions and alternatives to the issue. While getting the NGT fully functional again will solve most of the problem, the complete access to justice will be achieved with reforms in the existing judicial institutions.

KEY WORDS: POLITICAL WILL /ACCESS TO JUSTICE / NATIONAL GREEN TRIBUNAL / ENVIRONMENT

78 pages
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>iii</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>iv</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>vii</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>viii</td>
</tr>
<tr>
<td>CHAPTER I INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Research problem</td>
<td>1</td>
</tr>
<tr>
<td>1.2 Research questions</td>
<td>4</td>
</tr>
<tr>
<td>1.3 Objectives of study</td>
<td>4</td>
</tr>
<tr>
<td>1.4 Scope of research</td>
<td>4</td>
</tr>
<tr>
<td>1.5 Literature review</td>
<td>5</td>
</tr>
<tr>
<td>1.6 Research method</td>
<td>5</td>
</tr>
<tr>
<td>1.7 Importance/values of research</td>
<td>8</td>
</tr>
<tr>
<td>1.8 Ethical concerns</td>
<td>9</td>
</tr>
<tr>
<td>1.9 Limitation</td>
<td>9</td>
</tr>
<tr>
<td>CHAPTER II BACKGROUND</td>
<td>10</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>10</td>
</tr>
<tr>
<td>2.2 Legal framework in India</td>
<td>14</td>
</tr>
<tr>
<td>2.3 The national green tribunal</td>
<td>20</td>
</tr>
<tr>
<td>2.4 Amendment through the finance ACT, 2017</td>
<td>23</td>
</tr>
<tr>
<td>CHAPTER III CONCEPTUAL FRAMEWORK</td>
<td>25</td>
</tr>
<tr>
<td>3.1 Sustainable development and access to justice</td>
<td>27</td>
</tr>
<tr>
<td>3.2 Political will</td>
<td>31</td>
</tr>
<tr>
<td>3.3 Force-field analysis</td>
<td>33</td>
</tr>
<tr>
<td>3.4 Hollow hope and resilience</td>
<td>36</td>
</tr>
</tbody>
</table>
CONTENTS (cont.)

CHAPTER IV ANALYSIS AND FINDINGS
  4.1 What has led to the uncertain future of the tribunal? 40
  4.2 Hardships and alternatives 44
  4.3 How has the right to access to environmental justice been affected? 47
  4.4 Possible solution to the problems 53

CHAPTER V CONCLUSION 55
REFERENCES 66
APPENDICES 75
BIOGRAPHY 78
LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Gill, 2018</td>
<td>56</td>
</tr>
<tr>
<td>5.2</td>
<td>Lewin, 1943a</td>
<td>59</td>
</tr>
<tr>
<td>5.3</td>
<td>Gill, 2018</td>
<td>59</td>
</tr>
<tr>
<td>5.4</td>
<td>Result from data analysis</td>
<td>59</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
<td></td>
</tr>
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<td>&amp;</td>
<td>And</td>
<td></td>
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<tr>
<td>AIR</td>
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<tr>
<td>CZ</td>
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<td></td>
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<tr>
<td>CRZ</td>
<td>Coastal Regulation Zone</td>
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<td>EIA</td>
<td>Environment Impact Assessment</td>
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<td>ERF</td>
<td>Environment Relief Fund</td>
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<td>HC</td>
<td>High Court</td>
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<td>INR</td>
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<td>MoEFCC</td>
<td>Ministry of Environment, Forest and Climate Change</td>
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<td>NEAA</td>
<td>National Environment Appellate Authority</td>
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<tr>
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<td>National Environment Tribunal</td>
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</tr>
<tr>
<td>NGT</td>
<td>National Green Tribunal</td>
<td></td>
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<tr>
<td>No.</td>
<td>Number</td>
<td></td>
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<tr>
<td>OA</td>
<td>Original Application</td>
<td></td>
</tr>
<tr>
<td>Ors.</td>
<td>Others</td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>Supreme Court</td>
<td></td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court Cases</td>
<td></td>
</tr>
<tr>
<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
<td></td>
</tr>
<tr>
<td>UPA</td>
<td>United Progressive Alliance</td>
<td></td>
</tr>
<tr>
<td>v.</td>
<td>Versus</td>
<td></td>
</tr>
</tbody>
</table>
CHAPTER I
INTRODUCTION

“Man’s paradise is on earth; This living world is the beloved place of all; It has the blessings of Nature’s bounties; Live in a lovely spirit.”

-Supreme Court of India in Rural Litigation & Entitlement Kendra v. State of UP quoted from the Atharva Veda (5.30.6)

1.1 Research problem

The National Green Tribunals were set up in India under a Statute in 2010. An aftermath of the Stockholm Declaration in 1972 and the Rio Conference in 1992 was the setting up of environmental courts in many countries. The motto was to protect the environment and adjudicate on environmental disputes. There were also other laws that were environment specific that came about after this period. In India, this included various pollution control laws, wildlife protection laws, environment protection laws and forest conservation laws. The Indian Constitution (1950) was amended in 1976 to include direct provisions for the protection of environment as well. One was under the Directive Principles of State Policy, casting a responsibility on the State to protect the Environment. The other one was under the Fundamental Duties that put a duty on the citizen to protect the environment. Also, in 1998 (M.C. Mehta v. Union of India, (1998) 9 SCC 589), the Supreme Court of India read down Article 21 of the Indian Constitution (Right to Life and personal Liberty) to include the right to clean environment. In effect, the right to clean environment became a fundamental right.

In India, Environmental Courts were first set up in response to the Bhopal Gas Tragedy. However, the functions were restricted to compensating the victims. Later, in 2009, the introduction of the National Green Tribunal Bill led to the repeal of
the law that set up these Environmental Courts. The National Green Tribunals were set up under the National Green Tribunal Act, 2010. The Act provided for five benches in total. The Principal bench is in New Delhi. The other four benches are in Pune, Chennai, Kolkata and Bhopal. The Act speaks comprehensively about the composition of the court, the qualification of members and experts, the jurisdiction and guiding laws.

In August 2014, a high-level committee was appointed by the government to review existing environmental laws. It was called the TSR Subramanian Committee. The committee submitted its report in December 2014 and the report proposed a drastic overhaul to the existing laws. It advocated for self-certification of compliance by the industries, enacting an umbrella legislation to replace the existing separate statutes relating to air, water etc and the setting up of special district level courts to deal with environmental violations thereby diluting the powers and ambit of the NGT. The self-certification system for compliance of environmental laws by industries is found on the basis of good faith and will depend on the amount of information the project operators or developers choose to disclose. The review of these projects is done by random sampling, leaving the prosecution of an offence a mere possibility. Apart from this, it also recommended national and state authorities to appraise and monitor projects and this would replace the existing state and central pollution control boards. Although a process of diluting environmental laws is happening, the direct implementation of this Report was never done. The Parliamentary Standing Committee on Science, Technology, Environment and Forest rejected the recommendations in July 2015 on the ground that it would compromise on the existing environmental laws (263rd Report presented before the Rajya Sabha).

An attempt to clip the wings of the NGT was through the Finance Act of 2017. The provisions of the Finance Act gives the Centre the power to decide on qualifications, appointment, salary, term of office and removal of the Chairperson and other members of the NGT. It also allows for a non-judicial member to be the Chairperson of the NGT. This is in contrast to the provisions of the NGT Act itself, where, Section 5 states that the chairperson of the NGT must have been a judge of the Supreme Court or the Chief Justice of a High Court. By giving the centre the power to decide on qualifications and appointment, the Act directly violates the idea of
separation of powers, where the judiciary and tribunals must be free from executive control. The Supreme Court of India, however, upon the filing of Public Interest Litigations against the amendments, has stayed parts of the Finance Act, 2017.

The Statute (2010 Act) confers solid powers on the Tribunal to dispense environmental justice. Recently, the Government has also not appointed staff and judges to the zonal benches, citing financial reasons. This has led to the partial shutdown of regional benches. The cases are heard by the principal bench through video conferencing, in the absence of judges at the zonal benches. The disposal rates are high due to lack of manpower. The future of this Tribunal is uncertain. This thesis will be an attempt to trace the history of these Tribunals and reflect it on the present and future and the implications of the temporary shutdown and its relation to the access to environmental justice.

When human rights are considered, subjects like refugees, minorities, self-determination, etc., come up. It is not very obvious for someone to construct environment as a human right. It is a *sine qua non* or a prerequisite to the enjoyment of other human rights. Without the environment, human survival is in question. The enjoyment of other rights in such situation is impossible. The right to access to environmental justice must be constructed in the light of right to environment and the right to access to justice. If the State’s commitment/political will towards it decreases, the right to environment will be affected. The researcher will briefly explain the framework of the thesis so as to outline the contents to the reader.

The Researcher, in the second chapter will first establish the link between environment and human rights and conclude that the right to environment is essential. Then the researcher will briefly explain the legal framework in India with respect to environmental laws. The framework before the NGT is explained in detail along with the environmental jurisprudence laid down by the Supreme Court of India. Then, the NGT, its set up and functioning is explained in brief. Following this, the researcher explains the amendment made to the NGT Act through the Finance Act in 2017. With this as an introductory framework, the researcher moves to the third chapter to explain the conceptual framework. The researcher starts by explaining why this right matters at all by briefing concepts of sustainable development, intergenerational equity and finally access to justice. Then, the researcher explains the concept of political will and
situates it within the force-field analysis by showing that it can be either a driving force or a restraining force. Finally, the researcher explains the concepts of “dynamic” and “constrained” courts to later find out where the NGT falls through the data collected. Whether or not political will is present, and whether or not it contributes to the restraining forces will be the outcome of the analysis of the data gathered through interviewing six lawyers associated with the NGT. The findings will also help the researcher establish that the right to access to justice has indeed been altered from what it was when the NGT was fully functional and what it is now. These research findings and analysis will be a part of the fourth chapter.

1.2 Research questions

1.2.1 What prompted the Government to set up Green Tribunals?
1.2.2 What is the future of the Green Tribunal?
1.2.3 How has this affected the right to access to environmental justice?

1.3 Objectives of study

The objective of the study is to trace a timeline of the Green Courts and point out the highs and lows of the Court; to examine and explore the outcomes of setting up these courts; to identify the factors that contribute to the growth or demise of the green courts. Also, the study aims to point out the repercussions of the temporary shutdown of the zonal benches on the right to access to environmental justice.

1.4 Scope of research

The study is limited to the time period after the passage of the National Green Tribunal Act, 2010. The analysis will be based on interviews with lawyers associated with the Tribunal alone.
1.5 Literature review

There is literature on the constitution, history, functioning and drawbacks of the National Green Tribunal. There are works that also point at the change in the attitude of the Government towards the Tribunal that led to the introduction of bills in the Parliament to amend the Act. However, the phenomenon this thesis will study - the coming to stand still of the zonal benches due to lack of manpower and finance - is fairly recent. Most of the data that this thesis will be relying on so far as this happening is concerned will be newspaper articles and the primary data that will be collected.

The thesis will be structured on a conceptual framework on the access to environmental justice/courts, Government Commitment/political will towards the Environment, force-field analysis and the three step model to change.

The idea is to study the phenomenon - the systematic overhauling of the existing environmental laws so as to affect the functioning of the NGT, the temporary closure of the zonal benches, the impact of the closure on the right to access to environmental justice, the existing alternatives and the perspectives and opinions of lawyers on all of these happenings. The background of the study is premised on concepts of political will in keeping the courts alive, and the nature of restraining forces acting against the institution as such. The thesis will also look into how lawyers are reacting to this happening by finding out how they are coping with it.

1.6 Research method

A Narrative-Interpretive-Qualitative Research; it is an approach that is designed to understand the meaning different people have constructed to a happening or an experience they encountered in the world. It is a narrative because, the research seeks to understand their experiences through the stories the respondents tell. Given that, the research seeks to find answers to subjective questions about a certain phenomenon, while acknowledging the context or backdrop, through the different meanings lawyers attribute to it. The researcher has relied on this method primarily because the happening is fairly recent. This would be a first-hand account of how lawyers are reacting to this and coping with the environment against the Green Courts.
The research would also include the researcher’s interpretation of the narratives obtained from the research process.

1.6.1 Data collection plan

The study includes 6 participants/lawyers involved with the National Green Tribunal in Delhi (The fully functioning Principal Bench is located in New Delhi). All the participants will be informed about the study and explained about the research design and an informed consent will be received before the research starts. The researcher will make sure that the group is balanced with lawyers representing litigants from within the people, representing the government, and lawyers representing both the common litigant and the State in different cases. This sampling will allow the researcher to look into different aspects of reaction to the same happening from lawyers representing different interests. For example, a lawyer representing the State may feel that the changes are fair while a lawyer representing a victim may not.

With the group as the target fixed, the researcher will frame questions to accomplish the purpose of the thesis. The questions will aim to bring out their understanding of the happening (what exactly happened? Was the government involved? If yes, how? Why did it happen? Did they already know of this outcome? What were their personal experiences?); their reactions to the happening (how are they coping with it? What are the hardships they are facing? Have they found alternatives?); and their thoughts about what is in store in near future (will this continue? Will the government push for reforms? How has the Supreme Court reacted thus far? Will the courts shutdown? Or will they live? And why do they think so?). The questions will also aim to find out how the victims have been deprived of their complete access to environmental justice by virtue of this happening.

1.6.2 Data analysis plan

Since it is a narrative, based on qualitative research, the thesis will rely on the interviews with Lawyers. The interviews collected will be in the form of narratives, which are mostly un-structured. The form and content (structural and thematic) of all the narratives will be analyzed by the researcher. A thematic analysis
will focus on the content of the narrative by looking at what will be said by the participant rather than how it will be said. This will allow the researcher to identify common themes, locate similar events from the different participants. The structural analysis on the other hand will look at the form and flow of the narrative. Aside from this, reliance will also be placed on existing secondary data on the subject and concepts.

Once the data is collected, the researcher will read the collected material. This is done to get familiar with the collected data, and to build a holistic understanding of each narrative. This will keep the researcher aware of the different perspectives in the collected data. The next step will be to breakdown the collected narratives into fragments of smaller data. The breaking down can be done in ways that can keep one concept in each grouping. This will help the researcher compare and contrast between the different responses from the participants. The fragmented data can then be reconstructed into a structured categorized data. The categories will point to concepts and specific objectives and research questions. The next will be to relate the categories and see how similar or different they are from one another and why they are so. Finally, the researcher will attempt to integrate this collected data into the conceptual framework. The nature of study, a narrative, is the study of a phenomenon/happening based on the views of the participants. There is much emphasis on the participants’ account of events and experiences in the surroundings. The researcher will construct their experiences to fit into the conceptual framework that political will is declining and is a huge portion of the restraining forces; however, the driving forces are not dying. Although the courts are constrained courts, the force they contribute in bringing about social change is immense.

The researcher will analyze the above obtained data in light of the research objectives. The timeline will be traced majorly from existing secondary data. The factors that aid to the growth or demise of the court will be identified and derived from the narratives. This will set the basis for the conceptual framework. The researcher will draw inferences from the narratives to see if the restraining forces are gaining momentum and if political will is an integral part of it; or if the climate is changing, paving way for a stronger driving force where the Supreme Court is playing a greater role in keeping the institution alive; or if the courts have just been a constrained court,
with voice without action; or if they are resilient enough to pass through this phase, and restore their former glory, if at all there was any. The analysis will also finally look at what these participants think about the right to access to environmental justice. The researcher will infer from the data if the right has actually been crippled or if the right still exists in some form. The idea would however be to derive from the data whether the nature of the right has been altered before and after the happening.

By drawing these inference for the experiences of the lawyers will fulfill the objectives of the thesis.

1.6.3 Hypothesis

1) The Commitment towards the Green Tribunal is decreasing and is a constituent of the restraining forces.

2) This is in turn leading to the uncertain future of environmental justice in India.

3) The right to access to environmental justice is more crippled now as a result of this happening.

1.7 Importance/values of research

The value of this research is that it helps us see the dynamics of political commitment towards environmental protection and justice. If there is a lack of political will, most of the laws will fail, and the same goes to environmental governance. The research helps us to see the varying degree of political commitment towards environment in a span of over 8 years. This could also give us an insight of a future that may be more vibrant in protecting environmental rights and also a future that would cut off the wings of such rights.

The research could also tell us how the lawyers feel, how their clients feel as a consequence of this happening. We will know how different subalterns are getting affected because of this lack of commitment. We could also try and prepare to confront a system without green courts, and look out for an alternative.
1.8 Ethical concerns

Given the nature of the research, ethical considerations play an important role in the process. The considerations are related to gaining access to the participants, ensuring confidentiality and anonymity, keeping up to written and verbal informed consent, the right to withdraw from the study, staying aware of the power relations, non-deception, proper listening and a non-judgmental attitude.

Lawyers associated with victims may feel uncomfortable with certain questions and may have difficulty in narrating the problems they faced. They also have to maintain the lawyer-client secrecy. The questions will be devised in such a way so as to be very general in nature, and not about any specific victim. The lawyers can however, reveal to the researcher facts that are already in court (have become public documents). Lawyers who are associated to the government may feel that a few questions are sensitive to answer. The researcher will make sure that the questions are devised keeping in mind all their concerns.

1.9 Limitation

The nature of the study is a narrative. It comes from the perspective of lawyers alone. The researcher is apprehensive of leaving out perspectives of other stakeholders like judges and policy makers. The outcome of the research may or may not stand true in distant future with changing circumstances. For now, the outcome speculates immediate future of the Tribunal.

The researcher has resorted to a qualitative research involving interviews with only six lawyers associated with the Tribunal. Although there is diversity in the type of lawyers, the result is based on the responses from them alone. Three of them were men and three of them were women. Two of them were representing states primarily while the others were representing affected parties primarily. Despite this, there is a pattern of similarity in most of their answers.
CHAPTER II
BACKGROUND

2.1 Introduction

Human life is dependent on the environment. Air, water, food and all other essentials for human life is from the environment. The introduction page to the Special Rapporteur on Human Rights and Environment states that a safe, clean, healthy and sustainable environment is a precondition to the enjoyment of other basic human rights like the rights to life, food, health and water. A healthy environment is a condition precedent to fulfilling and achieving other human rights. The link between human rights and environment has been increasingly recognized across the globe. The introduction to the page also says that the protection of human rights helps to protect the environment directly. When people are sensitized about issues on environment and sustainable development, and are able to participate in decisions that affect them, they can help ensure that public decision making does not degrade the environment at any cost. This also has its foundation in the access to environmental justice. Increasingly today, many environment protection laws are present at national levels in many countries. Judiciaries across the globe have proven to be conscious of the environment and environmental rights. They have also led to Countries incorporating environment and environment protection in the National Laws and Constitutions. For example, Article 22 of the Constitution of Rwanda states that “Everyone has the right to live in a clean and healthy environment”; Kenya has authorized environmental courts and tribunals (ECTs) in its Constitution (Constitution of Kenya, Sections. 162(2) (b), 162 (3)). They have penal provisions that punish infringement of the right to clean and healthy environment (Buhungiro, 2018).
Environment as a Human Right

Human rights and environment are inseparable. Human survival depends on air, water, food and shelter. If these are contaminated, polluted or destroyed, life on earth may cease to exist. We need to protect our environment, in order to preserve human life. One way to achieve this was through recognition of environment as a legal human right (Thorme, 1990-91). While there are skeptics that say that the right exists only in moral terms as it lacks the elements of authority to making it count as a law (Weston, 2015), it needn’t be so necessarily. For example, Rivera (2001) in an essay says that whether or not a human right to environment is recognized under international law depends on the source. According to Weston (2015), there are at least three ways in which human right to environment is officially recognized today.

1) As an entitlement that is derived from other recognized rights, centering primarily on substantive rights such as the rights to life, health and other subsidiary rights like the rights to livelihood, habitat, culture, property, dignity, equality and sleep;

2) As an entitlement autonomous by itself where the right stands on its own independent of other rights;

3) Lastly, as a cluster of procedural entitlements that are generated from a “reformulation and expansion of existing human rights and duties” (Shelton, 1991).

Human rights are rights fundamental to every person by virtue of being born a human being and not by virtue of any citizenship or allegiance. They are fundamental international moral and legal norms that protect people from social, political and legal abuses (Nickel, 1993b). To qualify as a human right, the Right to a safe environment must satisfy at least four criteria (Nickel, 1987a). First, the proponents must demonstrate that the proposed rightholders have a strong claim to the liberty, protection or benefit in question by showing that the said values are frequently threatened by political and social abuses (Nickel, 1993b). To qualify as a human right, the Right to a safe environment must satisfy at least four criteria (Nickel, 1987a). First, the proponents must demonstrate that the proposed rightholders have a strong claim to the liberty, protection or benefit in question by showing that the said values are frequently threatened by political and social abuses (Nickel, 1993b). Second, it must be shown that this claim cannot be adequately satisfied without granting the people rights rather than any other weak forms of protection. Third, proponents of the right must demonstrate that the proposed addressees- those that bear duties under the right- can be legitimately subject to both negative and positive duties required for compliance with and implementation of the right. Lastly, the right must be feasible given the
current economic and institutional resources. According to Nickel, the right to a safe environment satisfies all the above criteria. With respect to the first criteria, Nickel says that technological development and population growth have contributed to the creation of major environmental threats to human well-being and human health. The level of severity of these environmental problems is high. A city that is facing large levels of air pollution, for example, may put people of that city, victims to diseases that arise out of the condition—such as asthma and other allergies. So, Nickel (1993b) says that, to justify a right as a human right, not only should the abuse be identified, we should also be able to show that the abuse frustrates some fundamental human interests. Taking the example of air pollution alone, the consequences are a threat to human interests. So, the right to a safe environment aims to protect humans from these consequences and therefore, Nickel (1993b) says that it should be accorded a position equal to any other human right that seeks to prevent such consequences.

With regard to the second criteria, Nickel (1993b) first points to the argument of Giagnocavo & Goldstein (1990). Nickel endorses their argument of “developing an ecological consciousness” rather than perpetuating the status quo “in the guise of environmental rights and environmental legal reform”. While endorsing it, Nickel (1993b) doubts that even if there is a development of environmental consciousness, would that make environmental rights unnecessary. If there is a public consciousness, there will be no pollution that is willingly done, and this might eliminate the need for a right at all. But, the world population might not develop this consciousness soon enough. Even if it does, the dependence of human on dangerous agricultural and industrial processes and the consequences of those still remain. Nickel (1993b) says that large populations need water and energy and they generate large amounts of sewage and wastes. Powerful economic interests often tend to work against requiring polluters to reform their practices. While threat-elimination strategies must be promoted, the society will benefit from the ‘right’ until the threat-elimination strategies become totally successful.

With regard to the duty of the addressees, rights generally empower rightholders by imposing legal burdens/duties on the addressees. The proponents of the right must show that there is not only a strong case for desiring some freedom and protection or benefit, but also that the burden of providing this can be legitimately
imposed on the addressees (Nickel, 1993b). Organizations, corporations and individuals have a negative duty to refrain from activities that cause substantial threats to the right to a safe environment. Governments and international organizations also have a positive duty to promote and protect a safe environment. Lastly, it is feasible to implement the right in most parts of the world. Some countries may find it difficult to get the resources to implement the right, however, it is not different from any other human right (Nickel 1993b).

Most of the international instruments related to environment are non-binding instruments. In this context, the role of customary international law remains important. A large part of academic work has been devoted to what norms of environmental law have reached the status of customary law (Dupuy et al, 2018). In 2015, the International Court of Justice in Costa Rica/Nicaragua summarized the core of customary environmental law as:

"to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment [...] If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk”

The development of customary environmental law has led to the emergence of a close-knit core of customary norms consisting of the prevention principle (Principle 2 of the Rio Declaration) and three related duties ((Dupuy et al, 2018))- duty of due diligence, procedural duties to conduct EIA¹ and to co-operate in

¹Principle 17 of Rio Declaration; Pulp Mills Case recognized the duty as a part of general international law, para 204
good faith\(^2\). While this can be the case internationally, the right to environment is recognized as a fundamental right within the National Constitution of India (like in many other countries as well) through the Apex Court’s interpretation of the right to life.

### 2.2 Legal framework in India

Like many other countries, the constitutional framework of environment protection in India is quite comprehensive. The Constitution of India (1950) is a moderately flexible document that can be amended according to the requirements of time. The Indian Constitution was amended in 1976 to include direct provisions for the protection of environment. One was under the Directive Principles of State Policy, casting a responsibility on the State to protect the Environment (Article 48-A states that “the state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country”). The other one was under the Fundamental Duties that put a duty on the citizen to protect the environment (Article 51-A (g), states that “It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.”). In 1988, the Supreme Court of India in Rural Litigation and Entitlement Kendra v. State (AIR 1988 SC 2187) first recognized the right to live in a healthy environment as a part of the right to life. Also, in 1998 (M.C. Mehta v. Union of India, (1998) 9 SCC 589), the Supreme Court of India read down Article 21 of the Indian Constitution (Right to Life and personal Liberty) to include the right to clean, pollution free environment. In effect, the right to clean environment became a fundamental right.

Prior to the establishment of Environmental Courts, the writ jurisdictions of High Courts of States under Article 226 of the Constitution and the Supreme Court under Article 32 of the Constitution were invoked to address environmental issues. Under the leadership of the Supreme Court and the High Courts, many landmark environmental decisions were given. In the process of adjudication, principles like the

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\(^2\)Principles 18, 19 of Rio Declaration; South China Sea Arbitration para 946, 984-985; Lake Lanoux Arbitration, para 22
‘polluter pays’ and ‘precautionary principle’ were incorporated as a part of sustainable development (Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647).

**Environmental Court Framework before the NGT**

The National Environment Tribunal Act, 1995 in its preamble provided for “strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or incidental thereto.” The Act was limited to this scope. The Act was in furtherance of India’s commitment to the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro, 1992 calling States to develop laws for liability and compensation for the victims of pollution and other environmental damages.

The National Environmental Tribunal Act of 1995 was enacted by the Parliament to address strict liability for damages and disposal of cases arising out of accidents while handling hazardous substances. The liability was on the basis of ‘no fault’ under Section 3 of the Act and compensation for damages to person, property and the environment was payable under Section 4 of the Act. Section 9 of the Act spoke of the composition of the Tribunal. It shall have one Chairperson and such members as Vice Chairpersons/ Judicial and technical members as the Central Government may deem fit. The tribunal can sit in benches where there is a judicial member and a technical member. To be a Chairperson, he/she should be or should have been a judge of the High Court of the Supreme Court, or should have been the Vice-Chairperson for at least 2 years. To be a Vice-Chairperson, the person should be or should have been a judge of a High Court or a Secretary to the Government of India for at least 2 years or has held any other post in the State or Central Government, that has a pay scale of not less than that of the Secretary to the Government of India or has held the post of Additional Secretary in the Government of India for 5 years and has acquired the experience in legal, technical, administrative and scientific aspects of problems relating to the environment, or at least three years experience as a judicial member or a technical member. A judicial member should be a person who is or is
qualified to be a judge of a High Court or has been a member of the Indian Legal Services and has held a post in grade I for at least 3 years. A technical member should be a person who has adequate knowledge, experience and capacity to deal with scientific and administrative aspects of problems relating to the environment. The appointments of the Chairperson and the Vice-Chairperson can be made only upon consultation with the Chief Justice of India. The appointments of the judicial and technical members can be made only upon the recommendation of a selection committee appointed by the Central Government that consists of the Chairperson of the Tribunal, the secretaries of the Ministry of Environment and Forest and the Ministry of Law, Justice and Company Affairs, the director general of the Council of Scientific and Industrial Research and an environmentalist nominated by the Central Government. The term of office for the Chairperson, the Vice-Chairperson and all other members was five years. Appeals were to lie to the Supreme Court only on questions of law.

Sadly, the Act was never notified and the Tribunal was never constituted. The Report (186th Law Commission Report, 2003) points to what the National Environment Tribunal Act did not have. The Tribunal was not given the powers of a civil court, which meant that the court could not pass orders of injunctions or grant declarations. The tribunal was not effectively constructed as a court. It had powers only to award compensations. Members other than the judicial members were not in all instances experts in environmental matters. It speaks of experience in administrative, scientific or technical matters related to the environment and not experience in problems relating to the environment itself in first-hand.

The National Environmental Appellate Authority (NEAA) Act was passed in 1997 to hear appeals with respect to restriction of area in which any industries, operation or processes shall be/ shall not be carried out subject to the safeguards under the Environment Protection Act, 1986. Section 4 of the Act gives the composition of the Appellate Authority. There will be a Chairperson, a Vice-Chairperson and such other members not exceeding three, as the Central Government may deem fit. Section 5 gives the qualifications of a Chairperson. The person should have been a judge of the Supreme Court or the Chief Justice of the High Court. To be appointed as a Vice-Chairperson, he/she should have held the post of Secretary to the Government of India.
for 2 years or any other post under the State or Central Government that has a pay scale of not less than that of the Secretary to the Government of India and has expertise or experience in administrative, legal, management or technical aspects of problems relating to environmental management law, planning and development. The term of office was three years. The Report (186th) says that in view of the narrow scope of jurisdiction, the Appellate Tribunal did not have much work. It dealt with a very few cases, and appointments after the first cycle were not made. The forum was itself constituted for the limited purpose of reviewing administrative decisions on Environment Impact Assessments and the work load was very negligible (186th Law Commission Report). But both these institutions prove to be obsolete and very restrictive in scope and application. Positions of Chairman and vice-chairman remained vacant from 2000 up until the repeal of these laws by the passage of the National Green Tribunal Act, 2010 (Gill, 2018).

The Commission pointed out certain factors that must be kept in mind while speaking about Environmental Courts. The Bench of the court will require independent expert advice due to uncertainties of scientific conclusions and the need for expertise from both the judiciary and independent experts was stressed on. This was also felt because of the then inadequacy of judges in issues relate to science and environment. There was a need to maintain proper balance between sustainable development and the regulation and control of pollution by industries. A balance also had to be struck between unemployment/loss of livelihood in cases of closure of polluting industries. It recognized the need for an appellate body to review decisions on ‘environment impact assessment’ at the State level. There was a need felt to develop a jurisprudence in this branch of law which would also be in accord with science, technology, developments in these fields and international instruments. The aim was to achieve the objectives of Articles 21, 47, 48A and 51A (g) of the Indian Constitution by means of a fast, fair and satisfactory judicial procedure (186th Report). The Report also points at many cases\(^3\) to show how the courts have responded to science and human health related matters. The Report (2003) points at A.P. Pollution

\(^{3}\) Vincent v. Union of India (AIR 1987 SC 990); Dr. Shivarao v. Union of India (AIR 1988 SC 953); A.P. Pollution Control Board v. M.V. Nayudu (1999 (2) SCC 718); S. Jagannath v. Union of India (AIR 1997 SC 811)
Control Board v. M.V. Nayudu (1999 (2) SCC 718)\(^4\) and says that this case was an example of how important scientific input is in any case. If not for an opinion sought for by the Supreme Court, the permission would have been granted, and the industry would have polluted ground water causing millions of lives to be endangered. The Report points at problems that arise out of industries at different stages. Some might be at the construction stage, while some might be at the production/functioning stage. Balancing remedies, well-being of people, and unemployment in case of a closure, loss of revenue to the government and much more at the same time might prove to be difficult and the burden is on the courts to do this. However, the court has, in many cases\(^5\) ordered for a shift of the industry elsewhere for a price or has worked out schemes for payment of compensation to the employees and providing re-employment opportunities.

The Report then lays emphasis on the environmental jurisprudence prior to the establishment of environmental courts. It cites a number of decisions by the Supreme Court to denote the pro-environmental stand of the court\(^6\). The Report also

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\(^4\) In this case, the correctness of the claims in the petitions were checked by an expert committee. In this case, questions were raised on whether the operation of an industry was hazardous or not. The question was also about the repercussions of the operation of the industry. If, it becomes operational, whether the chemical ingredients produced world sooner or later contaminate the ground water which flows into huge lakes which are the main source of drinking water for two metro cities. The industry filed a report of an expert which was accepted by the appellate authority constituted under Section 28 of the Water Act manned by a retired High Court Judge. The conclusion, based on this expert report produced by the industry, was that there was no harm in operating the industry. The High Court affirmed this decision, but the Supreme Court asked for expert advice from the NEAA. The result was against the industry. The industry relied on an earlier order in A.P. Pollution Control Board and said that, if the industry complied with some safeguards, it could be allowed to function. The Court then referred the matter to the University Department of Chemical Technology, Bombay assisted by the National Geophysical Research Institute, Hyderabad. Again, the result was against the industry. Based on these, the industry was refused permission to operate.

\(^5\) For example, in S. Jagannath v. Union of India (AIR 1997 SC 811), Shrimp Culture Industries in fragile coastal areas were directed to close due to the adverse effects on the environment. The court directed for the employees to be paid six years’ wages.

points out that these cases have remarkably added burden to the High Courts and the Supreme Court. The Environment Courts will lessen this burden. However, the basic foundation for environmental jurisprudence comes from the traditional courts.

**186th Law Commission Report’s Conclusion**

The Law Commission of India had undertaken a detailed study of “Environmental Courts” in response to the observations made by the Supreme Court of India in four judgments, namely, M.C. Mehta v. Union of India (1986 (2) SCC 176); Indian Council for Environmental- Legal Action v. Union of India (1996 (3) SCC 212); A.P. Pollution Control Board v. M.V. Nayudu (1999 (2) SCC 718) and A.P. Pollution Control Board v. M.V. Nayudu II (2001 (2) SCC 62). In the judgment of 1999, the Supreme Court made reference to the idea of a “Multi-faceted” environmental court with judicial, technical and scientific input just like in England, as formulated by Lord Woolf. A similar trend was also in existence in Environmental Court legislations in New Zealand, Australia and a few other countries. In this context, the Report placed reference on the Report of Dr. Malcolm Grant in the UK in the year 2000 and to the 23rd Report of the Royal Commission in 2002.

The idea that the Report came out with was to establish separate courts that could deal with environmental issues so as to reduce the burden and pressure on the traditional courts (the High Courts and the Supreme Court). Such courts will exercise all the powers of civil courts in its original jurisdiction and they will be courts of fact and law. The Court will also play the Appeal Court for appeals arising out of orders passed by authorities under Environment Protection Act, 1986; Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution), Act, 1974 with the possibility of including other statutes within this fold through a notification issued by the Central Government. In order to give effect to the commitment under the Stockholm Conference of 1972 and the Rio Conference of 1992, this law was to be made under Article 253 of the Indian Constitution read with Entry 13A of the Union List in Schedule VII of the Constitution.

The Report speculates that the press had reported government plans on having one appellate authority based in Delhi constituted under Section 3 of the Environment Protection Act, 1986. The Report finds solutions to this plan and points
out that this authority will not have power over issues under other legislations like the Air Act or Water Act. The single appellate authority concept will prove to be inaccessible to many people living in remote or faraway places. Serious environmental concerns will be left unaddressed due to an ineffective right to access to courts. The Law Commission therefore proposed a scheme, which, in a way has also not been very effective. The proposed scheme called for judicial bodies at the State level. The benches will consist of judges- sitting or retired- or members of the Bar with more than 20 years of standing, assisted by a panel of experts. The function of these courts were that of courts with original jurisdiction on all environmental matters and also an appellate authority for all the three Acts, Air, Water and the Environment Protection Act. Then next form of statutory appeal will further lie to the Supreme Court. This was proposed against the single appellate authority under the Environment Protection Act.

2.3 The national green tribunal

Per the directions of the Supreme Court in a couple of cases for specialized courts for environmental issues, and the 186th Law Commission Report, The National Green Tribunal Act was passed in the year 2010. The Act was to provide for ‘effective and expeditious disposal of cases relating to environmental protection, conservation of forest and other natural resources including 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’ (Preamble). The Tribunal shall consist of a fulltime Chairperson, not less than ten, subject to a maximum of twenty fulltime judicial members and Expert Members as the Central Government may from time to time notify. The Chairperson also has the powers to invite other persons having specialized knowledge to assist the Tribunal in any case (Section 4). The Central Government may, in consultation with the Chairperson of the Tribunal make rules regulating general practices and procedure of the Tribunal (Section 4 (4)). Section 5 lays down the qualifications of the members. To be a Chairperson or a judicial member, he/she should be or should have been a judge of the Supreme Court or the Chief Justice of a High Court. A person who is or who has been the Judge of the High Court can also be a judicial member. To be appointed as an expert member,
he/she should have “a degree in Master of Science (in physical sciences or life sciences) with a Doctorate degree or Master of Engineering or Master of Technology and has an experience of fifteen years in the relevant field including five years practical experience in the field of environment and forests (including pollution control, hazardous substance management, environment impact assessment, climate change management, biological diversity management and forest conservation) in a reputed National level institution;” or have “administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution” (Section 5 (2)).

In addition to this, none of them can hold any other office during their tenure in the Tribunal. They shall not, for a period of two years from the date of completion of the tenure, accept any employment in connection with the administration or management of, any person who has been a party to a proceeding before this Tribunal. This restriction will not be applicable to any employment under the State or Central Government, local authority, statutory authority or any corporation established by the Governments.

Subject to the qualifications, Section 6 says that all the members will be appointed by the Central Government. The Chairperson is appointed by the Central Government in consultation with the Chief Justice of India. The judicial and Expert members are appointed upon recommendations by the Selection Committee. The term of office is 5 years and they shall not be eligible for re-appointment (Section 7). Section 7 also prescribes retirement age for the members.

The Tribunal shall have jurisdiction over all civil cases where there is a substantial question relating to the environment is involved. Such question should also arise out of the implementation of all the enactments in Schedule I of the Act. A dispute can be brought to the court within 6 months from the date of cause of action. The Tribunal may grant further extension of a period not exceeding 60 days in specific cases after due consideration (Section 14). The Tribunal may, by order provide for relief and compensation to victims of pollution and other environmental damage; restitution of property damaged or of the environment as the Tribunal may deem fit. This relief will be in addition to the relief payable or paid under the Public
Liability Insurance Act, 1991 (Section 15). The Tribunal will serve as the Appellate Jurisdiction for appeals arising out of Acts such as the Water (Prevention and Control of Pollution) Act, 1974; Forest (Conservation) Act, 1980; Air (Prevention and Control of Pollution) Act, 1981; Environment (Protection) Act, 1986 and the Biological Diversity Act, 2002 (Section 16). Section 19 lays down procedures and powers of Tribunal. The Tribunal is not bound by the Code of Civil Procedure, 1908; instead, it shall be guided by the principles of natural justice. The Tribunal shall have powers to regulate its own procedure subject to the provisions of the Act. The Tribunal is also not bound by the rules of evidence under the Indian Evidence Act, 1872. The Tribunal is also vested with all the powers of a civil court under the Code of Civil Procedure, 1908 in a matter in respect of matters like summoning and enforcing the attendance of any person and examining that person on oath; requiring discovery and production and discovery of documents; receiving evidence on affidavits; requisitioning public record from any office subject to provisions of the Evidence Act; reviewing its decision; issuing commissions for the examination of witnesses or documents; deciding an application _ex parte_; dismissing an application for default; pass an interim order; setting aside certain orders and any other order which may be prescribed (Section 19). All the proceedings before the Tribunal will be deemed to be judicial proceedings. Section 20 explicitly calls for the Tribunal to apply principles of sustainable development, precautionary principle and polluter pays principle while passing any order, decision or award. Appeals from the Tribunal lie to the Supreme Court, and it has to be filed within 90 days from the date of communication of the decision. The Supreme Court can entertain appeals beyond 90 days if there is a sufficient cause (Section 22). The Act also provides for the power of the Tribunal to impose costs (Section 23, 24) and penalties for non-compliance of its orders and awards (Section 26). Offences under this Act, notwithstanding the provisions of the Code of Criminal Procedure, 1973 are non-cognizable. The Act has separate provisions for offences by Companies (Section 27) and Government Departments (Section 28). The Act, under Section 29 ousts the jurisdiction of civil courts in matters where the Tribunal is empowered to decide.
2.4 Amendment through the Finance ACT, 2017

The Finance Act of 2017 amended significant parts of the National Green Tribunal Act 2010. This part will bring out the difference between the original legislation and the amended legislation. The amendment to the National Green Tribunal Act, 2010 through the Finance Act 2017 started from Section 182 of the Finance Act. After Section 10, Section 10A was inserted. It was about the qualifications, terms and conditions of service of the Chairperson, the Judicial Member and the Expert Member. It pointed to the Application of Section 184 of the Finance Act in the above matters prospectively. Section 184 of the Finance Act allows the Central Government to, by notification, make rules for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the members. Some of these provisions may undermine the independence of the judiciary. For example, appointments no longer need a consultation with the Chief Justice of India or a selection committee instead is done by the Search-cum-selection Committee constituted according the 2017 Rules mentioned below. Initially, the Chief Justice had a say in the appointment of the Chairperson of the NGT. However, under the new rules, the appointment and the remuneration is made by the Ministry of Environment, Forests & Climate Change. The Chairperson is recommended by a five member search-cum selection committee that is led by the Chief Justice of India. Four members, out of the five will be recommended by the Ministry. It gave the executive a free hand in matters relating to the above subjects. Petitions have been filed in the Supreme Court against some of the provisions of the Finance Act. The petitioners have also claimed that the new law will encroach upon the principle of separation of powers. The Central Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service Members) Rules, 2017 gives the Central Government complete power over appointing members of Tribunals including the Green Tribunal. This was stayed by the Supreme Court via an order dated 9 February 2018. This was a welcome move, as many considered this rule to defeat the purpose of the NGT to function and adjudicate as an independent judicial body (The Telegraph, February 02, 2018). It is also important to mention here, that even prior to the stay, the Centre had constituted a Search-cum selection committee in December 2017 for filling up vacant posts of the Chairperson.
and judicial members, and a committee for expert members was still under finalization. This information came as a response to a question raised in the Lok Sabha relating to vacant posts in the NGT. It was made by Mahesh Sharma, the then Minister of State in the Ministry of Environment and Forests (Unstarred Question No. 1267). It has also been reported that in March 2019, the Supreme Court passed an order to fill up vacancies in important Tribunals within two weeks and questioned the Central Government as to why the Supreme Court’s Judgment of 1997 (L. Chandra Kumar’s case) advising the government to bring all the Tribunals under the Ministry of Law and Justice. The Court also pointed at some recommendations that had been made by the Search-cum selection committee to the National Company Law Tribunal and its Appellate Tribunal which had not been implemented by making appointments.
CHAPTER III
CONCEPTUAL FRAMEWORK

So far as the institutional framework on environmental justice as it stands today in India is under the leadership of the National Green Tribunal, the Supreme Court of India and the other High Courts. The National Green Tribunal and its coming into existence is attributed to an array of factors (Amirante, 2012). Amirante (2012) says that the constitutional background is one of the elements that contributed to the origin of the NGT. The gradual evolution of the Constitution from when it had no original provisions (1950) on environment protection to the incorporation of provisions on environment in 1976 is an indicator. The other element is the proactive role played by the Supreme Court in advancing environmental jurisprudence. Being a common law country, the constitutional reform paved way for more robust environmental jurisprudence. This was the period when Judges played a proactive role in shaping the environmental justice in India. Another relevant “background factor” according to Amirante (2012) is the commitment or attention paid to the environment policy by both the coalitions in power during the first decade of the third millennium. The UPA (United Progressive Alliance) government had in place a “green turn” in their policy. They had a comprehensive National Environment Policy that was subsequently approved by the Cabinet in 2006 (National Environment Policy, 2006). Around this time, institutional changes to the environmental justice dispensing were suggested. This was a response to the then failing institutions in-charge for this role like the National Environmental Tribunals and the National Environment Appellate Authority (Amirante, 2012). There was also a global push towards environmental protection and it had an influence on national decisions. It was a duty cast on States to facilitate access to environmental justice to all citizens.

More than anything, the Supreme Court of India has always been pro environment (Baig, 1996; Shastri, 2008) and has been a major driving force to the establishment of specialized environment courts. The 186th Law Commission Report
titled ‘Proposal to constitute Environmental Courts’ was by far the first political force that facilitated the establishment of the Courts (186th Report of the Law Commission of India, 2003) (The Law Commission of India is an agency of the Government of India that works as an advisory body to the Ministry of Law and Justice.). On the second page of the report, the Commission quotes the decisions of the Supreme Court calling for special courts to dispense environmental justice with judicial/technical/scientific inputs. Amirante (2012) defines the establishment of the NGT as a “judge driven” reform without underscoring the weight of the political will and the role of the parliament in passing the law. It is majorly because the NGT was designed according to the needs indicated by the judiciary (Amirante, 2012).

The design of this court has been very innovative and they have invented new methods to implement environmental laws and to resolve environmental disputes (Ramesh, 2002 as cited in Amirante, 2012). Sahu (2008) gives an insight on these innovations. The Court has powers of *suo motu* (the court can take cognizance of an issue on its own motion against the polluter without having a litigant bring the concern before it). International laws and principles can be applied to national and local environmental issues. The Court can appoint expert committees to monitor its decisions, and can make site visits. They can also appoint *amicus curiae* to speak on behalf of the environment. Aside from this, the 2010 Act excludes applicability of the Civil Procedure Code to the adjudication of disputes in the NGT. The NGT’s only mandate is to follow the principles of Natural Justice (justice, equity and good conscience). An appeal from the NGT lies to the Supreme Court of India. With this as an overview of the legal framework in place in India, the access to environmental justice has been on stage for a while now.

Rosencranz and Sahu (2014) identify that the NGT act has caught the attention of the present Government because of its “unusual effectiveness”. This opinion can be quite debatable in itself. The government wants the NGT to be a recommending body as against being a judicial body. According to the Government, only the Supreme Court can have the power to reject clearances. The NGT has been continuously rejecting the views of the Ministry of Environment and Forests, its master. The Tribunal has also strongly criticized the ministry’s poor decisions and actions. This has in effect put the tribunal in its current position. Before
problematizing this current position, it is essential to look into why institutions like this matter and why environmental justice matters at all.

3.1 Sustainable development and access to justice

In 1992, the world community, at the United Nations Conference on Environment and Development (UNCED) agreed to an ambitious global action plan for addressing issues and problems relating to poverty and environmental degradation. Every participating State committed itself to the domestic implementation of Agenda 21 program and also agreed on the Rio Declaration. Both these documents embraced ‘sustainable development’ as a conceptual framework for achieving ‘economic development that is socially equitable and protective of the natural resource base’ on which human activity and survival depends (Dernbach & Tarlock, 2009). There is a deeply held view that environmental degradation is a ‘small price’ we pay for economic development and sustainable development is a response to this view. But, the price is not small, and environmental degradation prevents or threatens social and economic progress. (Dernbach & Tarlock, 2009). Ten years later, in 2002, the World Summit on Sustainable development concluded that the progress since UNCED was not satisfactory and that the global environment continues to suffer.

The first direct assertion about development in the international stage before the UNCED was the Declaration on the Right to Development in 1986. The General Assembly recognized it as an inalienable human right. The Declaration describes development as a comprehensive process that involves political freedoms and “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income” (Dernbach & Tarlock, 2009). The Declaration States that every human being is entitled to “participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized”. The basic foundations of development referred to by the declaration are peace and security, economic development, social development and proper governance. Dernbach & Tarlock, (2009) say that the starting point of making progress in many countries is the recognition of domestic implications of sustainable
development. All these international documents like the Agenda 21, the Rio Declaration finally stress for national action and governance in the lines of Sustainable Development.

Environmental protection alone as an international objective was addressed in 1972 at the United Nations Conference on the Human Environment. It was a response to degrading environment world over. This produced rising of consciousness; reinforced national responsibility for environment protection and officially recognized the need for international co-operation and action. It brought environment into the discussion of what development means (Dernbach & Tarlock, 2009). It led to adoption and implementation of environmental laws nationally and treaties internationally. The Conference resulted in the Stockholm Declaration with twenty-six principles. It included provisions for States to ensure that activities within their jurisdictions do not cause damage to the environment of other States or areas beyond their borders; for States to exploit and utilize their resources subject to the above principle that they do not cause trans-boundary environmental damage. The declaration recognizes the relation between environment and development. It says that “economic and social development is essential for ensuring a favourable living and working environment for man” and that “the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries.”

The World Commission on Environment and Development was formed by the UNGA to examine the relationship between the two. The Commission, headed by the Norwegian Prime Minister, Brundtland, issued its report in 1987 titled ‘Our Common Future’. The Report’s conclusion was that developmental inequity and environmental degradation were “inexorably linked”. The Report found that (Dernbach & Tarlock, 2009) the four basic components of development needed environmental protection. For example, environmental stresses can lead to military conflicts over scarce resources. These kinds of happenings may disrupt peace and security. Nuclear weapons or other weapons of mass destruction can cause unimaginable damage to the environment. Unsustainable agricultural practices may cause soil erosion, loss of soil fertility and ground water pollution in cases where there is use of pesticides and other insect repellants. Using non-renewable sources of energy
like petroleum or coal will add to greenhouse emissions to the environment. Social development also takes a hit when people can no longer stick to their occupation, like fishing or farming due to environmental degradation (Dernbach & Tarlock, 2009). They say that the very connection between development and environment provides a “powerful rationale” for environmental protection. So, a sequel to the Stockholm Declaration and a response to ‘Our Common Future’ was the Rio Declaration in 1992.

UNCED was an attempt to integrate environment and development issues. Sustainable Development was endorsed by the international community and this time around, added another fifth element to the four discussed above— the protection of the environment. The Rio Declaration had twenty-seven principles highlighting amongst them sustainable development and intergenerational equity.

More importantly, Agenda 21 called for a comprehensive international ‘plan of action’ to further the action towards sustainable development. It was the instrument through which the principles in the Rio Declaration were to be applied by different States. The plan of action given by Agenda 21 was far more specific and detailed when compared to the one given by Stockholm Declaration (Dernbach & Tarlock, 2009). It also had a process for reviewing the progress of different countries in achieving sustainable development. The Commission on Sustainable Development (CSD) was to review the implementation of Agenda 21.

Sustainable Development calls for the use of natural resources by the present generation without compromising the needs of future generations. We, the present generation are keepers of the nature and we must pass it on to our future generations. We should not take advantage of the temporary ownership of natural resources and use them to the detriment of our descendants (Weiss, 1992). Weiss tries to elaborate on the fact that all generations have certain rights and responsibilities towards the environment. He cites the theory of intergenerational equity which states that the “…human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations.” To achieve this, Weiss says that our relation with the nature and our relationship with other generations matter. Intergenerational equity is seen as a basis to sustainable development. Both the Stockholm (1972) and Rio Declarations (1992) (Rio,
hereinafter) speak about this principle. The Rio in essence reaffirmed the United Nations Conference on the Human Environment (Stockholm, 1972) and built upon it.

Weiss (1992) claims that the institutional frameworks in place nationally and internationally are designed to handle relatively short term problems. Weiss (1992) adopts this from the Global Accord (the idea of the global environmental accord was to develop an integrated approach to address the relationship between human actions and environmental consequences and to improve prospects for global responses to environmental problems). However, Weiss (1992) says that our responsibilities to the future generations should be in a long-term perspective. For this, he calls for a re-adjustment or re-structuring of institutions at different levels. He also calls for public consciousness and political will. With this as a basis, all principles in the Rio and Stockholm are inter-related and inter-dependent.

**Access to Justice**

The establishment of judicial and administrative procedures has been a part of Agenda 21 (Section 8.18):

> "Establishing judicial and administrative procedures
> 8.18. Governments and legislators, with the support, where appropriate, of competent international organizations, should establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest.”

Principle 10 of the Rio Declaration:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity
to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”

and Goal 16 of Agenda 30:

“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

In order to realize Principle 10 of the Rio Declaration in Practice, the Bali Guidelines were adopted by the UNEP Governing Council in 2010 to assist countries in developing national and sub-national legislation to facilitate broad access to information, access to justice and public participation in environmental matters. An Implementation Guide on Putting Principle 10 Into Action was published by the UNEP in 2015. The Guide cites among other countries, the best practices in India as well. The Guide points to the access to information laws in India, the environmental jurisprudence and procedures in India and finally a reference to the National Green Tribunal. In today’s world, we are witnessing a push towards human rights and access to justice is undeniably one among the plethora of rights out there. The NGT is an instrument to fulfill the mandates of Principle 10 and a manifestation of Weiss’s (1992) public consciousness and political will. One of the ways in which sustainable development can manifest in local and national policies is through political will, in the absence of which, major important institutions can fail.

3.2 Political will

A pre-requisite to practically implement all of this is public consciousness is political will. Political will, is by far the most abstract concept. It cannot be measured perfectly. We can only point at indicators that may contribute to the presence or absence of political will. However, there seems to be differences in how the concept is
understood by different scholars. Hammergren (1998) in his text says that political will is one of the slipperiest concepts in the policy lexicon. He also says that political will is the *sine qua non* of policy success that is never defined except by its absence. Most of the scholars, including Hammergren (1998) and Post *et al* (2010) agree to the fact that measuring the presence of political will is very difficult. However, identifying the absence of political will seems easier to them. The importance of political will in the success of any policy or institution for the sake of this thesis is acknowledged. Post *et al* (2010), keeping the importance of the abstract concept in mind, propose a ‘pragmatic and systemic approach’ to its definition. From the literature available, we can come up with three major elements of political will (Roberts, 2017).

1) Distribution of preferences: this is related to different people and their needs (who wants what).

2) Authority, capacity and legitimacy of reformers/key-decision makers: whether the interested party has the power/authority to push for the outcome.

3) Commitment to preferences: willingness of these people in authority towards the cause.

Post *et al* (2010) put these indicators in a nutshell and define political will as “the extent of committed support among key decision makers for a particular policy solution to a particular problem.” The authors also attempt to give the components of the definition.

1) There should be decision-makers.
2) There should be a problem.
3) There should be a common understanding of that problem.
4) A committed support towards solving the problem.
5) A common perception of a solution.

If all these indicators are present, we can say there was political will present. In the absence of these, we can say that there was an absence of political will.

The thesis would first point at the presence of political will that led to the enactment of the NGT Act in 2010. However, with the recent state of affairs, the strength of that political will is weakening. In fact, it is turning into a weak restraining force. There is an attempt to show the varying degrees of political will throughout the life of the NGT. Political will forms an integral part of Lewin’s (1943a) force-field
theory. It could be a driving force sometimes, while it can also turn out to be a restraining force. This is explained in detail below.

3.3 Force-field analysis

Lewin’s work constitutes a part of change management theory and is called the intellectual father of planned change (Schein, 1988a). Lewin (1943a), in the analysis identifies two factors- one responsible for a change and the other opposing that change. He called them driving forces and restraining forces. Driving forces are factors or forces that push for the change and facilitate the achievement of the change while restraining forces are the forces or factors that stop or restrain the change. Lewin (1943a) viewed change essentially as a struggle between these forces. Analysis on this basis helps identify the different forces working around a proposed change. In order to facilitate the change, Lewin gives three strategies (Lewin 1943a).

1) Increase driving forces;
2) Decrease restraining forces;
3) Or try both.

However, Lewin (1943a) also cautions us by saying that increasing the driving forces may reinforce the negative restraining forces. This might be an unwanted outcome. So, he suggests that decreasing the restraining forces is the best solution to keep the change alive.

Lewin constructed “force” to characterize the strength and direction of change (Gill, 2018). Accordingly the driving and restraining forces bring about changes. Forces that push for a positive change are driving forces while anything that obstructs or restricts or opposes this positive change becomes a restraining force. When the force exerted by both sides is equal, an equilibrium is maintained and the organization is said to have maintained status quo (Lewin, 1943a). For a change to be successful, naturally, driving forces must be stronger than the restraining forces. Gill (2018) uses this as a basis to understand the change in the organizational environment of NGT. Here Gill shows how restraining forces act against desired change that has in turn led to the bleak future of this Tribunal. However, what Gill (2018) does not go in dept with is the nature of these restraining forces and the major attribution of the
forces to the lack of political will and locating this absence or minimal level of political will in the structure. Although Gill (2018) mentions these aspects, it is not clear how the restraining forces have gained so much momentum in a span of just over a year, and why and how the forces forming a part of the restraining force have gained momentum.

Gill (2018) perfectly fits the NGT to the context of Lewin’s three step change model and the force-field analysis. Gill (2018) traces chronologically the three step process of how change came about locating the “unfreeze”, “learning new things”, and finally “refreeze” in the context of the NGT. Gill (2018) also gives a comprehensive idea of how the NGT fits into the force-field analysis. However, while concluding, Gill (2018) leaves an open question as to whether the NGT will live or die given its current circumstances. The idea of this thesis will be to throw light on political will in the organizational change theory. It will also seek to get first hand information of how lawyers are coping with the current wave of change. Lastly, the thesis will attempt to look at how this puncturing of the institution has led to affecting the right of access to environmental justice.

The next essential of organizational change is Lewin’s (1947b) Three-Step Change Model. A successful organizational change, according to Lewin (1947b), has three aspects (Gill, 2018).

1) Unfreezing the present level;
2) Moving to a new level;
3) Freezing the new level.

Lewin (1947b) connected this to the force-field analysis by stating that the change at either of these levels is determined by the forces acting to facilitate or restrict the stability of the organization. Unfreezing entails the process of unlearning something to create a motivation to change (Schein 2010b). Schein (2010b) also divides the unfreezing process into three sub-processes. The first one being to point out that something is wrong somewhere in the organization; second, make the people of the organization think that if they do not act on it, something bad will happen to the organization; and lastly, allow a mechanism of problem solving by learning something new and fix the problem. Followed by unfreezing is the process of bringing about a change. The learnt concepts are put to use to develop a solution to the problem and
establish a newly functioning organization. The last step, after the change is brought about is refreezing. Refreezing is the process by which the change is kept alive in the organization. It in essence tries to make the change permanent.

Lewin’s (1947b) interest was summarized by Burnes (2004). Burnes (2004) says that Lewin’s primary interest was in resolving social conflicts through behavioral change either within the organization or in the society at large. Two requirements were identified for success (Burnes, 2004). One was the force-field analysis and the other was the three-step model of change. The motive of the former was to understand how social groupings were formed and maintained and the motive of the latter was to change the set behavior in existence.

Although Lewin’s ideas may be out dated, they still have relevance to contemporary organizations. In this, there is complete agreement with what Gill also says (Gill, 2010). Lewin’s model has attracted criticisms lately (Burnes, 2004). Burnes (2004) points out to some key criticisms that say that Lewin’s work assumes that organizations operate in a stable state; ignores politics and organizational power; is suitable only to small-scale changes and could not effectuate transformational or radical changes and was top-down driven⁷.

Brunes (2004) responds to all these criticisms and concludes that despite its simplicity, it is relevant in the contemporary world. Brunes (2004) says that the crux of Lewin’s idea, the need to resolve social conflicts, till date survives. Burnes (2004) also says that there is renewed interest in understanding and application of Lewin’s organizational change by different scholars.

⁷ By early 1980s, Lewin’s planned approach attracted criticisms from the Culture-Excellence school, the postmodernists and processualists (Burnes, 2004). Proponents of culture-excellence School believe in an integrated nature of the organizations internally and within their environments (Kanter, 1983; Watson, 1997 as cited in Burnes 2004) as against a top-down, command and control driven style of management as Lewin suggests. They prefer a bottom-up driven change (Collins, 1998; Hatch, 1997 as cited by Burnes 2004). Postmodernists feel that power has a central role to play in organizational change. Processualists reject planned change and suspect simple explanation of events. They feel that the process of change is complex and it is impossible to pin it down to a particular cause (Huczynski and Buchanan, 2001).
3.4 Hollow hope and resilience

Rosenberg (1991) has argued against the capability of courts to bring about social change or reform in the US. In his book, he validates and supports his arguments by relying on various decisions of the Supreme Court and the amount of change it has helped bring about. In the process, Rosenberg (1991) comes up with two models of courts (Feely, 1992). One is the “dynamic court”, which has been an instrumental and powerful factor in effectuating social change. The other is the “constrained court”, which has no teeth to bring about significant change due to various constraints. Rosenberg (1991) tests both these models with various decisions of the Supreme Court, the ex-ante and ex-post outcomes of these decisions. The conclusion was that none of the Court decisions had a direct or indirect role to play in effectuating social change (Rosenberg, 1991; Feely, 1992). Rosenberg (1991) also argues that whenever change happens, it is mostly due to factors other than courts, and in most cases due to political efforts. This is the link to the conceptual basis of this thesis, political will that is wholly separate from the judiciary. Although Rosenberg’s conclusion can be debated on, the fact that the Courts are an essential institution to initiate or propagate change cannot be ignored.

This thesis will attempt to situate the NGT in both of Rosenberg’s models to again show that despite the NGT being a powerful body with unbridled powers is a constrained court. Its decisions have been very progressive; however, the way they are implemented is very disappointing. The hope one gets out of the decision is in essence hollow, because of poor implementation or enforcement. This could have possibly contributed to being a constraint in bringing about any kind of change. For example, some of the fines ordered by the NGT are not implemented by the states (Bushan et al, 2018). The ordered fines are not even imposed due to administrative lethargy. In December 2015, the NGT passed an order to levy an amount of INR 500 on vehicles that enter heavy-traffic areas in Shimla, Himachal Pradesh, towards environmental compensation (Premanand Klanta v. State of Himachal Pradesh, (OA No. 253 (THC)/2013) NGT). However, this fine-levy remains to be implemented as of April 2017 (Bushan et al, 2018).
Another similar example is of the environmental compensation ordered by the NGT in Manoj Mishra v. Union of India and Ors, relating to the pollution in River Yamuna. The penalty for directed at the dumping of debris in the river including all kinds of wastes and other pollutants. The levy was initially implemented, but a little into the process, the authorities found it difficult to prove the violations (Bushan et al, 2018). The penalty imposing authority was charged for corruption and eventually the authority to impose penalty was itself challenged. In essence, the implementation of this order was inefficient. These inefficiencies are a result of the absence of monitoring systems to keep track and monitor the penalty levy.

Lately, there is also an accusation of judicial overreach on the NGT. Judicial overreach means that the court/judiciary is acting beyond its powers or borders. For example, Section 24 of the NGT Act says that any ‘amount payable for damage to the environment’ should be credited to the Environment Relief Fund (ERF). The Rules to the Act, the NGT (Practice and Procedure) Rules 2011, states that the money should be remitted to the ERF within 30 days from the date of order and the same will be disbursed by ERF subsequently. However, a review of cases (Bushan et al, 2018) shows that the NGT has gone beyond the purview of the Statute and its rules by not directing payments to the ERF in all cases. The NGT, at this instance is in violation of the NGT Act itself. In addition to this, the Central Government and the Ministry of Environment, Forest and Climate Change (Now, MoEFCC) have accused the NGT of acting beyond its jurisdiction (Pabreja & Tiwari, no year). The suo motu powers are the best example. The Act does not confer powers of suo motu (the power to take cognizance of any issue related to the environment in its own motion without having a litigant to bring it before it) on the Tribunal. These are, according to the Government and some others self-assumed, because the law does not explicitly allow for it. While many High Courts have remained silent on this issue, the Madras High Court in 2014 clipped the wings of the NGT, Southern Zonal Bench located in Chennai, by restricting it from taking on issues suo motu. The reason often cited for taking issues suo motu is on the grounds of environment protection and human welfare (Gill, 2018). Some examples of suo motu proceedings are Court on its own motion v. State of Himachal Pradesh (NGT, February 2014), the case on vehicular traffic in Himachal and the suo motu cognizance on the impact of mining in National Parks.
The next aspect of the NGTs overreach is its contested power of judicial review. The power of judicial review is vested on the High Courts and the Supreme Court of India by the Constitution (Constitution of India 1950) under Article 226 and Article 32 to decide on the legality of any legislation or executive action. Judicial Review is a part of the Basic Structure of the Indian Constitution and it cannot be disturbed (Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789). However, the NGT is a statutory and a quasi-judicial body, and not a constitutional court. Apart from this, the NGT Act also does not confer the power of judicial review on the NGT. There is also no explicit bar on review. In a series of cases, the NGT has clothed itself with this power. Section 20 of the NGT Act allows the Tribunal to review the compliance of orders given by State authorities in line with environmental principles. But this does not seem to include the power to review rules and regulations and decide on their validity. This is a statutory limitation without an explicit bar; however, it may be seen as a breach of the provisions of the Act. The fact that the NGT has been able to criticize various government actions by reviewing the rules and regulations by evolving its approach towards review itself is an indicator towards a new learning to solve problems that it confronts (Gill, 2018). These issues have led to a visible turf between the Government authorities and the NGT.

The NGT has been moderately successful in courting social and ecological resilience (Brara, 2018). The impact of NGT on the environmental jurisprudence of the country has been dramatic compared to its erstwhile counterpart, the National Environment Tribunal. Environment was not taken seriously in the beginning. However, the environmental resilience has been catalyzed very effectively by the NGT and its constituents, despite the constraints (Brara, 2018). The idea of environmental court itself has been resilient enough to manifest itself in the form of the NGT after the fall of the NETs. The NGT has been incorporated as a strategy instrument by many NGOs and litigants in need of environmental justice. Like many other authors, Brara

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(2018) is also skeptical about the future of the NGT. While Gill (2018) says that the tribunal may fall into the Thucydides Trap (a victim of its own success), Brara (2018) is not very sure about its future. Brara asks if the NGT will turn out to be a flash in the pan. Court resilience at such cross roads is a concept of essence. The fact that the NET failed and the NGT came up to be more accomplished is an indicator towards the resilience of the environmental courts despite constraints.
CHAPTER IV
ANALYSIS AND FINDINGS

In this chapter, the researcher presents the new findings of the qualitative research undertaken. The researcher interviewed six lawyers associated with the National Green Tribunal. Four of the respondents (Respondents 1, 2, 3 and 5) were lawyers who represented affected parties and not the State, while the other two (Respondents 4 and 6) of them represented the State primarily. The interview questions are in Appendix I. The objective of the interview was to find out how the recent happening has affected the lawyers and their clients; how they were coping with it and the alternatives they has resorted to; what political will means to them; whether or not they see a presence or absence of that will or commitment in keeping the NGT alive; what they understand about the access to environmental justice and how this right has been affected now and other related issues. While addressing the outcome of the research, the researcher will refer to the six respondents with distinct names in order to maintain confidentiality of their identities in the text of the thesis.

Respondent 1- Ms. Alpha
Respondent 2- Ms. Bravo
Respondent 3- Ms. Charlie
Respondent 4- Mr. Delta
Respondent 5- Mr. Echo
Respondent 6- Mr. Foxtrot

4.1 What has led to the uncertain future of the tribunal?

The aim of this analysis is to find out what had exactly happened from the perspective of these lawyers. Why did the zonal benches shut temporarily according to them? This will allow the researcher to ponder over the reasons for this happening to start with. This will also allow the researcher to find reasons to implicate presence or
absence of the political will or other forces that are required to keep the institution alive. The argument here is that the will to keep the institution alive is decreasing or is almost absent. However, it is not construed as a strong restraining force as the driving forces seem much more stronger than the restraining force. Political will is construed as a weak restraining force. Deliberate political action was last seen in 2017. After that, there is no appointment of members, which is in-action. But, it is not necessary to construe this ‘inaction’ as a strong restraining force. Therefore, the future of the NGT is not as uncertain as it seems. The researcher first points at reasons for the recent happening and then points at the strength of forces on either side leading to a conclusion that supports the argument that the restraining forces are weakening and driving forces are stronger.

Alpha is not sure as to why it all happened. However, Alpha gives her opinion on the issue. She says that the government doesn’t want it as they see it as a barrier to larger projects. So, Alpha concludes that the entire move to cut appointment of staff and judges “…has to be either intentional or I am not sure why they would curtail the powers of the NGT when no other Tribunal was touched”. She says the amendment made via the Finance Act benefits corporates. She says unless the judiciary steps to strike down the law, it will remain. She says “There needs to be extreme political will to undo the change.” She feels that even if there is a government change, it is unlikely that this will be reversed. Once things are set in motion, she says, it is difficult to undo it. So, she says the government is creating barriers to slow down the court process and at the moment the government is against the institution.

Bravo’s response is somewhat similar to that of Alpha’s. She says that the idea of having zonal benches was itself based on access to justice. With the situation today, Bravo thinks it is just an absence of political will. All that has to be done is to appoint people. Bravo identifies a pattern where the government is trying to curtail the powers of the NGT indirectly. She says “there is a very basic lack of interest in the functioning of the NGT…..it is like it is on ICU (Intensive Care Unit). They don’t want to kill it. They just want it to be non-accessible”. Dilution of environmental laws including provisions of appointment is happening and it is just not the NGT. It is not done through a proper legislative process; instead, it is done through administrative actions, office memorandums or clarification letters. As of now, according to Bravo,
the government is not pro-environment and access to environmental justice is not their priority at the moment.

Charlie points at the Finance Act and says that it has been subject to challenge before the Apex Court on the ground that it violates the independence of the judiciary. She also points at things the NGT does (things like giving a clearance to a hydro project or a mining project for example) before giving her opinion. She says while the stakes are huge, if the government is pro-development, it isn’t a bad thing. Maybe the government just wants to clear projects faster, and one way is to avoid courts. To Charlie, it all started with the amendment and the government was involved. She says there is zero sensitivity form the government and she is also not sure if they see it as a priority, just like what Bravo had said. But Charlie goes a step ahead and doubts if the people of the country see environment as a priority. She says that the government has turned the minds of the people towards development, economy and money and they aren’t seeing other aspects. She says the insensitivity is a factor adds to the absence of political will or could be equated to the absence of political will itself. This has contributed to the forces against the Courts, according to Charlie.

Delta sticks to evidence and says that it is impossible to cite a reason as to why it all happened. He says there are speculations among the people and the Bar. Delta cites ‘lethargy’ as the primary and the most obvious reason for the happening. He says that they have been interviewing candidates for appointments, but he isn’t sure about its success. He doesn’t know the reason. He doesn’t know if it was a dearth of eligible candidates, red-tapism or lethargy that has lead to this. He diverts our attention to the cases calling for appointment in the NGT before the Supreme Court. He says that “the government has always taken a stand that they only require further time”. This, according to Delta, shows that the government is only slow in making appointments, and nothing else can be read into it. The reason behind the lethargy, Delta says, nobody can tell.

While Echo thinks that there is visible absence of commitment towards keeping the NGT alive, he feels that the NGT has not done anything great for them to get scared for them to shut it down. The Tribunal, according to Echo is also not going against any development agenda. Echo has a problem with the NGT Act itself. He
feels that having a statute that circumscribes the exercise of a fundamental right itself is wrong. He feels that this temporary shutdown is not done in purpose. They are just trying to ensure more uniformity by keeping one bench functional. He doesn’t think that the amendment has done anything new. He is quite definite that this is how things will go.

Foxtrot says that a common man’s perspective is what he can also think of. He says the centre probably isn’t interested in continuing the NGT because even government projects are stalled by interim orders passed by the NGT. He says “…probably the government is of the feel that the ultimate benefits which they devise for the common people…they are not able to deliver it in time because of interim orders passed by the green court…of course in the perspective of protecting the environment.” But, Foxtrot is clear with one thing. He says that these may not be a driving factor to stop these courts from functioning. He doesn’t agree with the statement that says “…the government is not willing to keep it alive”. He says there are visible losses, imposition of fines, interim orders and stays. There are environmental laws, and the NGT will look into whether or not there has been violation. The petitioners always have another forum to approach, the High Courts. He says “…Merely by shutting this court, you are not going to completely prevent the person from approaching any other judicial forum…” However, Foxtrot agrees to having an exclusive forum that can deal with matters expeditiously. But, Foxtrot is also unsure about what the government is up to. He just says we should wait and see.

All of them, in some form feel that there is some commitment or will or interest that is missing in keeping the institution alive. They just perceive it in different ways. Some of them, like Foxtrot, Alpha and Charlie think that the Tribunal is stalling government projects or development projects through its decisions and this might be a cause for causing disinterest in keeping the NGT alive. But, Echo is strong with his point while saying that the NGT has not done anything of that sort for the government or corporate to fear it. Foxtrot also iterates that none of these factors- the insensitivity, the lethargy or the lack of interest- contribute significantly to the driving forces against keeping the NGT alive. Merely shutting down the NGT does not bar access to other judicial forums like the High Courts in this country. When the other forums are always available as an alternative, and when there are visible losses to this date in the forms of
fines, stays and interim orders against large projects, it is ultimately clear that these are not strong restraining forces. All of them agree to the fact that there is an absence of political will and they relate this to their own definitions of the concept. All of them, except Delta and Foxtrot, identify it as a force acting against the Courts at the moment. The researcher, from the examples cited and the data collected, is of the view that the political will is missing, however, not completely absent from the picture. Like Foxtrot says, the Principal Bench is still alive, and alternate access to the High Court is always open. If at all there is something that is motivating the current situation, it could be lethargy like Delta said or insensitivity like what Charlie said. Apart from this, most of them also agree to the non-compliance of the laws by the government and this could also be a factor that influences how we interpret political will. So, political will is neither completely present nor completely absent. It is a weak force against the institution at the moment.

4.2 Hardships and alternatives

A set of questions were aimed at finding out if they ever foresaw this situation and how they are reacting to it. The researcher looks at their experiences, their clients’ experience and hardships they have faced due to this happening and tries to find out how this has affected the right to access to environmental justice. The researcher is also interested in finding out about the alternatives that these lawyers have found to help themselves cope with the situation. The researcher finally intends to find out how long they think this situation will last. With that, the researcher will try to predict if there is a scope for change or not.

Bravo and Echo were the only ones to have foreseen this situation. Bravo relies on the appointments that weren’t made and says that was how she foresaw this happening. Echo on the other hand says that this was a blueprint of how things would happen with these Tribunals and cites the NEAA as an example. All the others do not seem to have foreseen this situation at all. It was quite sudden to them and they had not anticipated it.
All of them seem to have a problem with the new procedure, the video conferencing. They highlight the procedural and technological difficulties involved with it. Alpha mentions the difficulties involved in getting the registries to function and get the case listed. Bravo feels that video conferencing is not much effective. Alpha also says that the lawyers on the other side are separated by technology and the Bench sometimes mutes them. Bravo too highlights the importance of being physically present during the arguments. Charlie and Bravo also mention about the muting of proceedings by the bench which has caused frustration. Many lawyers now prefer to come to Delhi rather than to do it through video conferencing. Charlie also says it is inconvenient. The clients do not feel like they are a part of the justice dispensing process. This is also what Echo says. Charlie says this process defeats the purpose of zonal benches and not all clients and lawyers can afford to travel to Delhi for every matter. She also mentions about one of her clients from Goa who travels to Delhi for every hearing, sometimes the matter would just get adjourned. Delta on the other hand says that clients with pending cases are not willing to come forward. They are waiting for the Tribunal in the Zones to become functional. They probably feel that the expenses are more or they feel it is more effective if they participate during the hearing, which is also Echo’s opinion. Like what Echo said earlier, Delta and Foxtrot also say that the filing rates have gone down. Delta says most of the lawyers, especially the ones from Chennai, are trained to appear before the Court physically. When the case is tough or if there is a detailed question of law involved, arguing such complex cases physically before the bench will be more comfortable. Delta says that they are “yet to fully embrace the technology” and he doesn’t know how completely effective it is either. Echo also advises his clients against filing before the NGT at the moment. He says it is the confidence that the people repose on a system that keeps it alive. If the current situation lasts for longer, then people will stop having that faith. Foxtrot, like Alpha also has pointed at the procedural hurdles before a case can be heard at the Tribunal. He says it is time consuming, and victims and industries don’t have an immediate access to justice.

With respect to alternatives, Alpha says she generally never advises her clients to approach the High Court. Although Bravo has not explored the High Court as an option, she says the option is always given to the client. She says they sometimes
try to go to the committees and bodies under statutes for redressal before approaching the Tribunal. Bravo also tells her clients to be prepared for a dismissal of the matter at first instance itself, and so they prepare for the case at the Supreme Court from the beginning itself. Charlie does not advise clients to approach the Committees. She also asks them to avoid the High Courts in a case to case basis. The High Courts may sometimes redirect it to the NGT or the process is time consuming as they lack expertise. Charlie says she also encourages her clients to float the matter out in the media if the representations to the connected bodies for redressal fail. Apart from this, she does not see an alternative to the NGT.

Delta says an alternative to the NGT depends on the case. But, he has advised his clients to approach the High Courts expressing the fact that the Zonal Bench is non-functional. He says that the High Court was inclined and willing to take up some of the cases. Echo does not waver from what he has said before. He says he has approached the High Court even when the Zonal benches were functioning. He finds the idea of circumscribing the fundamental right to remedy before High Court in favour of the NGT flawed. The jurisdiction of the High Court can never be ousted, and this is settled in law. He also cites the problems with the number of appeals a person can have by way of approaching the NGT first and the High Court first. Foxtrot says his alternative is the High Court, of course.

When they were asked “will this continue?” they all almost agreed on one thing. They believed and hoped for things to change. They say that a directive from the Supreme Court has to be obeyed. The Supreme Court is sending back cases to the NGT for reconsideration. The Apex Court has also asked the government to fill up the vacancies at the earliest. Delta also says that since the government is only asking for more time, he believes that the government will stand true to its word and appoint members. Echo says that the NGT itself was a mechanism built to remove certain other more accessible roads that an aggrieved person could take, so there was no way they would make it non-functional. He doesn’t think it is a possibility. Finally, like all the others, Foxtrot is also very optimistic about the change that the Supreme Court can bring about through its orders. So, all of them think it will be revived per the directives of the Supreme Court.
Bravo however feels that even the Supreme Court reacts differently to different cases. She says it depends on the judges who take the case, and the sensitivity they have towards environment. Charlie also agrees with the fact that the outcome of the case depends on the Bench. However, she says there is more hope in the Supreme Court. Both of them give a few instances to elaborate on their claims. Delta makes it clear that the entire government cannot be blamed for non-appointment of staff and members. He says it is also the responsibility of the Ministry and there is no direct evidence that makes the government liable. Echo has a problem with how the Supreme Court has interpreted sustainable development- economic development on one hand and environmental protection on the other. This was not sustainable development at all in the first place. Foxtrot feels that the Supreme Court’s reaction with respect to the NGT has been quite positive.

So, finally all of them, except Echo believe that the Tribunal will spring back to its original glory and they believe in the Supreme Court. Echo, however, has more faith in the traditional forums. He looks like he is done with the NGT as it has caused enough damage.

4.3 How has the right to access to environmental justice been affected?

This part will help the researcher to see how effective the NGT has been since its inception till now. The argument here is that the NGT even before the happening was not a completely accessible forum. The access to environmental justice was not achieved to the fullest, however, the recent happening has further dented the right by creating more barriers to access. From the analysis, except Delta and Foxtrot to an extent, all others had a problem with the functioning of the NGT even before the current happening denoting that it might not have been a completely effective mechanism to begin with. However, all of them, at least sub-consciously have acknowledged that the temporary closure of the zonal benches has created some additional problems. The researcher will summarise and list out the problems and barriers identified by the respondents to support the argument that even before the temporary closure of the zonal benches, the access to justice was not complete, and with this happening, that access has been further dented by creating more barriers.
Alpha says that The NGT had failed in its duty. “The orders are without reasons” she says. This is what leads to appeals in the Supreme Court she says. “The Supreme Court goes down to the reasoning of its orders unlike the NGT”, she says. The NGT doesn’t consider many things that the Apex court considers and this, according to her defeats the purpose of having experts on the NGT’s Bench. She says that the NGT isn’t functioning as well as it should. She says, not everyone can afford an appeal to the Supreme Court if the order of the NGT is not reasoned well. While the cost of filing has been reduced, it could still not be affordable and accessible to many victims. Alpha then points to the difficulties involved with the entire appeal process itself. To argue a case at the Supreme Court, the advocate has to be an Advocate on Record (only these advocates can appear and represent at the Supreme Court). Not many advocates are qualified, and the cost of hiring is more. “The functioning of the NGT has become painful and sad. All hopes and ambitions have taken a reverse path” she says. Just like Alpha, Bravo too says that the NGT “used to be a beacon”. In the last year, things have changed and it is no longer that beacon. She says that they were seeing the access to justice being curtailed in a sense where people have been dissuaded from approaching the tribunal. The temporary closure has brought about a bar in jurisdiction. This has also made filing very complex. Alpha highlights the technical difficulties of video conferencing. She also points at the problem of proximity of context experienced by the bench in some cases. She cites the Sterilite case in Tamil Nadu as an example. The NGT in Delhi went ahead saying there were no violations despite an argument by the State saying that the Delhi Bench did not have jurisdiction over the matter. The judges did not have a context of the issue. But, the Madras High Court on the other hand responded positively to this issue. There was more proximity to the cause. To Alpha, environmental justice is about proximity and according to her, the NGT does not offer it completely. She says “an NGT in every state would be great”. With this happening, she feels that the right has been affected more from what it was before. She says there is now a delay in justice. The zonal benches had an edge, although not perfect to begin with, over the principal bench today. The zonal benches were sensitive to issues around that region and this cannot be guaranteed now.
Bravo says that access to justice doesn’t just mean the access to a forum. It goes beyond that. There should be proper access to justice, proper consideration of the issue and finally a reasoned judgment. The entire process should be guaranteed. Bravo also acknowledges that the old model with four zonal benches was still a barrier to the right, but now things were a hundred time more worse that before. To Charlie, the right can only be realized if there is awareness about the right. It is not just about providing an institution or a mechanism; it is also about providing the people the needs/means to access these things. She also doesn’t know how sufficient the zonal benches were, but she says it would’ve still been better that what we have now. Delta constructs the right to access to environmental justice in the light of access to justice. If the access is denied, it is equivalent to denying the person justice. So, physical barriers, language barriers are all barriers to the right to access to justice. There is also the concern of affordability. Currently, the right has been dented to a large extent. With the zonal benches shut it is no longer practical for an ordinary citizen to have full dispensation of justice like it was before. But, to Delta, he is not sure of how much of a difference it make to people who were still far off from the zonal benches and had to travel even before the shut down. But ultimately, he says it is extremely harsh and difficult to have a bench functioning only from Delhi. So, the right is altered.

Access to environmental justice to Echo means that there should be a well defined law an efficient, cost-effective and a quick remedy that is also available under the same law; it should also not be a tribunal that is at the mercy of a ruling elite. It should be a proper independent judicial body that is local, accessible and affordable. Ultimately, access to justice and access to environmental justice are one and the same. Echo says that the damage was already done, and this has just made things a little worse. Again, Echo feels that the High Courts were a better forum compared to the NGT. Foxtrot calls human right a species and environmental justice as a particularization of the right. He welcomes a green court in every state for the convenience of the litigants. Clearly, the temporary shutdown has caused some inconvenience. When the benches were functional, they provided for an exclusive channel to address violation of environmental laws and rights, which is now, no longer available. While the High Court is an alternative, it lacks expertise. So, Foxtrot
concludes that the access to environmental justice has become worse after the shutdown.

About the suo motu proceedings, most of them have a concern. Alpha says that the common perception about suo motu being a brilliant power and all that is not always reality. She says “Many a times, a complaint filed by an individual gets dismissed on some grounds. But the same issue is taken up suo motu by the court upon seeing it on newspapers. The sad part is that the people who had a claim have no say in the case because they are not made parties to the petition. Also, the issue of ensuring compliance arises. Who ensures compliance in these cases? There is no petitioner to file an execution petition and there is no follow up in essence. It is just futile”. Very similar to this, Charlie also points to the lack of proper implementation of the decisions of the Tribunal. She gives an example of one of her own cases which was against the building of a skywalk across a lake by the Public Works Department. The department hadn’t taken any environmental clearance, and per that argument, the NGT had imposed a fine for the damage caused to the environment and ecology. The fine was to be paid to the bio-diversity board. The department, instead of paying the fine filed an application to the Tribunal stating why they cannot pay the fine. When Charlie filed a reply to the petition calling for the payment of the fine, nothing happened. Charlie says she has handled many cases where fines were imposed, but nothing was ever done about it. She says there is no accountability or there is no one to check if these payments are made or not. She cites one of her cases where she had raised the issue of non-payment of fine before the tribunal. She says the judge said “we understand. But what can we do?” She seemed helpless when she finally said “if they (the Bench) are incapable of doing things, then where do we go?”

Charlie also locates the problem with the current situation where the benches aren’t working properly. One of her matters had come up in court after continuous requests to bring it up for hearing. The last time it was taken up was in 2017. So, when the benches aren’t working or functioning to their full capacity, matters aren’t heard or they get delayed. Time is of essence in environmental matters, and they (the Court) seems to be insensitive towards it. She gives an example. If there is a construction going on, and the hearing of the matter gets delayed, the construction work might have finished. So, what is the point of the matter coming up before the
court after the damage is already done? There is no point in the court now saying that there are no proper clearances. To Charlie, the entire process becomes redundant and futile. Aside from this, Charlie also feels that the benches are sometimes politically motivated. She says that we all know that the judges also do get influenced sometimes.

From the analysis thus far, Alpha, Bravo and Charlie— all three of them somehow have pointed to some functional problems of the NGT. The way Alpha starts off by saying “they are not functioning as well as they should” itself looks like she has the recent happening at the back of her mind. She also has problems with the suo motu powers and the compliance of decisions. Similarly, Bravo says it is no longer the beacon it was. She goes on to say that people have been dissuaded from approaching the NGT ad instead are going to traditional old forums like the High Court. Again, she has the recent happening in mind while saying this as she is highlighting the recent trend in getting environmental justice. Charlie locates the problem directly in the non-functional Benches, political influence and compliance issues. What is clear here is that the three of them, who represent affected parties (against the State), have a problem with the temporary closure of the zonal benches. They don’t seem happy with how things are working out at the moment.

To Echo, the NGT is nothing new. He says it was very similar to the NEAA in many ways. He points at a few provisions from the NGT, Act which are problematic to him. He starts with limitation. The access to the High Courts under Article 226 of the Constitution is not subject to limitation unlike the NGT Act. The NGT also does not have powers of contempt. He says when you try to make the Tribunal a “repository of judicial power”, it must simplify the process. But the NGT, according to him is nothing of that sort. He finds flaws with the procedure. He says that the idea of an ‘aggrieved person’ with respect to the NGT is different from normal circumstances. He gives a situation where a thermal power plant is set up in a coastal land belt. Every fisherman and every village within a certain distance will be affected. Who gets the copy of the clearance? The procedure under the EIA Notification calls for the publication of the clearance on the website. But, Echo asks how many people are capable of accessing it, understanding it and react to it. He says “Practice has shown that people, say, villagers, farmers and fishermen realize that something is affecting them only when it starts operating or when the impact of that is known
practically”. But by then, the limitation period to approach the Tribunal may have expired. At this stage, the clearance itself cannot be challenged, only the conditions of the clearance can be challenged. Next, he also finds flaws with the idea of four zonal benches, one for three or four States. He says that the Act had overlooked many of the problems that would arise out of this structure. People travelling across each state will have to face an alien language, an alien place and much more. According to him, the ‘Tribunalization’ has helped major industries. He finally finds flaws with the ‘expert members’. He says they are not really ecologists or environmental engineers. There are IFS (Indian Forest Service Officers) being appointed as expert members. Such officers maybe experts in afforestation, tree growth and related things, but, they might not know much about affluent treatment plants. The expert body is not equipped to deal with everything. He says all that is created is a retired judiciary and executive. To him, the NGT is never an effective alternative to the High Court.

Unlike Alpha, Bravo and Charlie, Echo seems to have no faith in the NGT. He seems to trust the High Courts more than the Tribunal for the various reasons he has cited. The problems that Echo has cited are with reference to a fully functional NGT. The researcher is sure that Echo will probably say that the recent happening has made things worse for people. Echo also represents affected parties. The researcher believes that Echo does not want any more of this Tribunal at all. Given a chance, he would want the access to High Courts to be restored, which he acknowledges.

Delta on the other hand feels that the institution is a novel creation, and that it is just barely a decade old. He calls it a progressive legislation and says it highlights the importance of environmental rights as a part of life and livelihood. He says that the approach is appreciable and the court is a fantastic court. Foxtrot is even more optimistic. He says that the NGT has been a path breaker in so far as environmental justice is concerned. He says “…even now the principal bench is doing the best that is possible”. Again, unlike Delta, Foxtrot acknowledges the current situation, but still places high regards on the principal bench for its effort.

Thus the argument that the recent happening has further dented the right to access to environmental justice has been fairly justified. The happening has created barriers to access to the NGT physically, in a sense that not all parties can afford to travel to Delhi for a hearing. The extent of technology being an effective method for
justice disposal is a question, however, most of the respondents do not seem to like it as they point to its dark side. Many of them have said that they preferred being present physically before the bench while arguing the case. Again, this involves costs of travel and time. Some of them feel that the burden on the NGT is so high, and the rates of disposal have increased leading to a sharp rise in the number of appeals to the Supreme Court. They feel that most of the orders are not properly reasoned. Not many people have the money to pursue an appeal to the Supreme Court as it comes with its own procedures and costs. The affordability factor takes a hit and bars access to justice. There are also bigger issues of implementation and compliance of orders of the NGT and issues of proximity. Respondents point to cases where their clients, despite getting a favourable order, are unable to execute it. While there is access in this case, the access is ineffective and it makes that access itself useless. In the other case, some respondents feel that proximity to the problem leaves the bench clueless about the actual issues and problems. Here, although there is access to justice, it is not of good quality.

4.4 Possible solution to the problems

Finally the researcher attempts to ask the lawyers how this problem can be fixed. If not a solution, this will help the researcher to come up with the possibilities to cope with a future with or without the Tribunals.

Alpha and Bravo do not see any alternatives to the NGT. While Alpha says that the High Court can be an alternative forum, it still cannot be effective in translation of justice due to lack of expertise. This is what Delta also says, the High Courts may give better access, but it might not be an effective access. The importance of the NGT as a specialized body is clearly felt. Echo would disagree with this, as Echo says that the traditional courts have powers to appoint committees and have powers to refer it to expert bodies. This given, the environmental justice delivery under the traditional courts was way more stronger according to him.

Bravo feels that a push from the Supreme Court will set things back to how they were. Charlie also does not find the need for a new mechanism or a body. She says the best is here, the NGT. If this goes, there is nothing better to materialize.
She does not find flaws with the mechanism; she only has a problem with how it is implemented. She calls for the appointment of judges. She also calls for a system of uniformity in the filing process. Delta also calls for the appointment of members. If that is done, the Tribunal will be up and kicking. Delta says something that is completely the opposite of what Echo says. Delta says we had an era where traditional forums took up environmental cases, and a need for a specialized body was felt. This would give rise to different interpretations of the law without uniformity. He thinks that the NGT was a step towards bringing everything under one umbrella to avoid plural views. However, what he wants to change about the NGT is the provisions of appeal. He prefers an appeal to the High Court before approaching the Supreme Court. Foxtrot also calls for appointments to be made so that the NGT can go back to normal functioning. However, he seems okay if at least the four zonal benches start functioning given enormity of the country and the problems associated with infrastructure, management and administration and all that at least that will be the immediate requirement.

Unlike Delta, Echo wants to go back to the traditional forums. He believes that they have enough powers to render environmental justice. He wants a bench dedicated to environmental matters in every high court. He calls the ‘tribunalization’ as a “post retirement employment opportunity for bureaucrats and the judiciary” and says it isn’t a solution to the problem at all.
CHAPTER V
CONCLUSION

The researcher first established in Chapter II that environment as a human right matters and that human rights and environment are inseparable. The researcher went on to show that the right to environment can be construed as a human right. The researcher also pointed at the customary norms surrounding environmental law internationally. Finally, the researcher explains the legal framework of environmental law and environmental rights in India to show that the right has attained the standard of a fundamental right within the Constitution. The researcher begins with the National Environment Tribunal Act of 1995 and points to the drawbacks in the legislation. The researcher goes on to the National Environment Appellate Authority Act of 1997 and points at its limitations. Both these institutions had limited mandates and very limited power. Finally, the idea of setting up of specialized Environmental Courts as highlighted by the 186th Law Commission Report was explained. The Commission wanted the Courts to be Courts of facts and the law; they wanted it to have the powers of civil courts and finally they wanted it to have a broad mandate to decide on all matters related to the environment. In the same chapter, the researcher also highlights the response of the traditional courts to matters relating to science and human health related matters. In conclusion, the researcher has explored the reasons for setting up the National Green Tribunal in India. The researcher has briefly explained the various Law Commission Reports, Case Laws, National and International laws that called for setting up specialized environmental courts. The NGT was set up in response to India’s commitment to both the Stockholm and the Rio Declarations. It was also a result of the failure of institutions existing prior to the NGT. There was a push from the Law Commission and the Supreme Court asking the Government to set up the NGT. Gill (2018), says that at this time the “weaker restraining force” was the Central Government of India. The Law Commission Report says that the Government had proposed a centralized Appellate Authority based in New Delhi to hear appeals from the Water Act and the Air Act. The figure (Figure 1)
below shows how Gill (2018) has interpreted the forces at the time of passage of the Act. But, it was the legislature that passed the NGT Act, and further made the body functional. So, the Government of India inevitably became a driving force at that moment as against what the figure below depicts. The course of how the NGT was set up has therefore been explained and this answers the first research question.

![Diagram](image)

**Figure 3.** Initial dominant driving forces. Source: Author

**Figure 5.1** Gill, 2018

The researcher in Chapter III has summarized the conceptual framework of the thesis. The researcher explains the importance of the NGT and environmental justice. The researcher explains in detail the concepts of sustainable development, intergenerational equity, access to justice and finally the correlation between all of these and the environment. In the course of these explanations, the researcher highlights the development of all these concepts internationally. Following this, the researcher explains Lewin’s force-field analysis theory and situates political will within it. The researcher concludes that political will is not completely absent at the moment and that the Supreme Court is pushing for more commitment from the Government. It is therefore a weak restraining force. Public consciousness may also be another factor that adds to the driving forces. Today, more and more people are aware about environmental issues and are concerned about the outcomes of environmental decisions. The media is playing an important role in this as well. Although, one of the respondents points to the lack of enough public consciousness among the public, it has to be accepted that it is there and there are continuous efforts to increase the level of consciousness. Also, finally, while neo-liberal forces are pro-development and ignore environment protection, institutions such as the NGT are counter-acting forces that are
set up by the same government. The fact that the institution is still alive, and is not wound up itself is an indicator towards the fact that political will is not completely absent.

All the respondents have acknowledged that the NGT is not “the best” practice as it has its own drawbacks. They mention issues in compliance, implementation, access and many more. The NGT used to be a beacon and a dynamic court which was an instrumental and a powerful factor in effectuating social change. However, with issues of implementation and non-compliance with orders, the Court started becoming a constrained court. It gave out flouting orders, but couldn’t see them through to their last stage. Rosenberg (1991) argues that whenever change happens, it is mostly due to factors other than courts, and in most cases due to political efforts. This is the link to the conceptual basis of this thesis, political will that is wholly separate from the judiciary, but required to run the judiciary. Although Rosenberg’s conclusion can be debated on, the fact that the Courts are an essential institution to initiate or propagate change cannot be ignored and this has been the case with the NGT. Most of the respondents feel that the court at the moment is not giving even that hollow hope that it once gave. But, one respondent says that the court is doing as much as it can to dispense environmental justice. With this opinion, they all believe that the court will become fully functional per the orders of the Supreme Court.

From the analysis of the findings, placing the NGT in force-field analysis, the researcher concludes that the required amount of political will to keep the institution alive is not completely absent. While it does constitute a restraining force, it is very weak at the moment. Post et al (2010) defined political will as “the extent of committed support among key decision makers for a particular policy solution to a particular problem.” The authors also attempt to give the components of the definition.

1) There should be decision-makers.
2) There should be a problem.
3) There should be a common understanding of that problem.
4) A committed support towards solving the problem.
5) A common perception of a solution.
If all these indicators are present, we can say there was political will present. In the absence of either of these, we can say that there was an absence of political will. The fourth indicator is missing in the current situation. This commitment is brought about by force by the Supreme Court through its orders.

So, the researcher, instead of construing it strictly as a restraining force, is construing it as a weak force. Deliberate political action was last seen in 2017. After that, there is no appointment of members, which is in-action. But, it is not necessary to construe this ‘inaction’ as a strong restraining force. Clearly now, the Supreme Court seems to have an upper hand, and the Government has also said that it would fill in the vacancies just like it had done for a few other tribunals. Apart from the Supreme Court alone being a driving force, public consciousness is also a big driving factor. The fact the NGT in Delhi still receives cases and that there are petitions filed to the Supreme Court to make the NGT fully functional are also driving forces that need to be mentioned. Fresh law graduates are joining this area of practice and are not shunning away from it just because of the current circumstances. According to the researcher, this is also a driving force.

The researcher repeats a few things about what different authors think about the future of the NGT. Brara (2018) is skeptical about the future of the NGT. Brara (2018) is not very sure about its future. Brara asks if the NGT will turn out to be a flash in the pan. Gill (2018) says that the tribunal may fall into the Thucydides Trap (a victim of its own success). However, the researcher might disagree with these thoughts as a result of the findings. Although all the respondents had a problem with the functioning of the NGT, they still have that undying hope that it will bounce back. They believe in the Supreme Court’s efforts and the role of the public to help the Tribunal get back at its feet. The lawyers are not shunning away from this area of practice. The state of things now, in the opinion of the researcher, seems to be in favour of the NGT. So, incorporating Lewin’s Force-field model (Figure 2) in an adaptation of Gill’s (2018) diagram (Figure 3), the researcher concludes the following (Figure 4):
Figure 5.2 Lewin, 1943a

Figure 5.3 Gill, 2018

Supreme Court,  
Fresh minds joining the area of practice,  
Political Will

Public Consciousness

Figure 5.4 Result from data analysis
From the responses, the researcher concludes that the NGT used to be a dynamic court at one point in time. The respondents seem to be unhappy with the state of things now, and they say that the NGT is no longer the beacon it was. It might not have been a completely successful court, as the findings show the pitfalls with the mechanism and the institution. However, it was not a completely constrained court. But, now, with this happening, it has become one. The findings show issues with compliance and implementation of orders even before this happening. It has just made things worse now. One of the respondents also said that the clients are “dissuaded from approaching the NGT”. With this happening, the researcher feels that the NGT is not even giving that ‘hollow hope’ that it used to give once upon a time. But, despite these flaws, the lawyers seem very optimistic about the revival of these courts. While the assumption was that the future of this Tribunal is uncertain, from the findings, it no longer looks true. It looks like the court will be resilient and the Supreme Court will push for the functioning of the Tribunal- if not for the sake of environment, then for the sake of reducing its own burden, like one of the respondents had said.

The respondents also point to some success stories of the NGT. The case relating to the Aranmula International Airport in Kerala is a landmark decision. In this case, (Shreeranganathan KP v. Union of India, 2014) the approval given for the construction of the airport was challenged. The NGT suspended/revoked the approvals as the clearances were based on concealed data and incomplete information. The decision was also upheld by the Supreme Court. In January 2019, the NGT went to the extent of ordering an arrest of the directors of Volkswagen for failing to comply with an earlier order. The case came from an emission scandal in 2015 that involved Volkswagen. The NGT had, in 2018 directed Volkswagen to deposit an amount with the Central Pollution Control Board. The order was not complied with. This case is before the Supreme Court on appeal; however, the mention here is to highlight the effort of the NGT.

Another instance was in December last year where the NGT imposed huge costs on the State of Karnataka for negligence in maintaining the Bellandur and Varthur Lakes. The NGT also additionally required the State to provide a performance guarantee to ensure implementation of its directions. Similarly, in November last year, the NGT directed the Punjab Government to pay for the pollution caused to the Sutlej
and Beas rivers owing to municipal and industrial pollutants. In March this year, the NGT directed a closure of all industrial units that run on coal gasifiers in Morbi and Wankaner in Gujarat. This was after taking into consideration the alarming levels of pollution. These are some examples of how the NGT has been working after 2017, specifically after the closure of the regional benches. One of the respondents says that even the Principal Bench now, is single handedly doing as much as it can to dispense environmental justice. This shows the hope that most of the respondents hold onto. They do acknowledge cases that haven’t gone the right way, but cases like these keep the hope alive.

Gill (2018) says that the NGT stands at cross roads today, and the researcher does not deny that reality. However, from the data gathered, the researcher is apprehensive of construing political and government forces as strong restraining forces. Nevertheless, they are restraining forces that seem to be losing their strength with more action from the Supreme Court. There is conscious effort from the Supreme Court’s side to get the NGT functioning. Majority of the respondents also believe that one strong order from the Supreme Court cannot be avoided by the Government for too long. Eventually, the NGT must become functional.

There is also a push to bring all the Tribunals under the Ministry of Law and Justice to maintain independence of Judiciary. Gill (2018) cites the demise of the NEAA as a case lesson and says history could repeat. Despite the limited powers conferred on the NEAA, the government failed to fill vacancies of the Chair and Deputy Chairpersons between 2000 and 2010 stating an inability to identify qualified people (Gill, 2018). Gill (2018) calls into question the current operational closure of the zonal benches and relates it to the fate of the NEAA. The researcher would not concede to this conclusion as the result of the research says otherwise. The NEAA and the NGT had different mandates. The way environment is constructed now and how it was understood then are completely different. There is more awareness today compared to ten years before. The Supreme Court is a strong positive driving force and this is time and again acknowledged by the respondents. What can be inferred here is that there was a period when the restraining forces outweighed the driving forces. This was the period when the 2017 amendment was passed, the vacancies remained unfilled and finally when the Ministry of Environment and Forests allowed
for the NGT Chairperson to constitute single-member benches. During this time, the driving forces have been consistently opposing the changes. Parts of the 2017 amendments were stayed, the Supreme Court has been asking the Centre to fill the vacancies and the notice allowing the NGT Chairperson to constitute single-member benches was held to be ultra vires the NGT Act by the Supreme Court. As Gill (2018) says, there was a strong evidence of strong “restraining forces” seeking to destabilize the NGT. However, with the time that has passed since Gill’s (2018) conclusion, this seems to have changed. While the restraining forces remain, they are dormant and are not showing off their strengths at the moment. This has given an upper hand for the Supreme Court to push for a change. The re-freezing level might have been destabilized, but that de-stabilization was momentary. The Supreme Court is evidently trying to stabilize the process.

According to the three aspects of a successful organizational change (Gill, 2018), the problems with the NEAA were identified and were rectified to a certain level while making the NGT. There was un-freezing, a new learning and then the NGT. The National Green Tribunal was the new level. The third step was the freezing of the new learning. The researcher however feels that no new learning can be frozen and that change is a constant. From the research, it is evident that the NGT has its own pitfalls. However, the respondents feel that some kind of a fully functioning institution is far better than a dysfunctional one. While they agree that the NGT has its pitfalls, they still want it to at least function to its full capacity as the current situation has made access worse. From this aspect of it, political will and its absence is not the only contributing factor to the current situation. However, despite drawbacks in the mechanism, it was still functioning. So, when there is re-freezing, the mechanism should be re-considered to address these difficulties and problems. For example, physical barriers to the courts have to be considered, issues of language has to be considered. The researcher believes that a complete re-freezing of an institution can never happen. This is why there is a model to change and it all starts with un-freezing. The new level of change in the institution has to be continuously modified to suit the tastes of time.
One of the respondents pointed out to the state of affairs prior to the NGT. Earlier, issues of environment could be filed as a Public Interest Litigation or a Social Action Litigation. It was a public affair and people could approach the High Courts and the Supreme Court under writ jurisdiction. This changed after the NGT was constituted. Although the Act ousts the jurisdiction of civil courts, the High Courts often ask petitioners to approach the NGT as it is a specialized forum. In effect, the existing merits of the system were not examined properly (Raj, 2014). While a specialized forum was required, a complete access was not given. One other respondent says that if the old system was allowed to remain, it would have caused unnecessary confusion due to different decisions on similar matters. So, even if there was a remedy, it wouldn’t necessarily be effective. The NGT would bring uniformity in decision making. In fact, one other respondent says that the reason for the closure of regional benches was itself for uniformity in decision making and filing. However, most of them agree to having a bench in every State to facilitate more access to the Court. This could ensure having better institutional access (Raj, 2014).

The issues that the NGT decides on are issues of public importance. The appointment of the members can be made transparent. This will make the selections more competitive and fair. More young lawyers can be trained to dispense environmental justice. This will make sure that none of the benches face shortage of manpower. The number of benches in different zones should also be increased to make sure there is effective consideration of all the cases filed. The litigation process should be time bound taking into consideration that environmental matters are time sensitive. There should be guidelines on what an order should have. For example, every order should be reasoned properly. Due consideration should be given to the facts and circumstances of every case. Expert panels should be set up so as to not depend on just one expert sitting on the bench. Filing procedures should be uniform throughout the country. Issues of physical barriers and language barriers must be addressed to make the remedy more approachable and effective.

The High Courts as alternatives to the NGT can be explored. While the NGT Act does oust jurisdiction of Civil Courts, whether it would include a High Court should be taken up and analysed again. We could return to having ‘Green Benches’ in every High Court dedicated to environmental matters just like how there are benches
dedicated to other issues like tax for example. This will decrease the physical barriers to access to justice as High Courts are there in almost all states. The idea of ‘Tribunalization’ of the NGT itself should be revisited. Like one of the respondents had pointed out, it is important to weigh the pros and cons of making a Tribunal a repository of justice. The Tribunal does not have powers of initiating contempt. The process is so time bound, that the statute prescribes limitation for almost every issue. The respondent also points at problematic appeal provisions and communication procedures. Some High Courts take up appeals from the NGT, despite the appellate body being the Supreme Court. The idea of having recourse to two appeals is also defeated in this case. So, with problems surrounding the tribunal, is essential to explore more options. The researcher would also call for strengthening the framework of authorities under the Environment Protection Act of 1986 itself, as it gives the Central Government the power to constitute authorities to look into violations of the Act. The violations of the Act are currently taken up by the NGT which is not an authority under the Act, but, an independent statutory body in itself.

Ultimately, at the end of the day, all of these changes or suggestions can only be incorporated through legislative action and implementation. That is the one thing required to keep such institutions going. The Supreme Court can direct the State to do something and the State cannot disobey. Nevertheless, when the State will obey is a question that only time will answer. The result seems positive though as the State has not retaliated or opposed the directions of the Supreme Court. In conclusion, the future of the NGT does not seem as dull as it looks, for the light comes from the Supreme Court of India and increasing public consciousness. This answers the second research question that is about the future of the NGT.

Lastly, the right to access to environmental justice has been further dented at the moment with the closure of the regional benches. From the findings, the researcher concludes that the right to access to environmental justice alone (leaving aside the effectiveness of the remedy as only the NGT had expert members in the benches) was much better before the NGT was constituted as environmental issues were public issues that could be taken up by the traditional courts. The traditional courts were more physically accessible when compared to the NGT. After the NGT was constituted, there were physical barriers and language barriers that were in place.
that has caused problems in complete access to the courts and most of the respondents agree to this. However, the NGT is an expert bench that is capable of considering issues specifically related to the environment. This gave limited physical access, but the result was effective, is an argument some of the respondents raise. But now, with the temporary closure of the zonal benches, the right has further been crippled. It has caused further problems as the only functional bench is in Delhi and zonal matters are taken up via video conferencing, which has its own problems. This happening has clearly dented the right to access to environmental justice by creating more barriers to access to justice. This has answered the final research question.

The researcher reiterates the result of the research findings.

1) The Commitment of the State towards the Green Tribunal is decreasing and is a constituent of the restraining forces. However, it is a weak restraining force.

2) The future does not seem uncertain anymore as the Supreme Court is becoming a stronger driving force along with increasing levels of public consciousness and fresh minds in the area of practice.

3) The right to access to environmental justice is more crippled now as a result of this happening. It has also created more barriers to the access to justice.
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Visalaakshi Annamalai

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APPENDIX A
INTERVIEW QUESTIONS TO LAWYERS

1) How long have you been associated to the National Green Tribunal?
2) What prompted you to work on cases related to the environment?
3) What is your take on the functioning of the Tribunal?
4) What exactly happened? Why did the zonal benches shut temporarily?
5) Was the government involved? If yes, how?
6) Why do you think it happened? (the temporary shutdown)
7) What do you think is the Government’s stand on this issue?
8) How would you define political will?
9) Do you think this has contributed to the forces against the courts?
10) Did you already know of this outcome?
11) Can you share your personal experiences, if any?
12) How are you and your clients coping with it?
13) What are the hardships you are facing?
14) Have you found alternatives?
15) Will this continue?
16) Will the government push for reforms?
17) How has the Supreme Court reacted thus far?
18) Will the courts shutdown? Or will they live? And why do they think so?
19) What does access to environmental justice mean to you?
20) How do you think this right has been affected by this happening?
21) Do you think the right is altered from how it was before the happening? If so, why?
22) How do you think this can be fixed?
APPENDIX B

LIST OF RESPONDENTS

(Not real names)


**BIOGRAPHY**

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<thead>
<tr>
<th>NAME</th>
<th>Visalaakshi Annamalai</th>
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<tr>
<td>DATE OF BIRTH</td>
<td>30 JUNE 1995</td>
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<td>Tamil Nadu National Law University (Bachelor’s In Law, 2013-2018)</td>
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<tr>
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