

April 2020

Environmental Justice in India - The National Green Tribunal

Michael Rackemann

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Michael Rackemann, Environmental Justice in India - The National Green Tribunal, 45 Denv. J. Int'l L. & Pol'y 471 (2017)(book review).

This Book Review is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

ENVIRONMENTAL JUSTICE IN INDIA – THE NATIONAL GREEN TRIBUNAL

REVIEWED BY JUDGE MICHAEL RACKEMANN*

Gitanjali Nain Gill, *Environmental Justice in India – The National Green Tribunal* (1st ed. 2017), Routledge; ISBN: 9781138921108 (hbk); 238 pp. (hardcover).

Since the 1990s, there has been a global explosion in environmental law. It has blossomed in scope, content, reach, status, and significance. An even more recent phenomenon is the creation and proliferation of specialist environmental courts and tribunals (ECTs). This reflects a growing appreciation of the particular nature and character of environmental disputes and the special challenges and opportunities they present to those seeking to achieve efficient, effective, and beneficial dispute resolution.

Although longstanding specialist ECTs can be found in some countries, including Australia,¹ the vast majority of ECTs are of more recent origin. Indeed, most have been created in the last decade. This phenomenon has been the subject of renowned, valuable, and indeed ground-breaking work by Professor George (Rock) Pring and his wife Catherine (Kitty) Pring, who have undertaken comparative studies of ECTs in order to provide guidance for those looking to create or to improve them.² Otherwise, however, the academic community is still playing “catch-up” in producing a body of literature about ECTs, particularly when it comes to detailed and robust examinations of particular ECTs.

Against this background, the recent publication of *Environmental Justice in India – the National Green Tribunal* by Dr. Gill is a welcome and timely development. It offers an in-depth analysis of the National Green Tribunal of India (NGT), a recently formed ECT, with a broad jurisdiction and a reputation for an activist approach. It operates in the challenging context of a populous and rapidly developing emerging economic powerhouse, where the inevitable tensions in balancing ecological, economic, and social considerations in the pursuit of

* Judge Michael Rackemann was appointed to the Queensland Planning and Environment Court and the District Court of Queensland in 2004.

1. The Planning and Environment Court of the State of Queensland was first created more than 50 years ago. It has stood longer than the Land and Environment Court of New South Wales which is referred to, in the book, as being the world’s first.

2. See GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *GREENING JUSTICE – CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNAL* (Access Initiative, 2009); GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *ENVIRONMENTAL COURTS AND TRIBUNALS – A GUIDE FOR POLICY MAKERS* (United Nations Environment Programme, 2016).

ecological sustainability are profound. This is fertile ground for analysis, discussion, and debate. Dr. Gill has produced a valuable piece of work which responds to the challenges and opportunities of its subject matter.

The book reflects the author's extensive and meticulous field research. Dr. Gill has not contented herself with simply examining what the NGT is and what it does. She has studied the constitution, jurisdiction and processes of the NGT, the composition of its caseload, the nature(s) of the parties before it, the remedies it provides, and the jurisprudence emerging from its published decisions. She has also descended into the processes and procedures of the NGT to discover both the way it goes about its work and why. Her field studies for it include interviews with both legal and technical expert members of the NGT. Delving deeply into her subject in order to obtain an intimate understanding of the history, work, and ethos of the NGT, Dr. Gill conveys that understanding in an informative and engaging way.

It is noteworthy that the work does not commence with the institution of the NGT. Rather, it commences with an overview of the global perspective before tracing the historical background to the creation of the NGT. In the process, Dr. Gill surveys the judicial activism practiced by the Supreme Court [of India] in relation to public interest litigation and environmental protection by which it "has moved from being exclusively an adjudicator to embracing the role of policy-maker and, thereafter, superior administrator." This provides valuable context for an understanding of the establishment and operation of the NGT.

Chapter 4 of the book deals with normative principles. It usefully examines principles such as the precautionary principle, the polluter-pays principle, and sustainability. It provides an interesting insight (including by reference to case examples) into the NGT's application of those principles in the particular context of the challenges in India.

The ecological, economic, and social balance at the heart of ecological sustainability is not confined by the boundaries in a particular site, considered in isolation. It is a balance typically struck across a broader area (local, city-wide, regional, state, national, international, or global). Its pursuit may require, for example, one parcel of land within a broader area to be intensively developed (for economic wellbeing) whilst another is entirely preserved (for ecological reasons). A usual first step in considering whether a particular proposed development promotes or impedes ecological sustainability is an evaluation of the role which the subject site plays, or is intended to play, or should play, in promoting ecological sustainability at a relevant level or levels. In the case of Queensland, Australia, for example, there are statutory instruments which provide strategic guidance in this regard at the local, city-wide, regional, and state levels. It would be interesting to know more about what guidance is available to the NGT in evaluating the strategic importance of a particular site to the constituent elements of the ecological sustainability balance.

In Chapter 5, Dr. Gill identifies the importance of utilizing technical expertise

in the efficient, effective, and beneficial resolution of environmental disputes. That is a particular professional interest of mine.³ There are different ways of harnessing technical expertise. The NGT's approach is, apparently, to utilize its own internal experts. That is one model, but not the only available approach. Reliance on internal experts presents some problems including (but not limited to) that a tribunal will rarely have, within its ranks, a sufficient number or range of experts to cover all the issues which arise in all the cases which come before it or to cover those issues in sufficient depth. Dr. Gill quotes from judges of the NGT who have experienced difficulties in this regard and describes it as an issue to be addressed. Consideration could perhaps be given to the potential suitability, in the Indian context, of alternative models, used by other ECTs elsewhere, best to harness technical expertise without reliance, or sole reliance, on internal expertise.

In assessing the NGT's use of scientific expertise, Dr. Gill references the work of a political scientist (Schrefler) on the different roles experts may play in regulatory policy making and goes on to observe that the NGT uses expertise in each of these ways. Schrefler's work, for example, discusses the "strategic use" of expertise to, amongst other things, convince political overlords to extend the mandate of an agency or to justify and support predetermined or preferred policy positions. As Dr. Gill acknowledges, Schrefler's work does not expressly relate to courts or tribunals. Her use of it in this context is interesting, although it is debatable whether it is acceptable, or desirable, for a court or tribunal to use scientific expertise in all the ways discussed by Schrefler.

Dr. Gill assesses the overall success of the NGT by reference to academic work which observed four "essential dynamics" through which professionals "reconfigure" institutions and organizational fields. That is thought-provoking, although the work of those academics were not directed at assessing the success or otherwise of a court or tribunal and the justification for its use in that way is debatable.

It is evident that Dr. Gill has developed some admiration of the NGT. The book emphasizes its perceived strengths and achievements. The NGT is, however, not without controversy, including in relation to the extent of its perceived activism together with the extent to which it tends to blur the distinction between the judicial and executive arms of government.

As is discussed in Chapter 3, dealing with the interpretation and application of the *National Green Tribunal Act 2010*, the NGT adopts a robust and expansionist approach to the interpretation of its jurisdiction and powers. It has, for example, claimed (on the basis of implication) a judicial review jurisdiction not expressly conferred upon it. Further, it takes up matters on its own motion in response to things, such as newspaper reports, when there is no moving party seeking to invoke its jurisdiction. It makes wide ranging orders, including orders which appear to intrude significantly on policy and other matters conventionally regarded as the domain of the executive.

3. Michael E. Rackemann, *The Management of Experts*, 21 J. OF JUD. ADMIN. 168 (2012), http://jca.asn.au/wp-content/uploads/2013/10/P01_13_02_26-Rackemann-paper.pdf.

The book exemplifies and examines one case where, in response to reputed air quality concerns in Delhi, the NGT issued directions requiring government authorities to adopt an action plan including, amongst other things, measures banning vehicles fifteen years or older, banning diesel trucks from entering Delhi, and banning footpath parking. It subsequently gave further directions requiring the introduction of a cap on the number of vehicles to be registered, the provision of incentives for carpooling, and the imposition of higher registration fees and charges, including the imposition of congestion charges. Perhaps unsurprisingly, Dr. Gill reports that a number of the NGT's directions have variously been stayed, partially implemented, or not implemented at all.⁴

There are certain well recognized dangers which all specialist courts and tribunals should guard against. Those include the temptation to become overenthusiastic about vindicating the purposes for which the particular court or tribunal was set up, the temptation to exalt or pursue a particular purpose in too absolute a way, and the risk of becoming preoccupied in a way which leads to the development of distorted positions.⁵ Guarding against such risks and demonstrating impartiality are traditional cornerstones of the legitimacy and sustainability of any specialist court or tribunal. That requires decision making which is not only without fear, favor, or affection as between the parties to a particular dispute, but which is also objective, principled, fair-minded, and based on relevant statutory provisions and the proper application of the law otherwise. It involves a self-limiting approach. There is an important distinction between a decision maker's passion for the proper development and application of environmental law on the one hand and unrestrained environmental advocacy on the other.⁶ Courts and tribunals are conventionally concerned with the former and not the latter.

The creation of an ECT is no guarantee of its continued existence. Most longstanding ECTs with which I am familiar have been subject to regular review with a view to change or abolition. The sustained success of those longstanding ECTs generally owes much to the confidence which the broad cross section of stakeholders, be they environmental groups, developers, NGOs, government agencies, or others, have in their impartiality and to the respect their decisions command. ECTs which overindulge in zeal and activism may initially be cheered on as fighters of the good fight, but risk undermining sustained stakeholder and public confidence and legislative support. They can ultimately imperil the continued existence of the ECT itself to the ultimate potential detriment of the environment.

Dr. Gill acknowledges that the expansion of judicial activism, through environmental cases in particular, is widely debated and discussed in India and that

4. GITANJALI NAIN GILL, ENVIRONMENTAL JUSTICE IN INDIA – THE NATIONAL GREEN TRIBUNAL 92 tbl.3-1 (Routledge 2017).

5. Kirk v. Indus. Relations Comm'r of N.S.W., 239 CLR 531, 589 (2010).

6. Michael E. Rackemann, Address to the International Conference on Global Environmental Issues (Mar. 15, 2015), <http://www.austlii.edu.au/au/journals/QldJSchol/2015/21.pdf>.

there are those with concerns about the NGT's robust and activist approach. The book states that the NGT's public credibility is widespread, but it would be interesting to read a more detailed, evidence-based analysis of the extent to which the NGT enjoys confidence across the broad range of stakeholders (and with legislators). It would also be interesting to know more about the extent to which the executive has respected and implemented those NGT decisions which appear to intrude on its domain. As the Prings state in the book's foreword, "Documenting ECT effectiveness and the political and policy acceptance of its decisions over time would be another ground-breaking study."

Whilst I have referred to a few aspects of the book which leave scope for a little more, I conclude by reaffirming my earlier observations about the considerable strengths of this excellent and ground-breaking work and the importance of its contribution. I wholeheartedly concur with the view of the Prings, expressed in the forward to the book, that Dr. Gill, "makes an extremely important contribution to the international literature on environmental justice and specialized environmental courts and tribunals." Dr. Gill's work warrants and rewards careful study and promises as much from her next work.

DJILP
Division of the Law and Policy

The
Ved
Nanda
Center
for International &
Comparative Law

UNIVERSITY OF
DENVER
1938


THE VIEW FROM ABOVE
International Law at 5,280 Feet



In the world of international law, there's a new game in town.

The View From Above: International Law at 5,280 Feet is an online publication working with 50 students and over a dozen professional contributors to bring a more timely sensibility to the discussion of international law and policy. Join our online community of students, professors, and practitioners at:

www.TheViewFromAbove.org

The Denver Journal of International Law and Policy

is online with Hein Online, LEXIS®, and WESTLAW®; and is indexed and abstracted in Current Index to Legal Periodicals, Environmental Abstracts, ICEL References, Index to Federal Legal Periodicals, Index to Legal Periodicals, LegalTrac, and Shepard's Law Review Citations.

Cite as: DENV. J. INT'L L. & POL'Y

The *Journal* welcomes inquiries concerning its tax deductible donor program.