

# Odd, even and beyond: Courts carve out environmental jurisprudence

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The National Green Tribunal confirmed that Delhi's air quality has been at least 2.5 times more harmful than 'prescribed limits', possibly because of a combination of factors including trucks, two-wheelers, diesel combustion, industries and power plants. Photo: Bloomberg

The Delhi high court on Monday declined to interfere with the Delhi administration's experiment restricting private non-commercial four-wheelers on Delhi's roads to alternate days to cut pollution.

The National Green Tribunal (NGT) confirmed that Delhi's air quality has been at least 2.5 times more harmful than "prescribed limits", with all evidence pointing to a combination of man-made factors that contribute to pollution levels, including trucks, two-wheelers, diesel combustion, industries and power plants on the periphery of the national capital, garbage burning and coal tandoors.

The effect of the administration's odd-even policy on overall pollution levels may be uncertain and the serious lack of last-mile public transport infrastructure to replace personal cars worrying, but the Delhi

high court bench of chief justice G. Rohini and justice Jayant Nath said that the “power of judicial review cannot be extended to determine the correctness of such policy decision or to find out whether there could be more appropriate or better alternatives”. But in this case at least, legislature and judiciary have been mostly aligned in spirit. Judges have been among the most sympathetic to environmental causes in recent years, developing a young environmental jurisprudence.

Take chief justice of India (CJI) T.S. Thakur, for instance, who quickly announced his support for the odd-even policy after his appointment and even voluntarily carpooled with his colleague justice A.K. Sikri despite being exempt from the restriction.

And when Prime Minister Narendra Modi announced the Swachh Bharat initiative, judges in several high courts symbolically picked up brooms.

But the judiciary’s support is more than just personal.

### **Public before private**

“With the 42nd constitutional amendment in 1971—when Article 48A and 51A were inserted in the Constitution—a duty was cast on not just the state but on every citizen to improve the natural environment,” explained legal firm J&S Chambers partner Parinay Deep Shah. “And then the Supreme Court broadened the right to life, to include the right to a wholesome environment.”

In 2001, Shah said that the Supreme Court passed a milestone order in India’s environmental jurisprudence by banning cigarette smoking in public spaces—reasoning that non-smokers should not be subjected to passive smoking.

“The present government can take a leaf out of that judgment—broader public interest takes precedence over the interest of a few and the environment takes priority over revenue-earning,” said Shah.

### **Serious shift**

When the NGT was formed after the NGT Act was passed in 2010, environmental jurisprudence got a shot in the arm.

“With... the constitution of the NGT, the courts have become very active (with environmental litigation) and the Supreme Court has also started taking everything very seriously,” said Priyanka Sinha, a Jharkhand government counsel before the NGT.

Cases such as the M.C. Mehta petition on the Ganga river basin’s pollution, which was filed in 1985 but remained stuck in the judicial backlog for years, have now been taken up again, demonstrating that courts are far more proactive now, said Sinha.

And, in August 2015, the NGT took up an environmentalist's plea against the government's "half-hearted" attempt at saving the ecology of the Okhla bird sanctuary in Delhi.

"A few years earlier no complaints about environmental harm from garbage dumping would be taken seriously. Now pending before the tribunal is the 'green belt of Delhi' case—plantation needs to be done around Delhi, you cannot dump waste anywhere. So the judiciary is taking (the environment) very seriously," she said.

### **Tribunal with teeth**

The NGT can penalize the flouting of its orders with fines of up to Rs.20 crore and jail for three years, through the NGT Act.

"The NGT definitely has teeth which it is using more often now and it is clearly hurting the violators," said Luthra & Luthra environment and regulatory practice managing associate Nawneet Vibhaw.

The year 2015 began with the January order of the NGT fining a company Rs.25 crore for damaging mangrove forests in Maharashtra. In July, the NGT fined the Agra Municipal Corporation Rs.1 lakh for dumping waste into the Yamuna, and announced a fine of Rs.5,000 on individuals spotted throwing garbage into that river. A fine of Rs.5,000 was also announced in December 2015 for entities spewing waste into the Ganga.

December 2015 also saw the tribunal ordering that builders who dump construction waste on roads will be fined Rs.50,000. In July 2015, the NGT slapped a penalty of Rs.76 crore on seven builders for unauthorized construction across the country. Illegal felling of trees attracted Rs.15 lakh in fines for a district forest officer in July 2015.

However, actual enforcement of most of these rules is often minimal and difficult.

The NGT Act does not put a cap in terms of how much fine is to be imposed. It depends on the extent of damage caused, which is for the NGT to ascertain on a case-by-case basis, depending on the information provided to it, explained Vibhaw.

He said that the NGT has followed the international trend of heavy fines in environmental jurisprudence.

The principle is that the polluters have to pay, and the NGT is making them pay to the extent that it hurts and has a deterrent effect. He also pointed out that in treating government departments and private entities on par, the NGT is sending out a strong message about its stringency and fairness.

### **Incentive or inconvenient?**

The odd-even rule in Delhi is the Aam Aadmi Party's and not the NGT's doing, though the national capital's ruling party was certainly inspired by it. The tribunal had merely pointed out in its November 2015 order in the case of Vardhaman Kaushik versus Union of India that "reduction in traffic load of Delhi would certainly have positive impact on the ambient air quality of Delhi".

2015 saw other creative NGT orders containing several other prescriptions for environmental protection: it ruled in Court on its own Motion vs State of HP that not more than 1,000 vehicles per day should be allowed to pass through Rohtang in high touristic season—600 petrol driven, 400 diesel; and, in Nitin Chandran vs Union of India, directed that the Delhi University Students' Union was to conduct a "paperless election" without posters and flyers.

But there can be resistance to such creativity. In December, the NGT banned the registration of diesel vehicles in the Delhi region till 6 January and ordered the phasing out of diesel vehicles that are over 10 years old. Automakers affected by the ban, on the same day, appealed in the Supreme Court, terming the order "ridiculous".

"(Measures) introduced by NGT orders are not born out of the judges' brains but are the recommendations of bodies formed by government officers to conduct studies (on the problem at hand)," said Kolkata advocate Preeta Dhar, who works mostly at the NGT.

"Moreover, there is already a lot of existing codification—emission norms, for example—and most of the time the NGT is not devising new corrective measures but just doing the job of ensuring (the laws') real-time implementation. It is checking for compliance, asking for 'action-taken' reports, checking if a 'monitoring committee' has been formed," Dhar added.

The NGT Act, in fact, clearly mentions in Section 14 that if the non-implementation of one of the statutes listed in the Act is giving rise to "civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved", the NGT has power to admit such a case.

However, the jurisprudence is "slippery", cautioned Dhar. "(The NGT) justified the diesel-vehicle registration ban on the ground of 'public emergency' but there are cases in which an equally severe problem has come up and the courts have said that one cannot impose an 'unfair burden'.

"For instance, for a thermal power plant in Tamil Nadu the green tribunal was of the view that the plant needs to do a 'cumulative impact assessment'. The Supreme Court stayed the tribunal's order, ruling that this was unfair burden on the company and that we cannot 'be paranoid' about air pollution."

Carmakers who had appealed to the Supreme Court against the NGT's diesel-ban order were of the opinion that they were not heard by the tribunal.

Dhar pointed out that since the NGT is not a writ court (that is to say, it does not examine the violation of individual citizens' constitutional rights), it should not deal with metrics such as "the number and kind of vehicles which should be allowed on Delhi's roads".

"That question is within the domain of government policy," she said. The Delhi high court thought so too.

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