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APPELLATE AUTHORITIES UNDER POLLUTION CONTROL LAWS IN INDIA: POWERS, PROBLEMS AND POTENTIAL

Shibani Ghosh, Sharachandra Lele and Nakul Heble

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1

INTRODUCTION

Over the last four decades, courts in India have developed a rich jurisprudence on environmental issues. The large body of environmental case-law reflects the judiciary's predominant approach to environmental grievance redressal – directing regulatory institutions to take action against persistent violations and injustices,¹ expanding the scope of environmental regulation,² and recommending special environmental adjudicatory mechanisms to make environmental justice more accessible.³ However, apart from a few judgments,⁴ there has been less judicial attention, and resultant executive action, to strengthening existing structures and processes for effective redressal against administrative arbitrariness or inaction.

In this paper, we focus on this often overlooked aspect of environmental grievance redressal, viz., the effectiveness of existing redressal forums. Such assessments of the National Green Tribunal [NGT] are already emerging.⁵ Here, we evaluate the effectiveness of a set of much older environmental

redressal forums viz., the Appellate Authorities constituted under the Water (Prevention and Control of Pollution) Act 1974 [the Water Act] and the Air (Prevention and Control of Pollution) Act 1981 [Air Act] on two broad dimensions: (1) ability to deliver good quality decisions and (2) accessibility. These authorities, as environmental grievance redressal mechanisms, pre-date environmental courts and 'green benches' in the higher judiciary and have jurisdiction over critical decisions in the pollution regulatory regime. They are appointed by the State Governments and the Administration of Union Territories [UT], with the primary function of deciding on appeals against orders issued by the State Pollution Control Board [SPCBs] or Pollution Control Committees [PCCs].⁶

While effective functioning of the Appellate Authorities is in itself an important part of environmental redressal, they can also positively impact access to broader environmental justice in the country in two ways. First, they offer a statutory grievance redressal mechanism to not just regulated entities, but also affected and/or concerned citizens at a decentralised level. Unlike the NGT which primarily functions from five cities, every state and UT is required to constitute an Appellate Authority. Second, Appellate Authorities, like the NGT, are adjudicatory forums outside the formal judiciary, and are free from its incumbent problems including enormous case backlog, time-consuming procedures, and requirement of representation through a lawyer. If appropriately qualified persons are appointed to these authorities, they are well positioned to dispense effective and timely justice in pollution related cases.

How effective are the existing Appellate Authorities in discharging their mandate, and are they conducive forums to facilitating effective environmental redressal? Although the statutory basis for these authorities has existed since 1974 (when the Water Act was enacted), there is no systematic study on their working across the country. This paper is an initial attempt to fill this gap in understanding how these authorities are currently functioning and also to highlight the potential role these authorities *could* play.

Ideally, the effectiveness of such a forum would be judged by analysing the cases heard (and not heard),

1 e.g. *Vellore Citizens' Welfare Forum v Union of India and Ors* (1996) 5 SCC 647; *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 3 SCC 212 (Bichhri case).
2 e.g. *MC Mehta & Anr v Union of India* (1987) 1 SCC 395 (introducing the absolute liability principle); *TN Godavarman v Union of India* (1997) 2 SCC 267 (introducing a definition for 'forest' under the Forest (Conservation) Act 1980).
3 e.g. setting up of the Loss of Ecology Authority in pursuance of Supreme Court's directions in *Vellore* (n 1); *MC Mehta v Union of India* (1986) 2 SCC 176 (recommendation to set up environmental courts).
4 *Lafarge Umiam Mining (P) Ltd v Union of India* (2011) 7 SCC 338 (recommending the setting up of an environmental regulator); *Techi Tagi Tara v Rajendra Bhandari & Ors* (2018) 11 SCC 734 (commenting on the state of the appointments in the State Pollution Control Boards); *The Goa Foundation v Ministry of Environment, Forest and Climate Change* 2017 SCC OnLine Bom 8815 (considering the legality of transfer of Goa cases from the western bench to the principal bench of the National Green Tribunal).
5 For e.g. Armin Rosencranz and Geentanjoy Sahu, 'Assessing the National Green Tribunal after Four Years' (2014) 5 *Journal of Indian Law and Society* 191.

6 Water Act, s 28(1); Air Act, s 31(1).

decisions delivered, time taken to decide appeals, and the extent of implementation of the decisions. However, across states, decisions of Appellate Authorities are currently not available in the public domain. So our analysis of their effectiveness is based upon factors known to affect effectiveness, starting with the simplest question of whether these authorities have been set up at all, who heads them, whether they comprise expert members, whether they are accessible in general, whether they recognise *locus standi* of all 'aggrieved' parties and the number and types of cases being heard.⁷

To obtain this information, we used a combination of internet-based research, data obtained through applications filed under the Right to Information Act 2005 [RTI Act] with all states, interviews with members of a few Appellate Authorities and one civil society petitioner.⁸ Finally, we present the case of the Karnataka State Appellate Authority in some detail, based on our personal observations and interviews with two former judges of the High Court of Karnataka, including the current chairperson of the Appellate Authority.

7 Justice Preston of the Land and Environment Court, New South Wales, Australia has identified twelve characteristics required for an environmental court or tribunal to be successful. Amongst them are (1) judges and members are knowledgeable and competent; (2) the forum provides access to scientific and technical expertise; (3) the forum facilitates access to justice; and (4) the forum achieves just, quick and cheap resolution of disputes. See Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26(3) *Journal of Environmental Law* 365.

8 Interviews were held with: Justice Gururajan, former Judge, High Court of Karnataka, who declined the post of Chairman of the Appellate Authority (in person, at his residence in Bangalore, on 21.10.2017), Mr. DT Devala, former Senior Law Officer, Maharashtra Pollution Control Board (over telephone on 27.10.2017), Dr. Samir Saha, retired Professor (Mechanical Engineering), Expert Member, West Bengal Appellate Authority (over telephone on 28.10.2017), Dr. Mayuri Pandya, Assistant Professor, Sir LA Shah Law College, Expert Member, Gujarat Appellate Authority (over telephone on 29.10.2017), Mr. Sankar Pani, a lawyer with experience in filing appeals before the Odisha Appellate Authority (over telephone on 03.11.2017), and Justice Ajit J. Gunjal, former Judge, High Court of Karnataka and the current Chairman of the Karnataka Appellate Authority (in person, at his office in Bangalore, on 12.01.2018).

We begin with an introduction to the role of the Appellate Authority based on its statutory mandate, as well as judicial orders, and a preliminary assessment of the adequacy of its structure. We then present the results of our analysis of empirical data on the existing Appellate Authorities in two stages: the broad findings based on information received under the RTI Act and more qualitative insights emerging from interviews and personal observations. We end with drawing some overarching inferences about the current state and future potential of these authorities in the country.

2 PRELIMINARY ANALYSIS OF THE LEGAL FRAMEWORK FOR APPELLATE AUTHORITIES

In this section, we analyse the legally prescribed structure of the Appellate Authorities in light of their statutory mandate as well as relevant judicial orders. Using the lenses of accessibility and ability to deliver good quality orders, we examine the jurisdictional ambit of the authorities, qualifications of persons who can be appointed to them, and who can approach them and under what conditions.

2.1 What is the Role of Appellate Authorities?

Under the Water Act, any person establishing (or expanding) any industry, operation or process, or any treatment and disposal system,⁹ which is likely to discharge sewage or trade effluent, are required to obtain a Consent to Establish (CTE) from the concerned SPCB or PCC under Section 25 before it is established. Once the industry is established (i.e. the equipment has been installed, and other measures have been taken, in accordance with the CTE), it must then apply for a Consent to Operate (CTO) before it can commence operation. This CTO has to be renewed on a periodic basis, the frequency depending on the

9 Henceforth referred to collectively as 'industry' for ease of reference.

nature of the industry. Under the Air Act, similar provisions exist for industrial plants.¹⁰

Orders granting or refusing these two consents;¹¹ specific conditions imposed in these consents; or orders withdrawing a consent or amending the conditions in a consent¹² are administrative decisions. A forum is required where these orders may be contested by parties affected by them. Between requests for reconsideration that may be addressed to the SPCB itself and challenges in the courts (which would have to be the High Courts), the Appellate Authority provides a quasi-judicial forum, where such orders may be challenged by those aggrieved or affected by them.

As a statutory forum, the Appellate Authority is bound by the provisions of the Water Act and the Air Act, and does not have the flexibility enjoyed by the writ courts or the NGT (when it exercises its jurisdiction under Section 14, NGT Act). So all actions (or inactions) of the SPCBs cannot be challenged before the Appellate Authority – only actions specified in the two Acts. For instance, industries cannot appeal against SPCBs' directions for closure, or restricting power or water supply before the Appellate Authority,¹³ but only before the NGT.¹⁴ Or if an industry is operating without the necessary consents, an 'appeal' cannot be filed before the Appellate Authority as there is no 'appealable consent', nor can the Appellate Authority take *suo moto* cognisance of the issue. A case may, however, be filed before a civil court seeking an injunction on the operation of the plant,¹⁵ or in the NGT.¹⁶ Notwithstanding these limitations, given the number of consents that SPCBs process every year,¹⁷

we would argue there is likely to be enough 'appealable matter' within these limits, thereby making the current jurisdiction substantial enough.

2.2 Who may be Appointed?

Who is appointed to the Appellate Authority will clearly determine the quality of adjudication. Issues before these authorities relate to *inter alia* the adequacy or stringency (or not) of a pollution control/abatement measure; whether the grant (or rejection) of a consent was on technically sound grounds; or whether the impacts of the regulated unit have been correctly assessed. The decision makers' capacity to understand such technical issues will therefore affect the quality of orders delivered by them.

The Water Act and the Air Act, unfortunately, do not specify the qualifications of persons who may be appointed as chairperson and members of the Appellate Authority. They only state that the authority may consist of a single person or three persons.¹⁸ We find, however, that the Supreme Court commented on this issue in 1999 while deciding a case relating to industrial pollution in Hyderabad.¹⁹ Relying on its previous judgments as well as on publications in foreign academic journals, it reiterated the need for judicial and technical members in forums deciding environmental cases as both bring necessary qualifications to the adjudicatory process, and observed -

47. ... the Government of India should, in our opinion, bring about appropriate amendments in the environmental statutes, rules and notifications to ensure that in all environmental courts, tribunals and appellate authorities, there is always a Judge of the rank of a High Court Judge or a Supreme Court Judge, sitting or retired and a scientist or group of scientists of high ranking and experience so as to help a proper and fair adjudication of disputes relating to the environment and pollution.

48. There is also an immediate need that in all the States and Union Territories, the appellate

10 Air Act, s 21.

11 Water Act, ss 25 and 26.

12 Water Act, s 27.

13 Directions issued under Water Act, s 33A and Air Act, s 31A.

14 NGT Act, s 16.

15 *AR Ponnusamy v Thoppalan* 2003(2) CTC 516; *Sreenivasa Distilleries v SR Thyagarajan* 1985 SCC OnLine AP 183.

16 NGT Act, s 14.

17 For instance, in 2014-2015, the Maharashtra SPCB granted 12,222 consents under the Water Act and the Air Act (see Annual Report 2014-2015, available at http://mpcb.gov.in/images/pdf/MPCB_ENGLISH_AR_12022018.pdf), and the Gujarat SPCB granted 6,267 consents under the Water Act and the Air Act (see Annual Report 2014-2015, available at https://gpcb.gov.in/pdf/AR_2014_15_ENG.PDF).

18 Water Act, s 28(2); Air Act, s 31(2).

19 *AP Pollution Control Board v Prof. MV Nayudu* (1999) 2 SCC 718.

authorities under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 31 of the Air (Prevention and Control of Pollution) Act, 1981 or other rules, there is always a Judge of the High Court, sitting or retired, and a scientist or group of scientists of high ranking and experience, to help in the adjudication of disputes relating to the environment and pollution. An amendment to existing notifications under these Acts can be made for the present.

The Water Act and the Air Act have not, however, been amended to comply with the Supreme Court's recommendations. In 2003, the Law Commission of India, after considering relevant rules for appointment of Appellate Authorities in various states, expressed concern that appeals from decisions issued under the environmental laws lay with government officers and not with a judicial body or persons with experience in the field of environment.²⁰ However, unlike the Supreme Court, it did not recommend an amendment. Instead, it suggested the creation of an appellate court with special jurisdiction, assisted by experts in environmental science. This recommendation was properly implemented in 2010 when the National Green Tribunal Act 2010 came into force and the NGT started functioning.²¹

Subsequently, the Madras High Court has also dealt with the issue of who should be appointed to Appellate Authorities while considering a challenge against the appointment of the Joint Secretary in the Ministry of Environment and Forests as the Appellate

Authority under the Air Act in Puducherry.²² The Central Government contended that since the NGT, which exercised appellate jurisdiction over the Appellate Authorities, was headed by a judge,²³ the Appellate Authority need not include a judge. Rejecting this argument, the High Court held -

13. The constitution of National Green Tribunal cannot be stated as a reason for not constituting the Appellate Authority, in terms of the direction issued by the Supreme Court, as the National Green Tribunal will have jurisdiction to decide cases, which are to be filed against the orders of the Appellate Authority alone.

The Madras High Court's direction to appoint a judge as the chairperson of Puducherry's Appellate Authority does not have nation-wide applicability, but is a useful indicator of the judiciary's approach to this issue.

In light of the above as well as the academic literature on environmental courts and tribunals,²⁴ there is little doubt that Appellate Authorities need persons with some adjudicatory experience and with knowledge and experience in pollution control to ensure 'proper and fair adjudication' and good quality orders. The fact that the Water Act and the Air Act were not amended creates a structural weakness, as the states retain the discretion to appoint any person to the Appellate Authority. We shall see to what extent this has affected the actual composition of the Appellate Authorities in the findings section.

20 Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts* (2003) 98-99.

21 The NGT Act was preceded by two other attempts to set up environmental courts in the country. The first was the National Environment Tribunal Act 1995, and the second, the National Environment Appellate Authority Act 1997. The 1995 Act was never brought into force. The Authority set up under the 1997 Act functioned until 2010, when the NGT Act came into force. Its jurisdiction was much narrower than that of the NGT and it could not have heard statutory appeals as envisaged by the Law Commission. Over the years, its functioning was plagued with many problems. See for example, Armin Rosencranz, Geetanjoy Sahu and Vyom Raghuvanshi, 'Whither the National Environment Appellate Authority?' (2009) 44(35) *Economic and Political Weekly* 10.

22 *Puducherry Environment Protection Association v Union of India* 2014 SCC OnLine Mad 947.

23 NGT Act, s 7. However, due to the introduction of Section 10A to the NGT Act (vide Finance Act 2017, s 182), and the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 notified on 1 June 2017, a person who is not a judge may also now become the chairperson. This amendment to the NGT Act has been challenged before the Supreme Court.

24 Preston (n 7); George (Rock) Pring & Catherine (Kitty) Pring, 'Twenty-first Century Environmental Dispute Resolution – Is There an 'ECT' in Your Future?' (2015) 33(1) *Journal of Energy & Natural Resources Law* 10.

2.3 Who Can Appeal to the Authority, When and How?

Who can appeal to the authority, when and how, clearly affects the ‘accessibility’ dimension. As per the two laws, ‘any person aggrieved’ by an order of the SPCB under Sections 25, 26 and 27 of the Water Act,²⁵ and ‘any person aggrieved’ by any order made by the SPCB under the Air Act²⁶ can approach the Appellate Authority. ‘Aggrieved person’ is not defined under the two Acts. The two Acts put in place a limitation period – an appeal has to be filed within thirty days from the date on which the SPCB’s order is ‘communicated to him’.²⁷ The ‘him’, also not defined, could be interpreted in two ways: first, narrowly as the person who applied for a consent, who wanted to challenge the SPCB’s decision to either deny or grant conditional consent, and therefore the SPCB’s decision would necessarily have been communicated to him, or second, it could also be liberally interpreted as any person affected by the SPCB’s order, and communication is done through public media like notices, newspapers and the Internet.

We find that the courts have adopted the latter, more liberal construction for aggrieved persons and have interpreted the phrase to include not only persons who may have applied for the consent, and who want to challenge the SPCB’s decision, but also persons who will be affected by the functioning of the industry that has been granted consent.²⁸ In a case before the High Court of Gujarat, the Gujarat SPCB challenged the *locus standi* of a person appealing against the SPCB’s order granting consent to an industry. The person had approached the Appellate Authority on the ground that he and others in the area would be adversely affected by the industry’s operations. The High Court

observed that merely because he was not a party to the consent order ‘is hardly any ground to disallow him from filing of the appeal’. The Court held that ‘all the affected persons can file an appeal under Section 28 of the Act, which is very specific and clear. Any person aggrieved by an order made by the Board under Section 25, Section 26 or Section 27, has a right of appeal’.²⁹ Thus, the Authorities are clearly accessible to not just potential polluters but also to potential ‘pollutees’ – i.e. persons likely to be affected by the pollution.

In terms of time for filing the appeal, the two laws say that if an appeal is filed beyond the limitation period (of thirty days), the Appellate Authority may condone the delay if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.³⁰ What constitutes sufficient cause is not defined in the Act, and Appellate Authorities have the discretion to make a finding on that issue. This provision seems quite adequate.

The appeal format, the fees and the procedure to be followed by the Appellate Authority are not detailed in the two Acts and the State Governments have the rule-making powers to prescribe these procedural requirements.³¹ The Water Act was legislated by the Parliament under a special provision,³² as states have legislative competence over ‘water’ under the Constitution of India. Therefore, it is not surprising that the Act grants significant rule-making powers to State Governments. ‘Air’ is not specified as a legislative subject in the Constitution; but presumably because the Air Act closely followed the structure of the Water Act, it gives similar rule-making powers to the State Governments. This flexibility may be interpreted as a structural weakness or a strength—much depends upon how it is used in practice.

25 Water Act, s 28(1).

26 Air Act, s 31(1).

27 Water Act, s 28(1); Air Act, s 31(1).

28 *District Collector, Nellai Kattabomman Dist, Tirunelveli and Another v The Rajapalayam Cement and Chemicals Ltd.* 1997 Writ LR 157; *Gujarat Pollution Control Board v Parmar Devusinh Shersinh* 2000 SCC OnLine Guj 132; *Rajesh Kumar Raichandani v Rang Nath Pandey* MANU/UP/2897/2012; *Janajagrithi Samithi v Karnataka State Pollution Control Board* Appeal No. 56/2012, Judgment of the NGT (Southern Zone) dated 11 January 2013.

29 *Gujarat Pollution Control Board*, *ibid*, para 2.

30 Water Act, s 28(1) proviso; Air Act, s 31(1) proviso.

31 Water Act, s 64 (2)(m); Air Act, s 54(2)(v).

32 The Constitution of India 1950, art 252(1).

3

EMPIRICAL FINDINGS

Our analysis of the legal framework of the Appellate Authorities indicates that although there are some weaknesses and ambiguities, there are no major structural constraints to the authorities exercising jurisdiction in a wide variety of cases, competently adjudicating, and allowing a liberal interpretation of *locus standi* of persons approaching them. The question then is whether in practice, they have in fact functioned effectively. We begin with a brief comment on the kind of information that is publicly available, then examine whether these authorities are constituted at all, before going into their composition, accessibility and types of applicants across all states. We then present a case study of the Karnataka State Appellate Authority to provide more details on these aspects.

3.1 Is Information on Appellate Authorities Publicly Available?

A review of information available on the Internet on Appellate Authorities revealed that information regarding these authorities for most states was either not available on the official websites of the state environment departments or SPCBs, or very minimal information was available. Applications under Section 6 of the RTI Act were filed with the departments dealing with environment in all states other than Jammu & Kashmir³³ and Arunachal Pradesh³⁴ and with the Ministry of Environment, Forest and Climate Change [MoEFCC] seeking information about the UTs. The MoEFCC transferred the RTI application to the departments of environment of the seven UTs. The applications were filed in June and July 2016 seeking basic information about the Appellate Authority constituted under the Water Act – date of

constitution, composition, tenure, copies of relevant government orders or notifications, rules of procedure and dates of hearings. This information should have been proactively disclosed by the State Governments and the Appellate Authorities under Section 4(1)(b) of the RTI Act.³⁵

On grounds of non-receipt of any or complete information, first appeal was filed under Section 19(1) of the RTI Act in five states and two UTs. Second appeals were not filed in the Central or State Information Commissions. Manipur, Puducherry and Lakshadweep did not provide any information despite filing a first appeal. However, the website of the Puducherry PCC provided information about the Appellate Authority constituted under the two Acts.

As Appellate Authorities are constituted by State Governments, applications were filed with the department dealing with environment. In 17 states and five UTs, the department transferred the application in part or full to the SPCB or PCC. In nine states and one UT, the Application was also transferred (in part or full) to other departments including to the Appellate Authority (Goa, Karnataka Kerala, Jharkhand and Punjab). In some instances, such as in Bihar, Chhattisgarh and Himachal Pradesh, the SPCBs sent the application (or part of it) back to the department stating they do not maintain the information. Finally, we were able to obtain some information for 26 states and six UTs.

Clearly, in addition to lack of proactive disclosure, there is basic confusion in many states about where this information might even be available. There are also legally untenable restrictions on access to the orders themselves, as was experienced in the case of Karnataka (discussed below). Nevertheless, whatever information was available has been compiled and presented in Table 1, and we discuss that below.

33 The RTI Act does not apply to Jammu & Kashmir.

34 RTI Application could not be filed for Arunachal Pradesh as the application fees could not be paid remotely.

35 While the information is not available on the Internet for most states, the researchers are not aware if it has been disclosed to the public in any other way.

Table 1: Status of Appellate Authorities under the Water Act across different states and Union Territories of India

Features of Appellate Authority	Findings				
Have Appellate Authorities been constituted?	NO: four (Assam, Chhattisgarh, Meghalaya, Nagaland) states and one UT (A&N Islands)		YES: 22 states (AP, Bihar, Goa, Gujarat, Haryana, HP, Jharkhand, Karnataka, Kerala, MP, Maharashtra, Mizoram, Odisha, Punjab, Rajasthan, Sikkim, TN, Telangana, Tripura, Uttarakhand, UP, WB) and five UTs (Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Puducherry)		
Who chairs the authority?	Not applicable	Retired judges: six states (AP, Haryana, Karnataka, TN, Telangana, WB) and one UT (Puduchery)	Sitting judge: one state (Odisha)	Bureaucrats (<i>ex officio</i>): 15 states and four UTs	
Is it a single or three member authority?	Not applicable	Single-member Appellate Authority: eight states and four UTs	Three-member Appellate Authority: 14 states (AP, Gujarat, Jharkhand, Karnataka, Kerala, Maharashtra, Mizoram, Odisha, Rajasthan, TN, Telangana, Tripura, Uttarakhand, WB) and one UT (Puduchery)		
Are members non-governmental experts?	Not applicable	Not applicable	Neither: both members bureaucrats appointed <i>ex officio</i> : five states (Jharkhand, Kerala, Maharashtra, Mizoram, Uttarakhand) [for example, officers belonging to the state environment, forest, sanitation, or law departments]	One member is an external expert, the other is a bureaucrat appointed <i>ex officio</i> : two states (Gujarat and Rajasthan)	Both members are external 'experts': seven states and one UT [expertise ranges from engineering to law professors, to retired academics, retired chief engineer, public health department to retired assistant police commissioner]

3.2 Are the Appellate Authorities Set up at All?

There was no Appellate Authority functioning in six states namely Assam, Chhattisgarh, Haryana, Meghalaya, Nagaland and Odisha, nor in the Union Territory of the Andaman & Nicobar Islands at the time the information was sought. Haryana and Odisha have since constituted Appellate Authorities.³⁶ Even then, the states without such authorities presently constitute 14 percent of all states.

3.3 Who Heads the Appellate Authorities?

Only a minority of states have appointed judges as the heads of the Appellate Authorities. These include six states (Andhra Pradesh, Haryana, Karnataka, Tamil Nadu, Telangana, and West Bengal) and one UT (Puducherry) where the Appellate Authority is chaired by a retired Judge of the High Court. In one state, Odisha, which reconstituted the authority after a gap of four years, a sitting judge of the High Court has been appointed as the chairperson. Interestingly, the notifications constituting the authority in Karnataka and Tamil Nadu specifically refer to the Supreme Court's *Nayudu* judgment (discussed above) as the rationale for appointing a former judge of the High Court as the chairperson. On the other hand, according to the website of the Puducherry PCC, the Appellate

Authority under the Air Act continues to be the 'Joint Secretary in-charge of pollution control in the Ministry of Environment and Forests' despite the direction of the Madras High Court discussed above.³⁷

In contrast, in 15 states (Bihar, Goa, Gujarat, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Mizoram, Punjab, Rajasthan, Sikkim, Tripura, Uttar Pradesh, and Uttarakhand) and four UTs (Delhi, Daman & Diu, Dadra & Nagar Haveli, and Chandigarh), amounting to 52 percent of states and 57 percent of UTs, the chairperson of the authority is an *ex-officio* appointment. Moreover, in only seven of these states the post is held by a person from a department dealing with environment. In Sikkim, the District and Sessions Judge, Gangtok – *ex officio* – is the Appellate Authority.

3.4 Do the Appellate Authorities Contain Expert/scientific Members Also?

In 13 states (45 percent) and one UT (14 percent), the Appellate Authority is a three-member body. Of these, only in five states (Andhra Pradesh, Karnataka, Tamil Nadu, Telangana, and West Bengal) and one UT (Puducherry) are both members not *ex officio* appointments, and therefore seem to have been appointed for their 'expertise'.³⁸ Not surprisingly, these are the same Authorities where the chairperson is a retired High Court judge.

In two other states – Gujarat and Rajasthan – one member is an *ex officio* appointment, and the other appears to have been appointed as an 'expert': in Gujarat a college professor, and in Rajasthan a retired Chief Engineer of the Public Health and Engineering Department. In Tripura, the members are principals of colleges. In the remaining states – Jharkhand, Kerala, Maharashtra, Mizoram, and Uttarakhand – the

36 See information available at <http://www.haryana.gov.in/contacts/appellateauthority.html> (last accessed 25 June 2018). Copy of Notification dated 17 November 2016 constituting the Appellate Authority under the Water Act in Odisha is available on file with authors. The National Green Tribunal in *Lal Mohan Murmu & Anr v Odisha State Pollution Control Board & Ors* Original Application No.105/2015/EZ, Order of the NGT (Eastern Zone) dated 4 November 2015, had directed the State of Odisha to explain why the Appellate Authority in the state had remained defunct, and to submit relevant documents regarding its constitution. As this order was not complied with, the issue of non-constitution of Appellate Authority was raised again in another case by the same applicant. During the hearing of this case, the NGT was informed that the authority had been constituted on 17 November 2016. See *Lal Mohan Murmu & Anr v Odisha State Pollution Control Board & Ors* Original Application No.121/2016/EZ, Order of the NGT (Eastern Zone) dated 1 December 2016. Interview with Mr. Sankar Pani (n 8).

37 See Notification S.O. 1032(E) dated 12 December 1989, issued by Ministry of Environment and Forests, available at <http://www.moef.nic.in/sites/default/files/notification/SO%201032E.pdf> (last accessed 25 June 2018).

38 We say 'seem to' because at least in one case—Karnataka—there is no visible expertise: one member is a retired Assistant Commissioner of Police, and the other is the head of an educational institution but not an environmental expert by any stretch of imagination.

members are *ex officio* appointments, and a majority of them are from departments dealing with environment or water.

3.5 How Accessible are the Appellate Authorities?

As mentioned above, accessibility of the Appellate Authority has several dimensions: frequency of hearings, fees, whether a lawyer is mandatory, and physical location. We were unable to get detailed information on some of the dimensions of accessibility such as frequency of hearings and physical location. Information on rules and procedures, including fees and the requirement to engage a lawyer, was available for 14 states. In Karnataka, no fee is payable. In nine of the 14 states, the application fees are a fixed and relatively nominal amount, ranging from Rs. 100 to Rs. 1000. In a few states, however, fees are differentiated by the category of the industry. In Punjab, the fees depend on the category of the industry (Red, Orange and Green); in Odisha, Uttar Pradesh and West Bengal, fees are differentiated based on appellant type (industry or local body), and on the amount of capital investment in the project (for industry appellant) or population size/ local body type (local body appellant). A positive feature appears to be that a lawyer's presence is not mandatory in these states.

3.6 Who Has Been Given Locus Standi?

A review of the rules issued by States to govern the functioning of Appellate Authorities, as provided under the RTI Act as well as accessed through a legal database (www.manupatra.com), revealed that many states (Andhra Pradesh, Goa, Madhya Pradesh, Maharashtra, Odisha, Punjab, Sikkim, Telangana, and West Bengal) assume the appellants before Appellate Authorities to be regulated entities such as industries or local bodies, i.e., those denied consent, or aggrieved by some conditions in the consent, or from whom the consent has been withdrawn. Although systematic information for all authorities was not available, our conversations with a senior officer of a SPCB and with members of some of the Appellate Authorities support this finding.³⁹ In other words, 'potential

polluters' can approach the Appellate Authority to appeal against the orders of the SPCB, but persons who may be affected by the giving of consent, i.e., 'potential pollutees', are not given *locus standi*. However, in two states, viz., West Bengal⁴⁰ and Odisha,⁴¹ any person is permitted to file an appeal.

The rules reviewed reveal that although the implicit assumption may be that the appellant is a regulated entity, these rules do not expressly exclude other persons from filing an appeal. More importantly, the parent laws, the Water Act and the Air Act, state 'any person aggrieved' may approach the Appellate Authority, and therefore, States cannot make rules narrowing down the *locus standi* criteria.

3.7 The Karnataka State Appellate Authority: A Case Study

We were able to obtain some detailed information on the Karnataka State Appellate Authority by visiting its office, observing its proceedings, interviewing current and past chairpersons, and talking to lawyers and one civil society group that has appealed to it. This 'close-up' view provides some additional insights into the function of this institution.

Originally, the Karnataka State Appellate Authority also had *ex-officio* members. Following the Supreme Court's decision in *Nayudu*, since 2003 the Appellate Authority has been headed by a retired High Court judge, assisted by two independent members. In 2015 retired Justice Ajit J. Gunjal was appointed the Chairman and judicial member, and Mr. MV Seshan and Dr. Dinesh Kumar Alva were appointed as technical members. Dr. Alva, though not specifically qualified in environmental matters, has previous

40 Interview with Dr. Samir Saha (n 8).

41 In a telephonic interview on 03.11.2017, Mr. Sankar Pani attributed this trend to an order of the Appellate Authority in 2008 which held that any person could file an appeal under the Air Act. See *Sharan Oran v Member Secretary, State Pollution Control Board, Orissa and Anr* Appeal No. 11A of 2007, Order dated 29 March 2008, available at http://orienvappellateauthority.nic.in/pdf/judgement/air/APPEAL_NO.11-A%20-OF-2007.pdf (last accessed 25 June 2018) 6. Interestingly, according to Mr. Pani, 'third parties' or 'potential pollutees' do not have to pay fees while filing an appeal. However, the same is not mentioned in the Rules.

39 See n 8.

experience in environmental appraisal processes.⁴² Mr. Seshan is a retired police officer, with no known environmental expertise. In terms of the process of appointment, the government requests the Chief Justice of the High Court to recommend retired judges who would be suitable for this position and accepts the suggestions.⁴³

The Appellate Authority meets once every month in an office provided in Bengaluru by the State Government. Its proceedings are open to the public, but its decisions are not publicly available.⁴⁴ As mentioned above, no fees are charged for filing the appeals. According to the present chairperson of the authority, parties need not be represented by lawyers during hearings.

Since its constitution, the Appellate Authority has received 550 appeals till January 2018, typically about 25-40 per year, with a peculiar spurt of 190 appeals in 2013. As of January 2018, only nine cases were pending for final decision. Most appeals pertain to air pollution or noise pollution,⁴⁵ and are filed by regulated entities.

In the last few years, third parties – or potential pollutees – have also started filing appeals. This trend owes its origin to an appeal filed by Janajagruti Samithi (JS) in 2012 against consent granted to Udupi Power Corporation Limited (UPCL) for building and expanding a thermal power plant. The Appellate Authority refused to entertain the appeal on the ground that the authority is meant only as a redressal forum for regulated entities, and not for ‘third parties’. JS

appealed against this decision before the NGT. The NGT in its January 2013 judgment allowed the appeal and directed the Appellate Authority to hear the case.⁴⁶ The Tribunal held that as JS was an ‘aggrieved person’ under Section 28 of the Water Act, it could not approach the NGT directly without availing the statutory remedy available to it in the form of the Appellate Authority. The hearing before the Appellate Authority has now concluded. Notwithstanding the outcome of the appeal before the Appellate Authority, the case has established clear precedent for third parties to approach the Appellate Authority.

4 DISCUSSION

What do these cross-state findings and one set of close-up observations tell us about the current effectiveness and future potential of the Appellate Authorities as forums for environmental redressal? There are limitations to the data available, which in itself says something about the seriousness with which State Governments and UTs (and the Appellate Authorities themselves) view their roles. Nevertheless, some firm and other tentative interpretations are possible.

First, it is truly astonishing that four out of 26 states have not even constituted Appellate Authorities.⁴⁷ Even Odisha’s current Appellate Authority was constituted in November 2016 – four years after the term of the last authority had lapsed, and eight months passed before it held its first hearing.⁴⁸ In a situation where the Appellate Authorities were seen only as forums where regulated entities can appeal, this suggests that the states do not really expect too many regulated entities to be dissatisfied with the SPCB’s orders, hinting at either administrative settlement of disputes or a lenient consent process to begin with.

42 Dr. Alva has earlier held positions as a member of the Expert Appraisal Committee (for hydropower) and the Technical Advisory Committee of the Karnataka State Pollution Control Board. See Maps College, Mangalore, About Founder, available at <http://www.mapsmangalore.com/about-founder.php> (last accessed 25 June 2018).

43 Interview with Justice Gunjal (n 8).

44 When an RTI application was filed for inspection of the Appellate Authority’s decisions, the Superintendent of the Appellate Authority stated that separate affidavits must be submitted for each case before inspection could be permitted. According to Justice Gunjal, the Department of Forest, Ecology and Environment (FEE), Government of Karnataka is planning to set-up a dedicated website for the authority and it is likely to host some of its decisions.

45 Interview with Justice Gunjal (n 8).

46 *Janajagrithi Samithi* (n 28).

47 RTI Application could not be filed in Arunachal Pradesh and Jammu & Kashmir, and no reply was received from Manipur.

48 Interview with Mr. Sankar Pani (n 8).

The small number of cases in the Karnataka State Appellate Authority appears to corroborate this, or point to a bigger problem: a large number of cases seem to go directly to the NGT or the High Court. The reason civil society groups go to the NGT is probably because they do not know of (or have been denied) access to the Appellate Authority. This was certainly the case in Karnataka till the NGT forced the Appellate Authority to consider third-party cases, and even that decision is not well publicised.

Second, even where the authorities are constituted, it appears that the State Governments are not very concerned about the quality of the adjudicatory process. Notwithstanding the Supreme Court's advice in 1999, majority of the Appellate Authorities are not headed by judges, but by *ex-officio* appointments. Even majority of the members are *ex-officio* appointments. *Ex-officio* appointments are problematic as there is no way of ensuring that the incumbent has the necessary credentials to appropriately engage with the issues, nor of an individual continuing in the same position long enough to gain the necessary knowledge and experience. They are doubly problematic since the *ex-officio* appointments may be from departments that are potentially guilty of violating environmental norms themselves. For instance, in Jharkhand the Secretary, Department of Industries, and in Maharashtra, the Superintendent Engineers of the Water Department and the Municipal Corporation of Greater Mumbai are members of the Appellate Authorities. The 'expertise' of the non-*ex officio* appointments in the subject matter of water and air pollution is also not very evident: college principals, college founders, retired police officers, and such seem to dominate. The current composition of most Appellate Authorities thus does not inspire much confidence in the quality of adjudication.

Third, the law permits any person who is aggrieved by the grant of a consent to approach the Appellate Authority. As any entity which discharges sewage or effluent or emits pollutants beyond stipulated standards is regulated by the two Acts, the Appellate Authority offers a grievance redressal forum to scrutinise a large number of sources of pollution from the point of view of affected citizens. However, our research shows that the Appellate Authority is not a popular grievance redressal mechanism for affected

citizens.⁴⁹ This could be due to lack of public awareness about the existence of these authorities, and in particular, about the wider construction of 'aggrieved persons'. It could also be due to a lack of clarity in the appeal process if it is initiated by an affected citizen. Most appeal forms reviewed asked for details of the industry filing the appeal, indicating that the authorities had not yet internalised the court ruling about who has *locus standi*.

Given the limitation of the data we were able to access, we believe there is ample scope and need for further in-depth research on the functioning of individual Appellate Authorities and their orders. We hope that our work provides the basis for this future work.

5 WAY FORWARD

Have Appellate Authorities, institutions created four decades ago, been effective vehicles for grievance redressal? They certainly have a great deal of potential: they are geographically more accessible than the NGT, procedurally easier to navigate than conventional courts, and not burdened with similar backlogs. But there is little evidence to show that they have realised their potential. One reason for this is that people (especially those affected by pollution) are almost certainly not aware of this mechanism and its broad mandate. Another reason is the lack of initiative on the part of State Governments to set up these authorities and to appoint persons with demonstrated expertise in the relevant fields.

Popularising and strengthening the Appellate Authority as an adjudicatory forum could actually be done with no major legislative effort. It would require properly constituting the authority, increasing awareness about its mandate, amending the rules to clearly acknowledge the *locus standi* of persons others than regulated entities, and requiring the SPCBs and PCCs, as well as the regulated entities, to make the consent orders publicly accessible as soon as they are issued.

⁴⁹ Interview with Justice Gunjal (n 8).

As the country grapples with escalating environmental crises, the government must recognise that environmental justice is not limited to judicial, or even statutory, recognition of certain rights and duties. It includes environmental grievance redressal mechanisms that are accessible widely, and that have the ability to deliver good quality orders. If the case-load of the NGT is any indicator of the nature and scale of environmental issues and conflicts that need formal adjudication, undoubtedly there is demand for specialised environmental adjudicatory mechanisms. Without any time-consuming legislative effort on their part, State Governments can ensure that Appellate Authorities become such a mechanism.

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