SCIENTIFIC UNCERTAINTY AND NEED FOR SPECIALISED ENVIRONMENT COURT IN BANGLADESH: A LESSON FROM AUSTRALIA, NEW ZEALAND AND INDIA

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ABSTRACT

Disposal of science-rich environmental litigations by the ordinary judiciary often provokes criticism due to uncertain nature of scientific investigation. This frustrates the very basic purpose of the establishment of environment court purely combined of judge from ordinary judiciary. Absent an expert panel from different technical disciplines, it becomes difficult for the ordinary judiciary to evaluate the science-rich evidence in environmental litigation. It leaves the chance of erroneous decision which may defunct the environment preservation policy and degrades ecological balance. Meanwhile, combination of technical experts in the structure of environment court yields quality decision, effectiveness and efficiency in environmental decision-making. Given this backdrop, expert panel combination in the composition of environment court is an increasing global phenomenon. By contrast, it is found that the environment courts of Bangladesh are manned with judges with almost no basic learning in the relevant field to make a proper and objective assessment of the science-rich evidence produced before them during trial. It is also unveiled that though the pace and gravity of environment pollution is on the rise, the environment regime in Bangladesh still lacks this feature. The real drawbacks of environment courts are Bangladesh are here. Therefore, this study argues that for appropriate appraisal and assessment of environment related evidence, the environment courts should be equipped with modern legal tools. To this end, this study suggests, among others, for technical expert panel induction in the structure of environment courts of Bangladesh to facilitate proper evaluation of science-rich technical evidence while disposing of environmental litigation.

I. INTRODUCTION

Existence of human being largely depends upon a rich and balanced ecosystem. It presupposes a pollution free environment. However, rapid advance of science and technology pollutes the environment in a multifarious ways. This

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disturbs ecology and harms the ecosystem. Resultant consequence is an onslaught to human existence. Here come the environment laws to protect the environment from pollution and to preserve ecology and maintain the ecological balance. Environment court is vital component of environment laws. This court is designed to protect the environment and preserve the ecology on one hand and holds accountable the polluters on the other. However, environmental problems are 'polycentric and multidisciplinary'.[1] As such an environmental litigation more often involves scientific and technical issues. Judges purely on law background face difficulties in disposing of this type of environmental litigation. At the same time, evaluation of scientific evidence by judges who are 'technically illiterate' is 'dangerously unreliable'.[2] Further, litigation involving scientific issues is complex in nature. It requires 'not only extensive education and training but also extensive practical experience'.[3] This is readily accepted by some judges that they do not have 'basic scientific training necessary to decide technical issues'.[4] Thus it is being unequivocally recognised that a court with expertise in environmental matters is best placed to achieve 'ecologically sustainable development'.[5] So UN also puts emphasis on 'developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies'.[6] Besides, there is an outcry towards the specialised expertise in the composition of environmental courts since they have to evaluate 'complex and rapidly changing scientific and technical evidence' in their efforts to 'predicting future impacts' and 'balancing the conflicting economic, social and environmental demands of sustainable development'.[7]

Therefore, for better environmental adjudication toward ensuring a pollution free environment and maintaining ecological balance, many countries like Australia, New Zealand and India have established specialised environment court in different names. These courts combine both judges and technical experts on

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1 Preston, B. J., "Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study", 29 (2012) *Pace Environmental Law Review*, at p. 396; available at <https://digitalcommons.pace.edu/pelr/vol29/iss2/2> (Last visited on June 04, 2020).

2 *Ethyl Corporation vs. Environmental Protection Agency*, 541 F.2d 1 (DC Cir 1976), cited in Chaturvedi, E., "Green Courts: The Way Forward?" *Cornell Policy Review*, at p. 3; available at <http://www.cornellpolicyreview.com/green-courts-the-way-forward/?pdf=3102> (Last visited on June 04, 2020).

3 *ibid.*

4 *International Harvester Co. vs. Ruckelshaus*, 478 F.2d 615, 621-53 (DC Cir. 1973).

5 *supra* note 1, Preston, B. J.

6 NEP, Environmental Rule of Law, at<http://www.unep.org/delc/worldcongress/Home/tabid/55710/Default.aspx> cited in "Environmental Courts and Tribunals: A Guide for Policy Makers", p. 5; available at <https://wedocs.unep.org/bitstream/handle/ 20.500.11822/ 10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y> (Last visited on June 04, 2020).

7 *ibid.*

various aspects of environment. This combination serves the purpose. Meanwhile, Bangladesh, which also suffers from acute environmental pollution leading to ecological degradation, has environment courts composing of member exclusively from the judiciary. This article argues that absent the expert members in the composition of the environment court, the very purpose of their establishment is not being fulfilled. To this end, it offers some suggestions which, *inter alia*, include induction of expert members in the structure of the Environment Courts established under the *Environment Courts Act* 2010.

II. SCIENTIFIC UNCERTAINTY CATALYSING SPECIALISED ENVIRONMENT COURTS IN AUSTRALIA, NEW ZEALAND AND INDIA

Legal issues involving science are knocking the door of the court 'more and more every day'.[8] This is more than a reality in environmental litigation. Whether an activity of an actor constitutes environmental pollution leading to environmental degradation and ecological destruction is purely a matter of science. It is because an alleged activity causes environmental pollution when it makes chemical changes to an existing ambience making it deleterious to the living beings. Therefore, it involves a display of scientific and technological application of data to hold the actor responsible for an alleged environmental pollution. But the 'complex science-rich cases' has put the 'ability' of the courts into question on the ground that the judiciary is 'increasingly unable to manage and adjudicate science and technology issues'.[9] A judicial system lacking 'technical training' is criticised for making 'erroneous and inconsistent determinations' thereby creating a public perception that it is 'incapable of correctly resolving some of the most pressing legal issues'.[10] This haphazard situation of the judiciary results from the maxim that 'complete scientific certainty is an exception rather than a norm'.[11] Uncertainty works at the centre of scientific investigation. Therefore, it is asserted:

> *"Uncertainty is a driving force within science and a main driver for new discoveries, creativity and inventions. It plays an inherent part of the dynamics of research, where scientific investigations may contribute to close some knowledge gaps while at the same time*

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8 *Science and Technology in Judicial Decision Making: Creating Opportunities and Meeting Challenges-A Report of the Carnegie Commission on Science, Technology and Government,* 1993*;* New York, USA; at p. 13, available at <http://www.ccstg.org/pdfs/JudicialDecisionMaking0393.pdf> (Las visited on October 13, 2019).

9 *ibid.,* at p. 11.

10 *ibid.*

11 de Sadeleer, N., *Environmental Principles*, p 177, Oxford University Press, 2002 [quoted in 186th Report of the Law Commission of India on the Proposal to Constitute Environment Courts, at p. 11, available at <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf> (Last visited on October 14, 2019].