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Case Note

From Judicial Activism to Adventurism — The *Godavarman* Case in the Supreme Court of India

Nupur Chowdhury*

Abstract

Beginning as a conservative institution in post-independent India, the Indian judiciary has emerged as a more assertive actor. Key legal innovations have helped expand public interest litigation and, with that, the role of the judiciary. The Supreme Court has also established public bodies to directly oversee enforcement of its orders. This potentially trespasses into executive turf. In environmental law, the imprimatur of the Court's judicial philosophy is most striking in the case of *T N Godavarman v Union of India*. It demonstrates how institutions self-reflect on their roles, especially in a federal polity. Do the actions of the Supreme Court push the limits of judicial activism? Can they be seen as judicial adventurism? These questions are explored in this case note on *Godavarman*.

I Introduction

Most appellate courts around the world are empowered to undertake judicial review of legislation. The primary function of judicial review is to ensure compatibility of a jurisdiction's legislation with that of its Constitution. Judges review legislative output to check the constitutional validity of enactments. The philosophical foundation lies in the argument that a legislature may become majoritarian and in that process undermine the Constitution.¹ As an independent (of the legislature) institution, the judiciary is entrusted with this responsibility. Legal positivists view this function of the court in (largely pedantic) terms of interpreting black letter law—where the role of the interpreter is limited² and the

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¹ Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' (2002) 112 *Yale Law Journal* 153.

² This is known as the 'exegetical school'. It addresses the problem of statutory interpretation by directing judges to excavate the original intent of the legislator. Thus the judicial function is limited to unearthing the applicable law. This school also propounds that, in case this is

process often discounts the dynamic nature of interpretative activity. This leads them to scorn judicial activism.³ Judicial activism in effect underlines the self-understanding on the part of the judge that constitutional interpretation should be undertaken keeping in view social changes in order to ensure that the Constitution remains socially relevant. In developing countries like India (which is ridden by social and economic inequities) judges have a duty and responsibility to pursue social justice goals embedded in the Constitution.

In India, the Supreme Court has been a torch bearer of judicial activism. It has done so by adopting key procedural innovations like liberalising the rule of *locus standi*,⁴ allowing for epistolary jurisdiction, using extensively interlocutory orders⁵ and expanding the role of *amicus curiae*. The general trend has been to adopt inquisitorial techniques and consequently to move away from adversarial mechanisms in public interest litigations (also referred to as ‘social action litigation’ by some commentators). The substantive basis for this expansion of the Court’s role is the adaptation of art 21 of the *Constitution of India* through jurisprudential interpretation that supported the rapid extension of citizens’ rights to various public goods. Environmental public goods like clean air, drinking water, and reduced noise pollution have also been included in the ‘fundamental right to life’ under art 21. However, the conceptualisation of environmental protection as a series of public goods is not unproblematic. A public goods conceptualisation necessarily leads to certain conclusions. The Court is forced to weight environmental public goods against other public goods, such as industrial development, employment generation and so on. This trade-off between different public goods is necessary in each case and the outcomes may often be unfavourable for environmental protection. Contrast this with a scenario where the Court would characterise such cases simply as violations of environmental norms or non-compliance with environmental standards. In such cases, the violation would be penalised. The Court’s excessive reliance on constitutional

inconclusive, the next best alternative is to ask the present legislature—and the process of *refere legislatif*—provided for this process: Martin Vranken, ‘Statutory Interpretation and Judicial Policymaking: Some Comparative Reflections’ (1991) 12 *Statute Law Review* 31.

³ This view symbolised the English judiciary. They supported the rule of literal interpretation of statutes with the aim of rendering the law plain and unambiguous and, in the process, discounted the role of the judge to that of an interpreter rather than a creator of law. This stand has found instrumental support in the fact that Britain does not have a written Constitution or a Bill of Rights. There has been a much more activist and interventionist judiciary in the United States. The epoch-making cases were *Marbury v Madison*, 5 US 137 (1803) and *Brown v Board of Education*, 347 US 483 (1954).

⁴ This is in stark contrast to the European Union, where public interest litigation by non-governmental organisations (‘NGOs’) is discouraged by adopting restrictive rules on standing: B Muller, ‘Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law’ (2011) 23(3) *Journal of Environmental Law* 505. For a discussion on *locus standi*, see Susan D Susman, ‘Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation’ (1994–95) 13 *Wisconsin International Law Journal* 57.

⁵ The use of interim orders is also effective given the huge pendency of civil cases. Upendra Baxi highlighted the extensive use of interim orders by Courts to make the administration incrementally responsive to their constitutional obligations: Upendra Baxi, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ in N Tiruchelvam and R Coomaraswamy (eds), *The Role of Judiciary in Plural Societies* (St Martin’s Press, 1987).

tropes to pursue environmental protection, rather than exploring the statutory framework (pollution control statutes) to find solutions for public interest litigations, creates a path dependency that frequently leads to unnecessary trade-offs that could, in specific instances, result in negative outcomes for environmental protection.

Legal commentators have debated the idea of judicial review extensively in the context of India. Most commentators have been laudatory⁶ and complementary of the Court's role.⁷ However, this does not mean that the commentators support the active engagement of the judiciary in legislation and policy-making at the expense of the legislature.⁸ Therefore, in the minds of most commentators, presumably there are some notional limits to judicial activism,⁹ although this is left largely undefined.¹⁰ Most arguments supporting judicial review have been based on executive failure, the responsibility of the Supreme Court to preserve and protect constitutional values and also the Court's role as the final protector of individual rights and liberties. Such arguments have sought to provide a legitimate and justifiable normative foundation for judicial activism.¹¹ A different basis for judicial review that has been suggested by some academics is the right to hearing (that is, the right of the petitioner to be heard).¹²

⁶ Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (N M Tripathi, 1985); J Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *American Journal of Comparative Law* 495; Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 *Civil Justice Quarterly* 19; M P Singh, 'Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation' in M Singh, H Goerlich and M von Hauff (eds), *Human Rights and Basic Needs: Theories and Practice* (Universal Law Publishing, 2008); S P Sathe, *Judicial Activism in India* (Oxford University Press, 2001).

⁷ There have been some exceptions: S K Agrawala, *Public Interest Litigation in India: A Critique* (N M Tripathi, 1985); Rajeev Dhavan, *Litigation Explosion in India* (N M Tripathi, 1986).

⁸ The other extreme is also unpalatable to most commentators. Separation of powers does not mean abject judicial deference to legislative supremacy in legislation. The doctrine of separation of powers recognises the judicial function of interpretation and restatement of existing law: René David and John E C Brierley, *Major Legal Systems in the World Today* (Simon and Schuster, 1978).

⁹ James Young, 'The Constitutional Limits of Judicial Activism: Judicial Conduct of International Relations and Child Abduction' (2003) 66 *The Modern Law Review* 823; T R Andhyarujina, 'Disturbing Trends in Judicial Activism', *The Hindu* (online), 6 August 2012 <<http://www.thehindu.com/todays-paper/tp-opinion/disturbing-trends-in-judicial-activism/article/3732377.ece>>; Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (Springer, 2010).

¹⁰ A 'weak' judicial review is a review where judicial decisions may be reversed or modified. So the courts have a limited monitoring role, leaving the policy particular to be evolved by the executive: Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009); Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391; Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22(3-4) *Law and Philosophy* 381.

¹¹ Robert C Post and Reva B Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) 92 *California Law Review* 1027.

¹² Louis L Jaffe, 'The Right to Judicial Review' (1958) 71(3) *Harvard Law Review* 401; Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70(6) *Harvard Law Review* 953; Alon Harel and Adam Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review' (2009) 10(4) *International Journal of*

This argument seeks to legitimise judicial review based on the principle of a citizen's right to be heard. By putting the litigant at the centre of its contention, such a principle marks a radical departure from more institutional perspectives on separation of powers, the rule of law and other related principles.

In this case note I support the idea of judicial activism that is centred on a right to hearing. I argue that adopting a focus on litigants' perspectives allows us to use this as a standard of review to critically analyse public interest litigation cases in India. Thus, by departing from institutional arguments and focusing on litigants, I undertake a micro-level discussion of specific cases and examine whether each was a fit case for the exercise of the Court's power of review or if the Court should have engaged in judicial activism. I discuss a few critical orders passed by the Supreme Court in *TN Godavarman Thirumulkpad v Union of India*¹³ (the longest-running continuing mandamus in the history of environmental protection in India) in order to understand whether the Court has pushed (and maybe in some instances even breached) the limits of judicial activism.

This case note is divided into four sections. In the next section, I provide an introduction to Indian judicial activism, discussing key cases, with a brief overview of the development of the environmental protection regime. The third section provides an in-depth analysis of specific aspects of the *Godavarman case*, followed by some concluding remarks in the fourth section.

II *Judicial Activism in India*

If a history of judicial review in India is ever written, it will have to recognise both the legislature and the judiciary as equal protagonists. That is because judicial review in India has to a large measure been a result of a conversation (and sometime conflict) between these two institutions. This is not surprising; since it underlines the fact that exercise of the power of judicial review is always a decision of the Court and therefore it necessarily leads to certain political implications. Commentators have noted how, despite adopting the principle of judicial discretion as practised by English courts, Indian courts have been able to seek out opportunities for selective judicial interventions, thereby allowing judicial activism to flourish.¹⁴

Post-Independence, the Indian judiciary provided a conservative institutional bulwark against the raging upheavals of politics. It chose to uphold a positivist approach inherited as part of the common law tradition, where the judiciary is seen a neutral umpire in adversarial procedures. This meant a much reduced role of the Court as a mere applier, rather than an interpreter, of black

Constitutional Law 950; Mark V Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813.

¹³ (WP 202/1995) CDJ 2005 SC 713 ('*Godavarman case*').

¹⁴ Carl Baar, 'Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary' (1990) 19(1) *Policy Studies Journal* 140.

letter law.¹⁵ However, it did take its role as a constitutional court seriously enough to strike down progressive political enactments (land reforms) of the Parliament as violating the right to property.¹⁶ The legislature retaliated by bringing laws that overturned the Court rulings. This was repeated several times until the Emergency imposed by the then Prime Minister Indira Gandhi in 1975.¹⁷ The capitulation of the judiciary—more specifically, the justices of the Supreme Court—during the Emergency is widely accepted as the nadir in India judicial history.¹⁸ Post-Emergency, there was a remarkable expansion in the Court’s exercise of the power of judicial review to uphold a series of civic rights in the form of fundamental rights.¹⁹ In so doing, the Court chose to provide an expansive interpretation of Pt IV of the *Constitution* (which pertains to directive principles of state policy—a series of policy prescriptions for the state—that are expressly unenforceable in nature).²⁰

However, prior to the Emergency, the Court did mount a determined challenge to legislative authority. The primary point of contention was whether the Parliament had the power to amend the fundamental rights as provided in the *Constitution* by moving a constitutional amendment. The Court overruled *Golaknath*²¹ to mandate that constituent power of the Parliament under art 368 (the power of amendment) was not unlimited. The power had to be exercised so as not to violate the basic structure of the *Constitution*.²² Soon after, the Emergency was declared, and the Government used its brute Parliamentary majority to pass a number of constitutional amendments—including one that sought to invalidate the Allahabad High Court ruling—declaring the election results of Indira Gandhi (then Prime Minister of India) to be invalid on the

¹⁵ This is evident in the Supreme Court’s stand in cases such as *A K Gopalan v State of Madras* AIR 1950 SC 27, where it upheld the constitutional validity of the *Preventive Detention Act 1950* (India) based on unfettered competence of the legislature to legislate any enactment as there was no express constitutional provision preventing such exercise of competence.

¹⁶ See *State of West Bengal v Bella Bannerji* AIR 1954 SC 170; *State of West Bengal v Subodh Gupta* AIR 1954 SC 92; *K K Kochuni v Madras and Kerala* AIR 1960 SC 1080.

¹⁷ Justice A M Ahmadi, ‘Judicial Process: Social Legitimacy and Institutional Viability’ (1996) 4(1) *Supreme Court Cases Journal* 1.

¹⁸ This capitulation of the Court was witnessed in *A D M Jabalpur v Shiv Kant Shukla* AIR 1976 SC 1207, where the Court expressed its inability to uphold individual rights against state action under the circumstances in which the Emergency had been declared under art 352 of the *Constitution of India*.

¹⁹ *Govind v M P* AIR 1975 SC 1378; *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608; *Municipal Council, Ratlam v Yardichand* AIR 1980 SC 1622; *Bandhua Multi Morcha v Union of India* AIR 1984 SC 802; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.

²⁰ Mahendra P Singh, ‘The Statics and the Dynamics of the Fundamental Rights and the Directive Principles—A Human Rights Perspective’ (2003) 5 *Supreme Court Cases Journal* 1.

²¹ The rationale in *I C Golaknath v State of Punjab* AIR 1967 SC 1643 (*‘Golaknath’*) was that art 13(2) constrained the constituent power of the Parliament under art 368 of the *Constitution*. Although *Keshavananda Bharti v Kerala* AIR 1973 SC 1461 (*‘Keshavananda’*) overruled *Golaknath*, philosophically the former was the extension of the latter in terms of seeking to develop a constitutional restraint on the parliamentary power to legislate.

²² *Keshavananda*. The political context was that the Parliament was dominated by a single party that commanded a two-third’s majority. This may have influenced the Court to provide some restraint on the Parliament from pursuing majoritarian ends.

ground that corrupt practices were used.²³ This provision of the Thirty-Ninth Constitutional Amendment was challenged in the Supreme Court.²⁴ The Court upheld the elections, but decided to strike down the amendment on the grounds that it violated the basic structure of the *Constitution*. Therefore, the Court, while avoiding a direct confrontation with the Government, reiterated the basic structure doctrine.²⁵

The Emergency declared by Indira Gandhi was a catalytic event and highlighted the fragility of the political system, including the limited power of the judiciary. It provided the judiciary with an opportunity for reflection and change. Similarly, the Bhopal gas tragedy of 1984²⁶ and the inadequate response to it of the Indian judiciary (as well as its cooperation with the executive to dilute criminal charges and accept a final financial settlement without consulting the victims) drew criticism from legal commentators.²⁷ The judiciary responded by first mandating the application of absolute liability for environmental pollution resulting from hazardous industrial activity²⁸ and then securing a number of environmental rights by reinterpreting the art 21 right to life (and thereby giving it the status of a fundamental right) to recognise (and create) a series of public entitlements to environmental goods by citizens²⁹—like access to clean drinking water,³⁰ clean air,³¹ and reduced noise pollution.³² Second, the Court provided for an indigenisation of international environmental law principles—such as the polluters pay principle,³³ the precautionary principle,³⁴ and intergenerational equity³⁵—to expand the tort law remedies for ensuring obligations of private citizens vis-a-vis environmental pollution. The decision to use art 21 in many ways was as expected as it was also used to support a range of civil rights

²³ *Raj Narain v Indira Gandhi* (Election Petition No 5 of 1971) judgment delivered 12 June 1975. A Single Bench Judge (Justice Jagmohan Lal Sinha) of the Allahabad High Court found Indira Gandhi guilty of corrupt practices and cancelled her election victory in Rae Baraeli and barred her from standing for elections for another six years.

²⁴ *Indira Gandhi v Raj Narain* AIR 1975 SC 2299.

²⁵ S P Sathé, 'Limitations on Constitutional Amendment: Basic Structure Principle Re-examined' in Rajeev Dhavan and Alice Jacob (eds), *Indian Constitution: Trends and Issues* (N M Tripathi, 1978).

²⁶ Approximately 40 tons of toxic gas (methyl isocyanate) accidentally escaped from the Union Carbide Plant in Bhopal, Madhya Pradesh (India) on 3 December 1984, leading to death of around 10 000 persons and injury due to poisoning for around 500 000 persons. The total number of affected persons continue to rise as the after-effects have also been passed on to the next generation. It is one of the biggest industrial disasters in Asia.

²⁷ Pratap Bhanu Mehta, 'Bhopal Tragedy: Caught in Court', *The Indian Express* (India), 10 June 2010, 239.

²⁸ *M C Mehta v Union of India* (1987) 1 SCC 395 ('*Oleum Gas Leak case*').

²⁹ Bharat H Desai, 'Enforcement of Right to Environmental Protection through Public Interest Litigation in India' (1993) 33 *Indian Journal of International Law* 27.

³⁰ *A P Pollution Control Board v Prof M V Nayadu* 2000 SCALE 354.

³¹ *Ishwar Singh v State* AIR 1996 P&H 30.

³² *Krishna Gopal v State of MP* 1986 Cr LJ 396 (MP).

³³ *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647.

³⁴ *The Majra Singh v Indian Oil Corporation* AIR 1999 J&K 81.

³⁵ *Glanrock Estate (P) Ltd v State of Tamil Nadu* (2011) (8) Scale 583.

entitlements—and environmental public goods came to be constituted similarly.³⁶

However, environmental public goods are quite different from civil rights entitlements. The latter is primarily concerned with restraining the state from undertaking action that is injurious to individual rights. Environmental public goods constitute a different set of entitlements that requires positive action by the state in first the creation and then access to such goods. Allocation of financial resources requires executive intervention and therefore such instances can be seen as unwarranted interventions into executive domain, and therefore violation of the separation of powers. From another perspective, the choice of art 21 as a vehicle for creation of entitlement to environmental public goods has necessarily meant a trade-off between those goods and other economic public goods, such as industrial development and employment generation. At an academic level, this may seem a false trade-off between economic policy imperatives and a set of environmental public goods; however, it has significance at the micro level of specific cases.

Unlike in developed countries where environmental debates are typically issues concerning the rich, in India they are embedded in resource conflicts between the state and poorer local communities. Environmental litigation is therefore closely related to the nature and distributional impacts of the Indian developmental paradigm. The Court has been repeatedly confronted with a trade-off between industrial development and environmental protection. However as discussed earlier, this is necessarily a false trade-off that has been forced upon the Court by its own decision to pursue an environmental public goods framing of the issue through the expansion of art 21. Thus, the judiciary has been structurally shackled by its own choice.

That said, legal commentators have argued that this activism had limited impact on the ground.³⁷ The reasons could be twofold. First, despite laying down environmental principles, there was little effort to ensure consistency of application and to incrementally build a sustained jurisprudence. The Court also eschewed detailed argumentation in its holdings that left little guidance on the circumstances, reasons and the conditions for application of certain environmental principles. Second, executive apathy led to non-implementation of Court's orders.

Faced with the lack of implementation on the ground, the Court adopted a more strident position demonstrated by its willingness to use the *amicus curiae* as a reviewer of facts on the ground and constitute committees to supervise

³⁶ *Rural Litigation and Entitlement Kendra v State of UP* AIR 1987 SC 2187; *M C Mehta v Union of India* AIR 1988 SC 1037; *Tarun Bharat Sangh v Union of India* (1993) SCR (3) 21; *M C Mehta v Union of India* (1999) 6 SCC 9; *A P Pollution Control Board v M V Nayadu* AIR 1999 SC 812.

³⁷ Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16 *Review of European Community & International Environmental Law* 274; Philippe Cullet, 'Water Sector Reforms and Courts in India: Lessons from the Evolving Case' (2010) 19 *Law Review of European Community & International Environmental Law* 328.

enforcement of its orders. The *Godavarman case* is a good example of this trend. Post-2000 we have seen a hitherto *activist* Court turning increasingly adventurist and repeatedly trespassing on executive turf.

III *Godavarman Case*

The *Godavarman case*³⁸ concerns a writ petition filed by Mr T N Godavarman in the Supreme Court that sought the intervention of the Court in directing the State of Tamil Nadu to check timber felling and to combat the problem of deforestation in general. Reacting to the continual apathy shown by state governments (state governments were made party to the dispute since the Supreme Court judged this problem to be a national problem plaguing all states), which refused to respond to repeated notices sent by the Supreme Court,³⁹ the Supreme Court has enlarged the remit of this case to include all aspects of forest governance with respect to protection of forests—specifically the issue of de-reservation of forests and the use of forests for non-forest purposes. The most important aspect of this case is that it is an ongoing case—continuing *mandamus*⁴⁰—and the Court continues to pass orders at regular intervals⁴¹ and without sight of any specific objective that would allow closure of this case in a time-bound manner.

The primary fallout of the *Godavarman case* has been a complete ban on felling of trees (also transportation of trees in the North East) except on a limited case-by-case basis in some parts of the country. Since the Court redefined the term ‘forests’ under the *Forest Conservation Act 1980* (India) to also cover privately owned forest land, the import of the ban has practically resulted in a debilitating effect on the functioning of the saw mill industry in India. The interminable nature of the case has meant that the Court has had the opportunity to spread in all directions concerning aspects such as pricing of timbers, mining within forests, transportation of timbers, distribution of forests revenue, and so on. In this case note I will limit my consideration to four specific aspects: the role of the *amicus curiae*; constitution of the Central Empowered Committee (‘CEC’); calculation of the Net Present Value (‘NPV’); and the appointment of an environmental regulator.

An outstanding feature of this case has been the expansive role played in it by the *amicus curiae*. To date the Court has appointed as many as four *amicus curiae* (these include Harish Salve, U U Lalit, Siddharth Choudhary and A D N Rao). This is not unexpected; given the breadth of issues the Court sought to address through this case, although it does belie the extent of dependence and the magnified position of the *amicus* in the proceedings of this case. Encroachment

³⁸ (WP 202/1995) CDJ 2005 SC 713.

³⁹ Ritwick Dutta and Bhupender Yadav, *The Supreme Court on Forest Conservation* (Universal Law Publishing Company, 2007).

⁴⁰ Another case in which the Court explored this remedy was *Union of India v Sushil Kumar Modi* [1997] INSC 68 (24 January 1997).

⁴¹ K Sivaramakrishnan, ‘Environmental, Law and Democracy in India’ (2011) 70 *Journal of Asian Studies* 905.

was one such issue in which the *amicus* made an intervention—filing an application in the Supreme Court to remove illegal encroachments from forest land across India.⁴² In response, the Court passed an order⁴³ stating that no further regularisation of encroachment would take place until further enquiries were undertaken, and without the permission of the Court. The Ministry of Environment and Forests (‘MOEF’) interpreted this as an express order of the Court for eviction of encroachers⁴⁴ and launch drives to remove encroachments in many states. This was severely criticised by civil society and tribal rights groups⁴⁵ and, reacting to the criticism, in an order in October 2002 the MOEF reiterated its commitment to the 1990 Guidelines and then issued new guidelines in 2004 for the regularisation of the rights of tribes to the forest lands. (However, the only difference was that, under the 1990 guidelines, the cut-off date was 25 October 1990 and, under the 2004 guidelines, 31 December 1993 was decided as the new date.)⁴⁶ These guidelines were stayed by the Supreme Court in response again to an interlocutory application moved by the *amicus*.⁴⁷ These instances illustrate how the *amicus curiae* in this case was able to repeatedly influence the Court’s thinking. Interestingly, at both times the Court chose to react and order a clamp-down, rather than to deliberate on the issue of tribal rights and forest protection and did not invest energy into even explaining what it did mean by the term ‘encroachment’.⁴⁸

The role of the *amicus* has generally expanded in public interest litigation in India, where the Court has come to rely on the *amicus* to provide not only independent legal counsel, but also to assist the Court to establish facts and to help monitor and implement Court orders—something akin to the role played by the Advocate General in the European Court of Justice. The *amicus* is also seen in environmental litigation to provide expert (not necessarily limited to legal expertise) advice to the Court and, in such cases, this expert advice needs to be treated in the same manner as that of an expert witness (and therefore such testimony should be open for cross-examination under the *Indian Evidence Act*

⁴² Interlocutory Application No 502.

⁴³ See order dated 23 November 2001.

⁴⁴ Jean Dreze, ‘Tribal Evictions from Forest Land’ (Report to the National Advisory Council, March 2005).

⁴⁵ Naunidhi Kaur, ‘Targeting Tribal People’, 19 *Frontline* (12 October 2002) <<http://www.frontline.in/static/html/fl1921/stories/20021025005603100.htm>>.

⁴⁶ Circular No 13-1/90-FP of Government of India, Ministry of Environment & Forests, Department of Environment, Forests & Wildlife dated 18.9.90 addressed to the Secretaries of Forest Departments of all States/UTs. The six circulars under this were:

1. FP (1) Review of encroachments on forest land
2. FP (2) Review of disputed claims over forest land, arising out of forest settlement
3. FP (3) Disputes regarding pattas/leases/grants involving forest land
4. FP (4) Elimination of intermediaries and payment of fair wages to the labourers on forestry works
5. FP (5) Conversion of forest villages into revenue villages and settlement of other old habitations
6. FP (6) Payment of compensation for loss of life and property due to predation/ deprivation by wild animals.

⁴⁷ P V Jayakrishnan, ‘Is There a Need for This Bill?’, *Seminar*, Issue 552 (August 2005).

⁴⁸ ELDF and WWF India, *Protection of Forests in India—The Godavarma Story* (WWF, 2009).

1872 (India)).⁴⁹ However, the *amicus*, as the functionary of the Court, functions outside the purview of these restraints and is therefore open to unwarranted influences. This is a structural flaw owing to the rapid expansion of the Court's role without concomitant institutional support. The following discussion on the CEC further illustrates this point.

The CEC was established by the MOEF notification in 2002.⁵⁰ Initially it was meant to be for a period of five years and therefore the notification expired in September 2007. However, it continues to function even today based on the repeated orders of the Supreme Court extending its term of functioning. The CEC is a powerful body and is empowered to, among other things, examine pending interlocutory applications and affidavits filed by states in response to orders of the Court and recommend action by the Court. Individuals may file an application for grant of relief with reference to the implementation of any Court order with the CEC. The CEC is also empowered to call for evidence and assistance from any person or government official.⁵¹ These are wide-ranging powers for a non-statutory authority, allowing it to function as both a court of first instance with considerable delegated powers of investigation and supervision of enforcement of Court orders.

Given the range of the CEC's powers, to what kinds of accountability mechanisms is it subjected? That is not apparent. The Court seems to be under the presumption that, as this is a case of delegation by the Court and the Court would be vicariously responsible for the activities of the CEC (with the Supreme Court as the principal and the CEC its agent), there is no requirement for any separate mechanisms for accountability. If the Court were to elaborate on reasons for accepting or rejecting CEC recommendations, that would be a welcome development—but this has not been the case. The CEC has enabled the Supreme Court to further extend the range of its powers as well as the subject matters it addresses within the ambit of this case. It is an institutional innovation without any precedent and has allowed the Supreme Court to usurp powers of enforcement agencies like the MOEF, as well as the various state agencies involved in forestry.⁵²

The Net Present Value ('NPV') is the amount to be paid in lieu of diversion of forest land for non-forest activity. The payment of NPV is in addition to payments to be made under the Compensatory Afforestation Fund

⁴⁹ Nupur Chowdhury, 'Role of the Indian Supreme Court in Shaping Technology Development' (2014) 19 *Science Technology Society* 57.

⁵⁰ The CEC was constituted by the Supreme Court by order dated 9 May 2002 and 9 September 2002 and formally constituted vide Gazette Notification No SO 1008 (E) dated 17 September 2002 issued by the Ministry of Environment & Forests under sub-s (3) of s 3 of the *Environment Protection Act 1986*. The Central Information Commission has ruled vide order CIC/AD/C/2009/000137 on 12 March 2009 that the CEC is a Public Authority as defined under provisions of the *Right to Information Act* of 2005.

⁵¹ Ministry of Environment and Forests, File No 1-1/CEC/SC/2002 (3 June 2002).

⁵² Armin Rosencranz, Edward Boenig and Brinda Dutta, 'The *Godavaran Case*: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests' (2007) 37 *ELR News and Analysis* 32.

(‘CAF’) provided for under the *Forest Conservation Act 1980*, but which only became operational (in strictly legal terms) since August 2009.⁵³ In 2003, the Court passed an order stating that no approval for felling of trees could be granted by the MOEF without levying NPV.⁵⁴ Initially the Court determined the value in the range of five to nine lakh per hectare, contingent on the density of forest land to be diverted for non-forest purposes. Later, however, Dr Kanchan Chopra led a committee of experts that made a recommendation which was then vetted by the CEC and thereafter accepted by the Court. The issue of NPV is another substantive policy objective the Court has introduced within forest regulation with limited consultation with the primary stakeholders—the states, the forest department, the gram panchayats and the forestry industry.

On 6 January 2014,⁵⁵ the Court reiterated its earlier judgment in *Lafarge Umiam Mining Private Limited v Union of India*⁵⁶ and categorically ordered the MOEF to appoint a national environmental regulator for appraising projects, enforcing conditions for approval and imposing penalty on polluters. The idea of a national environmental regulator first gained prominence when the erstwhile Environment Minister Jairam Ramesh proposed the establishment of the National Environment Assessment and Monitoring Authority. In a report⁵⁷ commissioned by the MOEF, IIT-Delhi recommended that the clearance processes under Environment Impact Assessment (‘EIA’) and the Coastal Regulation Zone notifications be overseen by an independent environmental regulator. Environmental (including coastal regulation zones) and forest clearances constitute the primary regulatory requirements for undertaking a range of economic activities in India.

Although the Court did consider the inclusion of the forest clearance process within the domain of the environmental regulator, that was disputed by the Solicitor General, Mohan Parasaran, who argued that this competence—to approve diversion of forest land for non-forest purposes—was statutorily mandated to the Central Government under s 2 of the *Forest Conservation Act 1980* and, therefore, could not be assigned to any other authority. The Central Government (in this case the MOEF) had in turn appointed the Forest Advisory Committee (‘FAC’) to vet applications for forest clearance for projects on its behalf. The Court, therefore, decided to only include EIAs within the competence of the national regulator.

Relying on the IIT-Delhi study, the Court found the present regulatory system for EIAs deficient and called for an independent, objective and transparent system via the appointment of a national environmental regulator.

⁵³ Ministry of Environment and Forests, File No 13-1/2009-CAMPA (13 August 2009).

⁵⁴ IA Nos 826, 859, Order (1 August 2003).

⁵⁵ Order of the Supreme Court, IA Nos 1868, 2091, 2225–2227, 2380, 2568, 2937 in Writ Petition (Civil) No 202 of 1995 (6 January 2014) <<http://supremecourtindia.nic.in/outtoday/WC2021995.pdf>>.

⁵⁶ (2011) 7 SCC 338.

⁵⁷ IIT Delhi, ‘Report on Scope, Structure and Processes of National Environment Assessment and Monitoring Authority’ (March 2011) submitted to the Ministry of Environment and Forests, Government of India.

Presently the system comprises a non-permanent expert body (the Expert Appraisal Committee ('EAC')), which recommends action (approval or disapproval of projects) to the MOEF to enable it to make a final decision. Lack of administrative distance between the regulating body and the MOEF was identified by the Supreme Court as the primary reason for growing ad hocism and non-transparency in environmental regulation in India, and the Court ordered the MOEF to appoint an independent environmental regulator under s 3(3) of the *Environment (Protection) Act 1986* (India) ('EPA'). However, the suggested legal basis for appointment of a regulator suffers from a serious limitation. Section 3(3) of the *EPA* empowers the Central Government to delegate authority to a separate body that is 'subject to the supervision and control of the Central Government'. Thus, any regulatory body set up under this legal provision must necessarily function under the administrative control of the MOEF. It is therefore ironic that the Supreme Court's search for an independent (of executive control) environmental regulator should rely on the very same legal provision for its establishment.

An alternative legal basis and a far better choice would have been art 253 of the *Constitution*. It empowers the Parliament to enact laws to implement 'any decision made at any international conference'. India's participation in decisions taken at the United Nations Conference on the Human Environment in Stockholm in June 1972 and the follow-up conferences in Rio in 1992 and 2012 could provide a reasonably substantive justification for the Parliament to enact separate legislation establishing a national environmental regulator that is independent of executive authority. The Parliament has previously relied on art 253 to enact other environmental legislation, such as the *Air (Prevention and Control of Pollution) Act 1981* (India), the *EPA* in 1986 and, most recently, the *National Green Tribunal Act 2010* (India).

Admittedly, it is beyond the remit of the Supreme Court to suggest that the Parliament use its competence under art 253 to establish a national environmental regulator. This highlights the inherent institutional limitation faced by the Court in pursuing policy interventions. It has used the *Godavarman case* as an alibi for establishing a continuing forum to deliberate and undertake fundamental reform of forest regulation in the country. Despite the expanding scope of these interventions—the latest being the case of EIAs—the Court is institutionally not designed as a deliberative forum for policymaking. Constitutional provisions embodying the doctrine of separation of powers have inhibited the Court's ability to credibly engage with the critical issue of institutional reforms in environmental governance in India.

IV Conclusion

The exercise of the power of judicial review by the Court in the *Godavarman case* has pushed the limits of judicial activism. It is now a good case for judicial adventurism; adventurism because the Supreme Court has opened a Pandora's box by constituting itself as the primary institution in reforming forest regulation in a manner it considers to be just and equitable, without a clear vision of where this path will end. Indeed, the length of the case itself (which has been ongoing since 1995) is evidence of the Court's inability to provide a logical and targeted reason for its intervention. The Court has abrogated executive power to an extent that it is impossible currently for the MOEF to make any independent policy decision and without consulting the Central Empowered Committee of the Supreme Court.

Further, there are two specific aspects that should be noted. First, the CEC has virtually been provided with a veto power over all decision-making undertaken by expert bodies currently operating within the ambit of the MOEF. Thus, for instance, the Forest Advisory Committee and the National Board for Wild Life—two independent expert bodies that advise the MOEF on forest clearance and for development projects in protected areas—find their decisions are regularly scrutinised by the CEC. Second, the approximation of power by the Supreme Court through the CEC has catalysed an extreme centralisation of forest regulation that ignores local and regional conditions and imperatives that must be considered when designing policy and regulatory responses. This amounts to clear violation of executive turf, and therefore a negation of the doctrine of separation of powers.⁵⁸ Institutional integrity must be restored and such adventurism must end.

⁵⁸ See for an excellent discussion on judicial restraint, see Markandey Katju, 'Lessons in Judicial Restraint', *The Hindu* (online), 20 July 2012 <<http://www.thehindu.com/todays-paper/tp-opinion/lessons-in-judicial-restraint/article3659978.ece>>.

