

# A précis of Justice Krishna Iyer's contribution to the environmental jurisprudence of the Supreme Court of India

Paper by the Hon. Justice Brian J Preston SC to contribute to a Festschrift celebrating the 99<sup>th</sup> birthday of Justice Krishna Iyer

## Introduction

V R Krishna Iyer served as a Justice of the Supreme Court of India between 1973 and 1980, during which time he articulated a body of jurisprudence that has had, and will no doubt continue to have, a profound influence on the common law landscape of India and other nations. In India, judges of the Supreme Court are vested, on judicial review of government decision-making, with a unique form of political power unknown elsewhere.<sup>1</sup> Provisions for judicial review in India sanction the courts' involvement in the ongoing political process.<sup>2</sup> As one of the most pro-active judges to have ever served on the Supreme Court,<sup>3</sup> Krishna Iyer J made valuable contributions to many different areas of law through both his judicial decisions and extensive extra-judicial writings. Such areas include: criminal law,<sup>4</sup> human rights and social justice,<sup>5</sup> constitutional and public law,<sup>6</sup> and access to environmental justice.<sup>7</sup>

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<sup>1</sup> George H Gadbois Jr, 'The Supreme Court of India as a political institution' in Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds), *Judges and the judicial power: essays in honour of Justice V R Krishna Iyer* (Sweet & Maxwell, 1985) 250, 250-267.

<sup>2</sup> C M Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999) 33. The existence of such power was defended by Krishna Iyer and Bhagwati JJ on a normative basis in *Fertilizer Corporation Kamgar Union, Sindri & Ors v Union of India & Ors* [1980] INSC 220; AIR 1981 SC 344, 351-352 [29]-[32].

<sup>3</sup> See Balakrishnan Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 8 *Human Rights Review* 157, 160.

<sup>4</sup> See, eg, *Shivaji Sahebrao Bobade & Anr v State of Maharashtra* [1973] INSC 151; AIR 1973 SC 2622; *Rajendra Prasad v State of Uttar Pradesh* [1979] INSC 33; AIR 1979 SC 916.

<sup>5</sup> See, eg, *State of Kerala & Anr v N M Thomas & Ors* [1975] INSC 224; AIR 1976 SC 490; 1976 (1) SCR 906; 1976 (2) SCC 310; *Sunil Batra v Delhi Administration & Ors* [1978] INSC 148; AIR 1978 SC 1675; 1979 (1) SCR 392; 1978 (4) SCC 494; V R Krishna Iyer, *Social Mission of Law* (Orient Longman, 1976); V R Krishna Iyer, *Law and Social Change: An Indian Overview* (Publication Bureau, Punjab University, 1978); V R Krishna Iyer, *Social Justice and the Handicapped Humans* (Trivandrum: Academy of Legal Publications, 1978).

<sup>6</sup> See, eg, *Mohinder Singh Gill & Anr v The Chief Election Commissioner, New Delhi and Ors* [1977] INSC 227; AIR 1978 SC 851; *State of Punjab v Gurdial Singh & Ors* [1979] INSC 220; AIR 1980 SC 319.

<sup>7</sup> See, eg, *Ratlam Municipal Council v Shri Vardhichand & Ors* [1980] INSC 138; AIR 1980 SC 1622; V R Krishna Iyer, 'Nature-Friendly Planning of Humanity's Future: Dialectics and Dynamics of Development Management' (1996) 31 *Economic and Political Weekly* 2297; V R Krishna Iyer, *Environmental Protection and Legal Defence* (Sterling Publishers, 1994); V R Krishna Iyer, *Towards a Natural World: The Rights of Nature, Animal Citizens and Other Essays* (Hope India Publications, 2004).

Unfortunately, a paper of this length is unable to pay full respect to the significant contributions Krishna Iyer J has made to Indian jurisprudence. As a result, I propose to address only the contributions Krishna Iyer J has made on access to environmental justice through his judicial decisions whilst on the Supreme Court.

### **Access to environmental justice: a trivalent concept**

The concept of environmental justice includes at least three components: distributive justice, procedural justice and justice as recognition.<sup>8</sup>

First, distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens). Access to distributive justice is promoted by the law giving and upholding substantive rights to share in environmental benefits (such as clean air, water and land, green space and a healthful ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise pollution, and loss of green space, biological diversity and ecological integrity).

Secondly, procedural justice is concerned with the ways in which decisions, including regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions. Access to procedural justice is promoted by the law giving and upholding procedural rights to have access to environmental information, be entitled to participate in environmental decision-making, and have access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights. Access to procedural justice is important for achieving distributional justice.

Finally, justice as recognition is concerned with who is given respect and who is and is not valued. Access to justice as recognition is promoted by the law not only giving

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<sup>8</sup> Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 10, 42-51; David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2007); Brian J Preston, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Paper presented to the 11<sup>th</sup> IUCN Academy of Environmental Law Colloquium, Hamilton, New Zealand, 28 June 2013), available at <<http://iucnacademy2013.org.nz/papers/>>.

substantive and procedural rights but also by affording recognition of different social groups and communities, and of the natural environment and components of it.

Krishna Iyer J, through his jurisprudence, has strived to ensure that the law of India enables the achievement of environmental justice through access to distributive, procedural and recognition justice. I will focus on distributive and procedural justice.

### **Distributive justice**

Perhaps the most influential decision made by Krishna Iyer J in the context of environmental justice, at least from the perspective of distributive justice, is that of *Ratlam Municipal Council v Shri Vardhichand & Ors* ('*Ratlam*').<sup>9</sup> Residents of a locality within the municipality of Ratlam were tormented by a public nuisance caused by inadequate public drains, human excrement deposited on roads by slum dwellers for want of public toilets, and the discharge of malodorous effluent from a nearby alcohol plant into the roads. They moved the Magistrate under s 133 of the *Criminal Procedure Code 1974* to require the Municipal Council to fulfil its public duties under the *Municipalities Act 1961* to abate the public nuisance. The Magistrate ordered the Council to draft a plan for removing the public nuisance within six months. On appeal, the Magistrate's order was reversed by the Sessions Court but it was subsequently upheld by the High Court, and on further appeal, by the Supreme Court.

Krishna Iyer J, in delivering the judgment of the Supreme Court (Krishna Iyer and Chinnapa Reddy JJ), held that the citizens could bring suit before a magistrate to force the Council, under the *Criminal Procedure Code 1974*, to abate a public nuisance,<sup>10</sup> that financial problems would not excuse the Council from performing its public duties,<sup>11</sup> and that a magistrate had a duty to order removal of such a

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<sup>9</sup> [1980] INSC 138; AIR 1980 SC 1622. For discussion of this case, see Abraham, above n 2, 51-60; John E Bonine, 'Public interest environmental lawyers – global examples and personal reflections' (2004) 10 *Widener Law Review* 451, 466; Brian J Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 *Asia Pacific Journal of Environmental Law* 109, 182-183; Swatanter Kumar, 'Indian Constitution and Access to Environmental Justice' (Paper presented to the 11<sup>th</sup> IUCN Academy of Environmental Law Colloquium, Hamilton, New Zealand, 28 June 2013)16.

<sup>10</sup> AIR 1980 SC 1622, 1628-1629 [14].

<sup>11</sup> AIR 1980 SC 1622, 1629 [15].

nuisance.<sup>12</sup> Importantly, the orders of the Court sought to expand upon the original order of the Magistrate by requiring, in addition to the Council, the State government to take appropriate action to stop the pollution caused by the effluent from the nearby alcohol plant.<sup>13</sup>

The decision in *Ratlam* is significant in at least four respects. First, it enabled social justice by giving procedural justice. The Court observed that while the relevant duty of the Council to abate the public nuisance, and of the Magistrate to enforce that duty, under the relevant Codes were 'of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes [the laws] a remedial weapon of versatile use'.<sup>14</sup> The people must be able to have access to the courts under these laws to enforce these public duties.

Secondly, the Court recognised that the public nuisance occasioned distributive injustice. By ordering abatement of the public nuisance, the Court facilitated distributive justice by simultaneously ordering the removal of environmental burdens (e.g. open drains and human waste) and the construction of drainage and sanitation facilities to provide environmental benefits to residents in the locality (e.g. access to adequately clean land, air and water).<sup>15</sup>

Thirdly, the Court's pithy observation that '[i]ndustries cannot make profit at the expense of public health'<sup>16</sup> and orders that the local and State governments take action to stop the effluent from the alcohol plant flowing into the street, involved an early recognition of the "polluter pays" principle.<sup>17</sup> The "polluter pays" principle holds that those who generate pollution and waste should bear the cost of containment, avoidance or abatement.<sup>18</sup> The Court delivered distributive justice by preventing

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<sup>12</sup> AIR 1980 SC 1622, 1628 [13].

<sup>13</sup> Abraham, above n 2, 55.

<sup>14</sup> AIR 1980 SC 1622, 1628 [14].

<sup>15</sup> AIR 1980 SC 1622, [15], [16].

<sup>16</sup> AIR 1980 SC 1622, 1630-1631.

<sup>17</sup> The "polluter pays" principle is expressly referred to in *Indian Council for Enviro-Legal Action v Union of India* AIR 1996 SC 1446, [67]; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715, [12], [13]; *Research Foundation for Science Technology and Natural Resources Policy v Union of India* [2005] INSC 14. See also Preston, above n 9, 197-201.

<sup>18</sup> Preston, above n 9, 195.

industries deriving economic benefit (in the form of profits) at the expense of the community (in the form of the burden of the environmental externality of pollution).

Fourthly, the Court held that the Council was obliged to comply with its public duty to abate the public nuisance 'regardless of the cash in their coffers',<sup>19</sup> which implicitly suggests that the human rights of residents in the Ratlam municipality to live burden-free from nuisance trumped any fiscal concerns on the part of Council.

The *Ratlam* case has been praised for provoking judicial cognisance of environmental problems,<sup>20</sup> and is recognised as a pace setter for environmental litigation and rights in India.<sup>21</sup> It has been cited favourably in subsequent cases, both in India<sup>22</sup> and other jurisdictions,<sup>23</sup> and in academic journals overseas.<sup>24</sup>

## Procedural justice

While the contributions made by Krishna Iyer J to access to procedural justice in India have permeated many different areas of law, it is arguably in the area of environmental law that his contributions have been most influential. Of these contributions, three are particularly noteworthy.

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<sup>19</sup> AIR 1980 SC 1622, 1628 [12].

<sup>20</sup> B K Sharma, 'Constitutional mandate for the environmental protection: dynamics of judicial activism' in Paras Diwan (ed), *Environment protection* (Deep & Deep Publication, 1987) 103, 105 (cited in Abraham, above n 2, 55).

<sup>21</sup> Kumar, above n 9, 13-17; Abraham, above n 2, 55-56; Sushila Abraham and C M Abraham, 'The Bhopal case and the development of environmental law in India' (1991) 40 *International and Comparative Law Quarterly* 334, 360.

<sup>22</sup> See, eg, *Dr B L Wadehra v Union of India & Ors* [1996] INSC 352; *Fertilizer Corporation Kamgar Union v Union of India* [1980] INSC 220; AIR 1981 SC 344; *State of Himachal Pradesh & Anr v Umed Ram Sharma & Ors* [1986] INSC 12; AIR 1986 SC 847; *Bangalore Medical Trust v B S Muddappa & Ors* [1991] INSC 161; AIR 1991 SC 1902; *State of Maharashtra v Manubhai Pragaji Vashi & Ors* [1995] INSC 394; AIR 1996 SC 1; *State of Uttaranchal v Balwant Singh Chauhal & Ors* [2010] INSC 54; AIR 2010 SC 2550.

<sup>23</sup> For example, in Pakistan: see *Irfan v Lahore Development Authority* (2002) PLD Lahore 555, 568-569.

<sup>24</sup> See, eg, Rebecca M Coleman, 'The human right of sanitation for all: A Study of India' (2011) 24 *Pacific McGeorge Global Business and Development Journal* 267, 286-287; Shyami Fernando Puvimanasinghe, 'Towards a jurisprudence of sustainable development in South Asia: Litigation in the public interest' (2009) 10 *Sustainable Development Law and Policy* 41, 43; Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 *Columbia Journal of Environmental Law* 223, 249-250; Sheetal B Shah, 'Illuminating the possible in the developing world: Guaranteeing the human right to health in India' (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 482-483.

First, Krishna Iyer J is widely credited for the key role he played in liberalising the rules of standing (or *locus standi*) in India.<sup>25</sup> Until the early 1970s, litigation in India was generally characterised by its focus on private actors seeking vindication of their own interests.<sup>26</sup> Only an individual party who had been aggrieved had the prerogative to initiate and continue litigation.<sup>27</sup> In the late 1970s, Justices P N Bhagwati and Krishna Iyer chaired two separate committees on legal aid.<sup>28</sup> Both wrote reports about the need to improve access to justice for ordinary Indians, and both subsequently recommended broadening of the prevailing rules of standing when serving on a Committee on Judicare.<sup>29</sup> The appointment of both Bhagwati and Krishna Iyer JJ to the bench of the Supreme Court at this time 'set powerful forces into motion' and resulted in the removal of existing procedural obstacles.<sup>30</sup>

In *Mumbai Kamgar Sabha v Abdulbhai* ('*Mumbai Kamgar*')<sup>31</sup> and *Fertilizer Corporation Kamgar Union v Union of India*,<sup>32</sup> Krishna Iyer J held that *locus standi* must be liberalised to meet the challenges of the times.<sup>33</sup> All public-minded citizens or organisations with serious concern for conservation of public resources should have the right to invoke the higher courts to correct misexercise of public power so as to promote social justice.<sup>34</sup> Through his decisions relaxing the rules of *locus standi* in India, Krishna Iyer J has promoted access to procedural justice.

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<sup>25</sup> See Bonine, above n 9, 465-466; Abraham, above n 2, 106, 138. See also Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *American Journal of Comparative Law* 495, 498-499; Jahid Hossain Bhuiyan, 'Access to Justice for the Impoverished and Downtrodden Segments of the People through Public Interest Litigation: A Bangladesh, India and Pakistan Perspective' [2007] *LAWASIA Journal* 1, 6-8. Standing, or *locus standi*, simply means that the person bringing litigation is considered by the court as having a right to instigate the particular proceedings in question: see Brian J Preston, *Environmental Litigation* (Lawbook Co, 1989) 21.

<sup>26</sup> Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4 *Law, Environment and Development Journal* 375, 379

<sup>27</sup> *Ibid.*

<sup>28</sup> Bonine, above n 9, 465-466.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* Case examples where Krishna Iyer J broadened the rules of *locus standi* include: *Ratlam Municipal Council v Shri Vardhichand & Ors* [1980] INSC 138; AIR 1980 SC 1622; *Mumbai Kamgar Sabha v Abdulbhai* [1976] INSC 46; AIR 1976 SC 1455; *Maharaj Singh v State of Uttar Pradesh & Ors* [1976] INSC 278; AIR 1976 SC 2602.

<sup>31</sup> AIR 1976 SC 1455.

<sup>32</sup> AIR 1981 SC 344.

<sup>33</sup> *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455, 1458 [7]; *Fertilizer Corporation Kamgar Union v Union of India* AIR 1981 SC 344, 353 [38].

<sup>34</sup> *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455, 1458 [7]; *Fertilizer Corporation Kamgar Union v Union of India* AIR 1981 SC 344, 353 [38]. The propositions articulated by Krishna Iyer J in these cases have influenced Indian jurisprudence on access to justice generally, including jurisprudence on environmental protection: see, eg, *People's Union for Democratic Rights v Union of*

Secondly, Krishna Iyer J also played an important role in facilitating access to procedural justice by being the ‘first [judge in India] to lay the conceptual foundation for what is now called public interest litigation [‘PIL’]’.<sup>35</sup> In addition to recommending broader rules of standing for litigation in India, the Committee of Judicare (of which Krishna Iyer J was part) recommended use of PIL.<sup>36</sup> As noted above, shortly after his appointment to the Supreme Court bench, Krishna Iyer J immediately set out to broaden the rules of standing, thereby removing what had been ‘the biggest hurdle in the path of litigation for environmental justice [in India]’.<sup>37</sup>

In *Mumbai Kamgar*<sup>38</sup> and *ABSK Sangh Railways v Union of India*,<sup>39</sup> Krishna Iyer J held that participative justice is facilitated through PIL. PIL allows citizens or non-government groups to bring collective or representative proceedings, rather than an expensive plurality of litigations, in the public interest, to conserve the environment or remediate environmental harm.<sup>40</sup> To enable PIL to flourish, the courts should ensure that procedural technicalities and hurdles are not used to prevent PIL being brought or succeeding.<sup>41</sup>

By introducing PIL in India, Krishna Iyer J revolutionised the conduct of litigation in his country for the better and has enabled stakeholders to enjoy the many benefits that arise from PIL in the environmental context.<sup>42</sup> In particular, it has facilitated participatory democracy by enabling the Supreme Court to redress any failure on the part of the legislative and executive branches of government to enact and enforce

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*India* AIR 1982 SC 1473,1482 (Bhagwati J) and *State of Uttaranchal v Balwant Singh Chauhal & Ors* [2010] INSC 54; AIR 2010 SC 2550, 2559-2575.

<sup>35</sup> See Kelly D Alley, ‘Legal Activism and River Pollution in India’ (2009) *Georgetown International Environmental Law Review* 793, 797. Krishna Iyer J introduced the concept of PIL for the first time in the *Ratlam* case: see Dubey Amit and B K Tiwari, ‘Role of the judiciary in environmental protection’ (2012) 7 *Journal of Environmental Research and Development* 200, 201.

<sup>36</sup> Bonine, above n 9, 466.

<sup>37</sup> Sahu, above n 26, 379.

<sup>38</sup> AIR 1976 SC 1455.

<sup>39</sup> AIR 1981 SC 298.

<sup>40</sup> *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455, 1458 [7]; *ABSK Sangh Railways v Union of India* AIR 1981 SC 298, 317 [63].

<sup>41</sup> *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455, 1458 [7]; *ABSK Sangh Railways v Union of India* AIR 1981 SC 298, 317 [63].

<sup>42</sup> For a summary of some of the benefits of PIL in the environmental context, see Brian J Preston, ‘The role of public interest environmental litigation’ (2006) 23 *Environmental and Planning Law Journal* 337.

environmental laws in the public interest.<sup>43</sup> As Balakrishnan CJ observes, PIL continues to play an invaluable role in improving access to justice in India today.<sup>44</sup> It is likely to continue to do so in the future.

Thirdly, in the *Ratlam* case, Krishna Iyer J was among the first judges in India to pioneer the important procedural innovation of a spot visit.<sup>45</sup> Before arriving at a decision in that case, Krishna Iyer J visited the Ratlam town to assess the problem before making orders requiring the Council to take appropriate measures to construct proper drainage and sanitation facilities in the locality.<sup>46</sup> By conducting spot visits, judges will often benefit from having first-hand information about the nature of the environmental problem in resolving a dispute.<sup>47</sup> Spot visits may also enhance procedural justice through making the courts more accessible geographically for litigants.<sup>48</sup> Other judges in India have since followed in Krishna Iyer J's footsteps by conducting spot visits in environmental cases.<sup>49</sup>

## Conclusion

In this paper, I have provided a précis of the revolutionary, innovative and truly remarkable contribution of Krishna Iyer J to environmental law in India, focusing particularly on his jurisprudence in the area of access to environmental justice. Krishna Iyer J may take great satisfaction from the valuable and indelible mark he has made on Indian environmental jurisprudence. While this festschrift is our gift to him, we should recognise that it is but a modest gesture or token of appreciation for his efforts. After all, he has bestowed upon us a most valuable gift: a body of learned environmental jurisprudence that endures.

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<sup>43</sup> See Michael G Faure and A V Raja, 'Effectiveness of environmental public interest litigation in India: Determining the key variables' (2010) 21 *Fordham Environmental Law Review* 251, 252.

<sup>44</sup> Konakuppakatil Gopinathan Balakrishnan, 'Growth of Public Interest Litigation in India' (2009) 21 *Singapore Academy of Law Journal* 1, 15.

<sup>45</sup> See Debadyuti Banerjee, 'Environmental jurisprudence in India with reference to initiatives of the Supreme Court for enviro-social justice' (2009) 3 *Journal of Environmental Research and Development* 992, 996.

<sup>46</sup> Sahu, above n 26, 383; Banerjee, above n 45, 996.

<sup>47</sup> Sahu, above n 26, 383.

<sup>48</sup> See generally Brian J Preston, 'Operating an environment court: The experience of the Land and Environment Court of New South Wales' (2008) 25 *Environmental and Planning Law Journal* 385, 398-400.

<sup>49</sup> See also Sahu, above n 26, 384.