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Implementation of Principle 10 in India
: Issues and Challenges

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GREEN ACCESS PROJECT II

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Implementation of Principle 10 in India: Issues and Challenges

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Abstract

India's commitment towards the implementation of Principle 10 of the Rio Declaration is evident from the series of statutory enactments since 1992 which aims at increasing access to information, public participation and access to justice in matters concerning the environment. India has without doubt showed political, administrative and judicial will to ensure that Principle 10 is implemented in letter and spirit. The various environmental legislations *viz*. The Environmental Impact Assessment Notification, 2006, the National Green Tribunal Act, 2010, the Coastal Regulation Zone Notification, 2011 among a host of other legislation have contributed to the implementation Principle 10. One of the most important factors contributing to the effective implementation of Principle 10 of the Rio Declaration is the vibrant civil society group and robust environmental movement in the country. The environmental jurisprudence in India, is replete with instances where the Courts have highlighted the importance of 'access rights'. However, recent legal developments in India show that the much the gains made previously so far as access rights are concerned is being undermined. In its obsession for 'economic growth at all cost', the foundation of environmental democracy is today under increasing threat and there is an urgent need for concerted effort to protect the existing legal framework.

Introduction

Principle 10 of the Rio Declaration emphasises on the need to share information, provide opportunities for public participation in the environmental decision making process and provide access to justice. The 'three pillars' of environmental democracy are interdependent on each other and each of the 'pliiars' complement each other. Thus, there can be no effective participation unless there is access to information and without avenues for participation, there is little that citizens can do with the information in their possession. Finally, the denial of information or opportunity to participate needs to be legally challenged before an independent judicial forum. This paper focus on how, the three pillars of environmental democracy has been put into practice in India and the effectiveness of the same so far as achieving environmental democracy is concerned.

Public Participation

The Supreme Court in *Research Foundation for Science Technology and National Resources Policy v Union of India*[2] has held that "The right to information and community participation for protection of environment and human health is also a right which flows from Article 21. The Government and authorities have, thus to motivate the public participation'.

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[2] [(2005) 10 SCC 510]

Public participation in the environmental decision making process is provided through the Environment Impact Assessment process in India. Though, the EIA process in India was introduced in the year 1992, it was in 1994 that 'Public Hearing' became mandatory for a range of projects in India. Public Hearing became the only opportunity for affected communities to raise their concerns with respect to the environmental aspects of a project. A whole range of projects require public hearings in India.

A revised Environment Impact Assessment Notification was introduced in the year 2006. The revised notification of 2006, provided for a process of Public Consultation as opposed to only a hearing. The public consultation process comprised of two stages : Public hearing at the project site or its close vicinity and written representation for those who have a plausible stake in the environmental aspects of the project. The relevant paragraph in the EIA Notification reads as follows:

> "Public Consultation" refers to the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate

Public Hearings opened a new window of opportunity for people to voice their concerns with respect to a new project. Given the rapidly growing nature of the Indian economy, large number of public hearings take place across the length and breadth of India. The analysis of the public hearings brings about some of the key challenges in the process as it exists today.

Lack of information is a critical challenge: Public hearings becomes an effective tool for ensuring public participation in the decision making process only if the public has access to the information with respect to the proposed project. Information with respect to projects are shared with the public through the disclosure of the Environment Impact Assessment Reports (EIA). There are however certain hurdles in the way of securing this information: Firstly, the public has direct physical access to only the Executive Summary of the EIA report and not the full EIA Report. To explain it further, only the hard copy of the Executive Summary of the EIA Report is distributed among the public and not the hard copy of the Full EIA Report. The Executive summary does not reflect the true scenario and does not disclose the basis on which the conclusions are arrived. The full EIA report is available on the website of the project proponent as well as some of the designated government agencies. However, in a country where not more than 3 % of the population have access to the internet, the reliance on internet is misplaced.

One sided Information in the EIA Report:

The EIA Report is supposed to present an unbiased opinion about a proposed project to the decision makers as well as to the public. This never happens. The EIA report, which is prepared by an EIA Consultant at the behest of the Project

proponent is aimed at justifying the project and only recommends mitigative steps in order to deal with the environmental and social consequences of the project. The 'pros' and 'cons' of the project, which is critical for the public is never a part of the EIA Report, which makes the process an empty formality. This aspect has been highlighted by the Himachal Pradesh High Court in **Him Parviesh Environmental society versus Union of India**[3] where the Court observed as follows:

> There is no use of having a public hearing if the public is not aware of the effects of the project both positive and negative. We have not come across a single case in the last two years, during which we have been hearing environmental cases where the Pollution Control Board or the MoEF have actually brought such facts to the notice of the Public during public hearing. A public hearing without first informing the public is a total sham.

Despite specific observations and directions from the various courts, the situation remains largely the same.

The Local versus Outsiders Challenge:

The Public Hearing process as per the Notification is to be limited to 'locally effected persons' or others who have a plausible stake in the environmental aspects with respect to a project. Both these terminology has led to confusion and problems so far effectiveness of public hearing is concerned. This was highlighted by the Delhi High Court in *Samarth Trust versus Union of India*[4]:

> …The second aspect of the public consultation, as already mentioned above, is obtaining responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity. If this is contrasted with a public hearing (which is confined to locally affected persons in the close proximity of the project site) then it appears, prima facie, that the responses are required to be invited from persons not necessarily in the close vicinity of the project site (and therefore at a distance). A condition attached to this is that those persons should have a plausible stake in the environmental aspects of the project or activity. It is not clear who determines (and how) whether or not a person has a "plausible stake" in the environmental aspects of the project or activity

Consultation versus Consent: As per the EIA Notification, 2006, there is a mandatory requirement of Public Consultation. Consultation is not the same as consent. Thus, the process requires that the view of the people likely to be affected are to be heard but it is nowhere stated that there is a requirement that Authorities must necessarily act in accordance with the wishes of the people. As a result of this limited interpretation, public hearing process was reduced to an

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[3] **CWP No.586 of 2010.**

[4] http://indiankanoon.org/doc/192020890/

empty formality so far as the opinion of the public is concerned. The trend continued from 1994 till the around 2008-2009. However, judicial interpretation, has not favoured this limited and narrow interpretation. The first major change took place with the Delhi High Courts decision in **Utkarsh Mandal Versus Union of India**[5] where the High Court held as follows:

> The public hearings conducted by the MOEF in terms of the EIA Notification dated 14th September 2006 is indeed a public act and the EIA Report is certainly a matter relating to such a public act of the central government. The construction that has to be placed……..must be such that will enhance the quality of the ultimate decision taken and also consistent with the requirement of the participation of those affected in a fully informed and effective manner. The opportunity to participate and voice an opinion on the project has to be a meaningful one.
>
> The requirement of an administrative decision making body to give reasons has been viewed as an essential concomitant of acting fairly. Given that such a decision is in any event amenable to judicial review, the failure to make known the reasons for the decision makes it difficult for the judicial body entrusted with the power of reviewing such decision as to its reasonableness and fairness. The decision must reflect the consideration of the materials available before the decision maker and the opinion formed on such material.

The decision of the Delhi High Court has been followed in a number of subsequent cases where the National Green Tribunal has emphasized on the need to give reasons as to how the objections raised by the public have been taken into consideration in the ultimate decision. This view has resulted in approvals granted for many projects being set aside on the ground that the concerns of the people as raised in the public hearing have not been taken into consideration.

Access To Information

Access to information with respect to the environment is among the most important pillars of environmental democracy. Information is the key which provides the public with the tools to engage in the decision making process. In this context a reference may be made to the decision of the Supreme Court in People's Union for Civil Liberties v. Union of India[6] where in the context of declaring the right to vote as being part of the fundamental right of expression of the voter under Article 19 (1) (a) of the Constitution of India, it was held that "a well informed voter is the foundation of democratic structure." In his leading opinion M.B.Shah., J. observed (SCC, p. 432):

> "(the) right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the

[5] http://indiankanoon.org/doc/188721650/

[6] (2003) 4 SCC 399

issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce."

In his concurring opinion P.V.Reddi. J., explained that (SCC, p.454) "the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1) (a)."

Though there has been significant progress with respect to the issue of access to information with respect to environment, yet critical information is still beyond the reach of the public at large. The Right to Information Act, 2005 brought about a sea change so far as information access is concerned. However, so far as environmental information is concerned, the impact has been mixed. The reason being that communities and affected people have now to take recourse to the provisions of the Right to Information Act to procure information held by the Government and there is very limited pro active disclosure of information. The Central Information Commission[7] has passed specific directions in order to increase public access to environmental information which includes the following information which is required to be displayed on the website of the Ministry:

a. Copies of applications and related documents submitted by the Project Proponent while seeking prior environmental clearance, particularly the following documents:
b. Additional information submitted to the Expert Appraisal Committees by the Project proponent.
c. Reports/studies commissioned by the Expert Appraisal Committees from independent agencies/ sub-committees.

Following information relating to post-clearance compliance of conditions stipulated in the environmental clearance letter and monitoring of the same-

a. Six-monthly compliance reports that are to be submitted to the Ministry of Environment and Forests.
b. Reports of committees which may have been constituted to monitor the compliance of conditions by the project proponent.
c. With regard to certain projects, the Ministry of Environment and Forests stipulates that certain additional studies/ reports such as mitigation plans have to be done after the clearance has been granted. These studies/ reports should be made available.

Despite such specific directions, information with respect to projects is lacking in most cases with respect to projects across the country and this leads to information gap so far as affected communities are concerned.

Access to Justice:

[7] Shibani Ghosh Versus Ministry of Environment and Forest [http://indiankanoon.org/doc/83958888/]

Access to justice in environmental matters has been through the Public Interest Litigation before the High Courts and the Supreme Court through the invocation of the Writ jurisdiction of the High Court and the Supreme Court under Article 226 and Article 32 of the Constitution.

The relevant Article reads as follows:

> Article 32: The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
>
> Article 226 : Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

In *M. C. Mehta & Another v. Union of India & Others*[8], the Supreme Court observed that Article 32 does not merely confer power on this Court to issue direction, order or writ for the enforcement of fundamental rights. Instead, it also lays a constitutional obligation on this Court to protect the fundamental rights of the people. The court asserted that, in realization of this constitutional obligation, "it has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights". The Court realized that because of extreme poverty, a large number of sections of society cannot approach the court. The fundamental rights have no meaning for them and in order to preserve and protect the fundamental rights of the marginalized section of society by judicial innovation, the courts by judicial innovation and creativity started giving necessary directions and passing orders in the public interest.

One of the most significant development in recent years in the field of environmental law and access to justice has been the establishment of the National Green Tribunal in India. The National Green Tribunal ['NGT' in short] has emerged as the most active and without doubt a forum where the maximum number of environmental cases are adjudicated on a daily basis[9]. There is perhaps no comparison anywhere in the world in terms of its volume and range of cases which the NGT deals with on a daily basis. The various decisions of the NGT has led to the development of a new environmental jurisprudence in the country. In addition, the NGT is also ensuring that the various environmental statutes are implemented in letter and spirit. Despite the challenges, there are issues which need to be addressed in order to make the NGT an effective forum for redressal of grievances with respect to the environment.

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[8] **AIR 1987 SC 1086**

[9] On an average about 150 cases are adjudicated on a daily basis on any working day in all the Benches of the Tribunal in India.

Following the observations made by the Supreme Court of India and the Principles laid down in the international conferences held at Stockholm and Rio de Janeiro, the Law Commission of India, undertook an extensive study on the establishment of separate and specialized environmental courts. The Law Commission in it's 186th Report, has inter-alia recommended establishment of a separate 'Environmental Courts' in each State, consisting of judicial and scientific experts in the field of environment for dealing with environmental disputes besides having appellate jurisdiction in respect of appeals under the various Pollution Control Laws. The Commission has also recommended for repeal of the National Environment Tribunal Act, 1995 and the National Environmental Appellate Authority Act, 1997.

As a cumulative effect of all the factors narrated above, the National Green Tribunal Bill was introduced in Lok Sabha by the then Minister of Environment and Forests on Jairam Ramesh on 31st July, 2009. Based on the comments by members of the Parliament and recommendations of the Parliamentary Standing Committee, the Central Government made seven amendments to the National Green Tribunal Bill, 2009. The amendments broadened the definition of "persons aggrieved" to allow individuals to approach the Green Tribunal. It also outlined the "foundational principles" of precautionary principles, polluter pays principle and inter-generational equity that would govern the Tribunal.

The Jurisdiction of the National Green Tribunal:

All civil cases where substantial question relating to environment arises with reference to implementation of the Acts mentioned in the schedule are to be decided by the Tribunal. Jurisdiction of the civil courts has been excluded under Section 29 of the NGT Act. In terms of Section 29 (1), from the date of establishment of Tribunal under the NGT Act, no civil court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its Appellate jurisdiction, while under sub-section (2), no civil court shall have jurisdiction to settle dispute or entertain any question relating to any claim for granting any relief or compensation or restitution of property damaged or environment damaged which may be adjudicated upon by the Tribunal, and no injunction in respect of the action taken shall be granted by the civil court.

The Tribunal is vested with three kinds of jurisdiction within the framework of the NGT Act:

(I) Original Jurisdiction: Section 14 gives original jurisdiction to the Tribunal. It is provided that the Tribunal shall have jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such questions arise out of implementation of the enactments specified in Schedule I to the NGT Act. In terms of Section 14 (2), this Tribunal shall hear the disputes arising from the questions in sub-section (1) and settle such disputes and pass orders thereon.

(II) Appellate Jurisdiction: The legislature has conferred upon the Tribunal an Appellate Jurisdiction. Section 16 contemplates that any person aggrieved by the orders passed by the authorities or bodies under clause (a) to (j) of Section 16, may file an appeal to the Tribunal. The NGT in *J Wilfred versus Union of India,* has held:

> There is nothing in Section 16 of the NGT Act that specifically or even by necessary implication provides that the appellate jurisdiction of the Tribunal is circumscribed by any limitation. The Tribunal shall be the Appellate Authority competent to decide questions of law and fact both. It may be noticed that the procedure laid down by the Code of Civil Procedure, 1908 (for short 'CPC'), does not apply to the proceedings before the Tribunal stricto sensu and the Tribunal is to be guided by the principles of natural justice. It is further stipulated under Section 19(4) of the NGT Act that the Tribunal is vested with the same powers as are vested in a civil court under CPC and would have specifically the powers enumerated under clause (a) to (k) of sub-section (4) of Section 19. Under the provisions of CPC, particularly Order XLI, the Appellate Court, particularly, the First Appellate Court is a Court of both fact and law. It is a settled principle of law and in fact has been consistently adopted by the Higher Courts. Thus, the questions of law or fact arising before the Tribunal in the Appeals preferred by the aggrieved persons can be examined by the Tribunal.

(III) Relief and Compensation: The third kind of special jurisdiction that is vested in the Tribunal emerges from the provisions of Section 15 of the NGT Act. This Section empowers the Tribunal to order relief and compensation to victims of pollution and other environmental damage arising under the enactments specified in the Schedule I, for restitution of property damaged and for restitution of the environment in such area/areas, as the Tribunal may think fit.

The Jurisdiction of the NGT has been further enhanced with the Supreme Court directing that environmental matters should be adjudicated before the National Green Tribunal. In *Bhopal Gas Peedith Mahila Sanghathan Verus Union of India* [10] **,** the Supreme Court has specifically directed that environmental cases should be filed before the National Green Tribunal and further all pending cases before the High Court be transferred to the NGT. The relevant paragraph from the Judgment reads as follows:

> 38. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short the ˜NGT Act particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule 1 should be instituted and litigated before the National Green Tribunal (for short

[10] **(2012) 8 SCC 326**

NGT). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

39. We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice.

So far as the jurisdiction is concerned, the NGT in **Kalpavriksh versus Union of India and ors**[11] have held:

> 'The jurisdiction of the Tribunal is thus, very wide. Once a case has nexus with the environment or the laws relatable thereto, the jurisdiction of the Tribunal can be invoked. Not only the cases of direct adverse impact on environment can be brought within the jurisdiction of the Tribunal, but even cases which have indirect adverse impacts can be considered by the Tribunal'

SOME KEY DECISIONS OF THE NGT

NGT on the Application of the Precautionary Principle

The NGT Act mandates that the NGT shall be bound to apply the Precautionary Principle while deciding an Appeal or Application. The Precautionary Principle was dealt in *Goa Foundation versus Union of India* where the Court elaborated on the jurisdiction of the Tribunal vis a vis the Precautionary Principle:

> *An anticipated action will also fall within the ambit of the jurisdiction of the Tribunal. Section 20 of the NGT Act provides that, while deciding cases before it, the Tribunal shall take into consideration the three principles -- principle of sustainable development, precautionary principle and the polluter pays principle. The precautionary principle would operate where actual injury has not occurred as on the date of institution of an application. In other words, an anticipated or likely injury to environment can be a sufficient cause of action, partially or wholly, for invoking the*

[11] NGT, Application No 116 of 2013 THC

jurisdiction of the Tribunal in terms of Sub-sections (1) and (2) of Section 14 of the NGT Act. The language of Section 20 is referable to the jurisdiction of the Tribunal in terms of Sections 14 and 15 of the Act. The precautionary principle is permissible and is opposed to actual injury or damage. On the cogent reading of Section 14 with Section 2(m) and Section 20 of the NGT Act, likely damage to environment would be covered under the precautionary principle, and therefore, provide jurisdiction to the Tribunal to entertain such a question. The applicability of precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of substantial questions relating to environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act. By inaction, naturally, there will be violation of the precautionary principle and therefore, the Tribunal will have jurisdiction to entertain all civil cases raising such questions of environment.

NGT on Burden of Proof

The National Green Tribunal Act, 2010 empowers the Tribunal to grant the following types of relief:

(i) Relief and Compensation to the victims of pollution and other environmental damages arising out of enactments in Schedule I of the NGT Act

(ii) Restitution of the property damaged

(iii) Restitution of the environment of such area or areas

In *Ossie Fernandes Verus Union of India*[12], the National Green Tribunal has clarified on the nature of burden of proof in environmental cases. The relevant paragraph reads as follows:

> We are aware that in the matter of environment, the burden is always on the project proponent. But that does not mean that the appellants cannot make a submission giving details of the environmental damage that may be caused in the given circumstances as an initial burden. Unless until a particular nature of environmental threat, prima facie made out by the appellant, it may be difficult for the project proponent to discharge his burden in the wilderness.

[12] *Appeal No. 12 of 2011*,

NATIONAL GREEN TRIBUNAL ON DUTY TO GIVE REASONS:

One of the most significant contribution of the NGT has been its insistence that decisions with respect to the environment must be based on reasons. Environmental decisions and specifically approvals given to various infrastructural related activities including extractive industries is marked by lack of transparency and arbitrariness. As per the statutory scheme in India, industrial and construction related projects beyond a certain threshold requires an approval under the Environment Impact Assessment Notification, 2006. The projects are appraised by the Expert Appraisal Committee (EAC) at the Federal level and the State Environment Impact Assessment Authority at the State/ Provincial level. The EAC or the SEIAA is required to undertake a detailed scrutiny of the proceeding and outcome of the Public hearings/ public consultation as well as analyze the Environment Impact Assessment Report. This procedure is rarely followed in letter and spirit. The NGT over the last four years has rendered numerous judgments wherein it reiterated the requirement that every administrative decision must be based on reasons and that it must be evident from the records that that the EAC/ SEIAA or the Ministry of Environment and Forest as the case may be has applied its mind to the various relevant aspects under consideration. The failure to give such reason would render the decision liable to be struck down on ground of arbitrariness. Some of the key decisions of the NGT on this issue are as follows:

Gau Raxa Hitraxak Manch and Gauchar Paryavaran Pouchav Trust, Rjula v. Union of India[13]*,*

> *"ii) The Authorities – Environment Appraisal Committee (EAC) and Ministry of Environment and Forests (MoEF), shall pass "speaking orders" giving reasons either for recommendation/non-recommendation of approval or rejection, whatsoever it may be, in support of Appraisal/EC, done on reconsideration of the issues/objections."*

Swami Gyan Swarup Sanand and ors. V. Union of India and ors[14]*.*

> *"5. .....There are a number of judgments signifying the need of recording the reasons for its decisions/ orders passed by an administrative authority/ judicial/ quasi- judicial body which serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making. Ultimately what is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration and applied its mind to the points in controversy. Therefore in our opinion the requirement of recording the reasons is very essential and that should be the basis for governing the decisions of the Committee exercising the administrative power."*

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[13] M. A No. 94/ 2014 in APPEAL No. 16/ 2014 order dated 17.11.2014

[14] M.A No. 461/ 2013 in Original Application No. 26/ 2011 order dated 20.02.2014

Rudresh Naik v. Goa State Coastal Zone Management Authority [15]

> *"12. It is a settled rule of law that administrative authorities which are dealing with the rights of the parties and are passing orders which will have civil consequences, must record appropriate reasons in support of their decisions. Certainly, these reasons must not be like judgments of courts, but they must provide an insight into the thinking process of the authority as to for what reasons it accepted or rejected the request of the applicant. The authority concerned should provide a fair and transparent procedure and the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order."*

Ossie Fernandes v. Ministry of Environment and Forests[16]

> *"There appears to be no improvement in following the procedure required in conducting PH, in spite of a catena of judgments rendered by the Hon'ble Supreme Court and Hon'ble High Courts across the country laying down the principles to be followed in conducting Public Hearing and subsequent appraisal of project by EAC. In view of our bad experience in dealing with the issue of preparation of draft EIA Report in consonance with the ToR and conducting PH, before parting with the judgment, we propose to suggest the following to be included either as part of executive instructions or rules, as the case may be. This may ensure proper appraisal of the suggestions/ objections raised during the PH, by the EAC, and even when they are challenged before the courts of law."*
>
> (Page 20)
>
> *"EAC minutes should incorporate detailed reasons, in writing, for acceptance or otherwise against each issue arising out of PH and brought before it."*
>
> (Page 22)

Jeet Singh Kanwar v. MoEF and Ors[17]

> *"21.The EAC in the 56th meeting dated 13.10.2009 considered the issues raised during the public hearing, viz. impact on environment due to operation of proposed project, location of ash pond; capacity for utilization of ash; development of green belt to arrest air pollution; measures for giving compensation to 22 families (homestead losers) and 212 land losers; water required from other sources having not been mentioned in EIA; impact due to land acquisition; acquisition of agriculture land; impact on ground*

[15] [2013 ALL (1) NGT REPORTER (2) (DELHI) 47]

[16] [Appeal No. 12/ 2011]

[17] [2013 ALL (1) NGT REPORTER (DELHI) 129

water; providing civic amenities to villagers by project proponent; providing free tree/fruit saplings for cultivation; impact on agriculture land due to proposed ash pond etc. Though, the EAC was cognizant of the above issues which are stated in the minutes yet it is not at all clear as to how the EAC was satisfied with responses of the Project Proponent and the cumulative effect of the issues raised in the course of public hearing."

Samata v. Union of India[18]

54……..The detailed scrutiny as required by the notification in order to make an evaluation of the project has not been done since there is nothing to indicate in the minutes of the meeting that in respect of the issues raised at the time of public hearing in respect of each issue i.e., objections raised at the public hearing and what was the correspondence and clarification made by Project Proponent thereon and why and for what reasons those objections were negatived and the clarifications of the Project Proponent were accepted. Thus, the Tribunal is able to notice a thorough failure on the part of the EAC in performing its duty of proper consideration and evaluation of the project by making a detailed scrutiny before approving the same. The contentions put forth by the learned counsel for the respondents that number of specific condition were stipulated by the EAC at the time of recommendation and without proper consideration of both objections and concerns at the time of providing and proper responses made by the Project Proponent, those conditions could not have been stipulated cannot be countenanced. It is true that the EAC while recommending the project for the grant of EC has stipulated conditions. Mere stipulation of specific conditions ipso facto cannot be an answer, while the minutes recorded above clearly indicate that there was no appraisal wherein an evaluation by detailed scrutiny of the project is required as per the mandatory provisions of EIA Notification, 2006. The Central Government, in its wisdom thought it fit and necessary and circumstances also warranted issuance of the EIA Notification, 2006 superseding the earlier Notification, 1990 whereby EAC has been constituted for all projects in Category A and SLEAC for Category B for the purpose of screening, scoping and appraisal of the projects. The EAC is constituted consisting of a Chairman and number of members who are experts from different fields only with the sole objective of national interest in order to ensure establishment of new projects or expansion of already existing activity without affecting the ecological and environmental conditions. Thus, a duty is cast upon the EAC or SLEAC as the case may be to apply the cardinal and Principle of Sustainable Development and Principle of Precaution while screening, scoping and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also

[18] Appeal No. 9 of 2011

disappointed the legal expectations from the same. For a huge project as the one in the instant case, a thermal power plant with an estimated cost of Rs. 11,838 crore, covering a total area of 1675 acres of land, the consideration for approval has been done in such a cursory and arbitrary manner even without taking note of the implication and importance of environmental issues. On the same day the EAC took for appraisal not only the thermal power plant in question, but also other projects which would be indicative of the haste and speedy exercise of its function of appraisal of the project. It castes a doubt that whether the EAC would have accepted the response made by the Project Proponent in respect of the objections and concerns raised at the time of public hearing as a Gospel Truth. Thus, the EAC has not conducted itself as mandated by the EIA Notification, 2006 since it has not made proper appraisal by considering the available materials and objections in order to make proper evaluation of the project before making a recommendation for grant of EC." (emphasis supplied)

The Way Ahead:

India has made substantial progress with respect to the implementation of Principle 10 of the Rio Declaration. The enactment of new laws and Rules, including the Environment Impact Assessment Notification, 2006, the National Green Tribunal Act, 2010 have contributed towards access to information, public participation and access to justice. However, some of the positive developments is likely to be overturned since the new Government which came to power in mid 2014 wants a complete overhaul of the environmental law in order to make it 'business friendly'. A High Level Committee headed by retired civil servent, was constituted in August, 2014 with the made to review existing environmental laws. The Committee submitted its report to the Government towards the end of 2014. The Government has expressed its willingness to accept the report. The Report if accepted will gravely impair the rights of citizens which is not only provided in the Rio Declaration, 1992 but will also be against the Constitution. Two of the important areas where the committee has emphasized on dilution are with respect to 'access to justice and public participation.

Public Participation

Amongst the most damaging aspects of the report is its absolute contempt for people's voices in the environmental decision making process. In the largest democracy in the World, the High level Committee report severely recommends curtailing the democratic space existing in the environmental laws of India for: projects of 'national importance'; projects of 'strategic importance'; projects to be setup in industrial zone, manufacturing zone; projects in areas of high pollution load; projects which are located away from settlements; and linear Projects including transmission lines, roads, irrigation canals, etc.;

The committee also recommends that the issues that can be raised in public hearings is to be limited only to environmental, rehabilitation and resettlement issues. It further recommends that only 'genuine local participation' should be permitted.[19]

Access to Justice

The Committee recommends overhauling the environmental justice processes and remedies, which will adversely affect access to justice of communities across our country. The existing law allows an Appeal to be filed before the National Green Tribunal by any aggrieved person within 90 days. The National Green Tribunal, established under the National Green Tribunal Act, 2010, has powers of both the 'judicial review' (that is, review of the decision making process) as well as 'merit review' that is, review of the merits of the decision). Further, the Tribunal has both original jurisdiction and appellate jurisdiction.

The Committee recommends that appeals against decisions of MoEF can be filed by an aggrieved person before an Appellate Board (comprising only of judicial and administrative members) within 45 days. An Application for Review against the decision of the Board can be filed before the National Green Tribunal. In effect, this takes away the process of merit review of environmental decisions by specialized courts altogether.

The HLC has recommended the setting up of special environmental courts at the district level. However, the recommendation contains a condition that a member of the public may file a complaint only after providing 'credible evidence of his bona fides'. This puts an unnecessarily high burden of proof, not at the stage of adjudication, but at the stage of approaching the courts itself. The Committee also recommends penalties against persons found to be abusing the process – which could work as a double-edged sword, and could be used instead as an intimidation/deterrent for civil society participation.

In sum, the Report of the HLC is regressive, is aimed at dismantling the legal framework which exists for protection of environment. It recommends for new law, Rules and procedures which is solely aimed at ensuring that environmental quality as well as peoples voice is silenced.

[19] It is pertinent to point out that the present EIA Notification, 2006 allows all persons to participate in the public consultation process.

Final Words:

India's environmental law framework has given importance to access rights. However, there is a need to translate the letters of the law into action. The various institutions including civil society can play a complementary role. Yet, it is important that the direction of change is towards increasing transparency and enhanced public involvement and not one which scuttles people's voice. If one sees the legal developments in the recent months, it the latter approach which has dominated the Governments' approach to environmental law.