Mirages of Hope: the response of the Indian judiciary and special courts on environmental conflicts

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In the history of environmental movements in India, the period from the 1980s onwards witnessed a peculiar phase. This is the period when environmental conflicts entered into the halls of the judiciary. Following the Emergency of 1975, the judiciary had already begun to take a much greater role in the functioning of the government. When Public Interest Litigations were allowed as an innovative mechanism of bringing matters of public importance to the court's attention by anyone, not necessarily an affected party, several environment matters were brought to the Supreme Court.

In the 1980s and early 1990s both state level high courts and the Supreme court had seen several instances where the courts had sought to intervene in day to day environmental management and policy matters. In many of the pollution related cases, the courts gave sweeping orders to shift the sites of production or to shut down manufacture besides deciding on penalities, fines and compensations. The orders, judgments and directives were the kind which had both long term and far reaching consequences on how legal frameworks would need to be implemented.

The Godavarman case

One of the most fascinating examples of the metamorphosis of the Supreme Court from being an adjudicator to becoming a major actor in the routine administrative environmental decision making process is narrated below. It is the T.N. Godavarman Thirumulpad v/s Union of India case which has over the years been popularly known as the Godavarman case or the forest case. Its history can be traced back to the time when the Supreme Court took action against large scale illegal felling of timber and denuding of forests in Gudalur Taluk, Tamil Nadu.

As part of the orders in this case, on 12 December 1996, the Supreme Court (SC) expanded the scope of the term « forest » to include its application as per the dictionary meaning. With this the SC reinterpreted the Forest (Conservation) Act, 1980. This Act had made it necessary to get permissions from the Union Ministry of Environment and Forests, in case forest land needed to be diverted for non-forest use and even in instances when tree felling needed to take place. Till the 1996 order, the FCA essentially applied to lands which were officially recognised as forest lands under the Indian Forest Act, 1927. What this order did was included within its scope not only forests as mentioned in government record but all areas that are forests where the dictionary meaning could be applied irrespective of the nature of ownership and classification. A large amount of land that was under community ownerships, or was village commons or was being managed historically by institutions set up during the colonial rule (like Van Panchayats) was with one sweep brought within the purview of the FCA. This added to a greater centralisation of decision making around forests, an already contested space.

In order to aid and assist the court as well as monitor the implementation of the court's orders, the forest bench of the Supreme Court that heard all matters related to the Forest case, initiated the process for the setting up of an authority in pursuance with the provisions of Section 3 (3), Environment Protection

Act, 1986. On 9.5.2002, the Court ordered the setting up of the Central Empowered Committee (CEC) with explicit functions of monitoring the implementation of the court's orders, look into cases of non-compliance including those related to encroachments, implementation of working plans, compensatory afforestation, plantations and other conservation issues. With this step, the Court unequivocally established itself as the administrator of forests.

Till date the Godavarman case continues to issue interim orders and judgements around several aspects including tree felling, operations of saw mills, violations of approvals for forest diversion, de-reservation of forests and many other matters related to compensatory afforestation. Significant judgments in this case have been pronounced in the last decade which has helped shape the discourse around forest governance in the country. One of the most controversial cases that was heard as part of this case was the one related to mining in Niyamgiri Hills in the state of Odisha in violation of the procedures prescribed under the FCA for forest land diversion. This extremely ecologically fragile and biodiverse landscape is where the Dongria Kondh tribal community draws its identity, culture and livelihood from.

A part of these hills was sought to be mined for bauxite by M/s Vedanta, a company registered with the British Stock Exchange. The four year battle as part of this ended in a judgement of the court which allowed for mining to take place by a subsidiary of Vedanta in India, M/s Sterlite if they got into an arrangement of a Special Purpose Vehicle (SPV) with the state owned Orissa Mining Corporation (OMC). This was at a time when there was stiff opposition from the local community against the mining activity and at a time when a few international funding agencies had withdrawn their support from the project. Niyamgiri remains unexploited for mining as of today because the cause of the Dongria Kondhs has the support of Shri Rahul Gandhi of the Congress (I). Also, another set of environmental approvals are pending decision in the SC before another judicial bench.

The Godavarman case has also put forth some very important decisions which related to the calculation of a "net present value" (NPV) for the diversion of forest land for non-forest use whenever a user agency seeks to do so. As a result of this, project authorities, both public sector and private sector have paid hefty amounts to a body called the ad-hoc Compensatory Afforestation Planning and Management (CAMPA). The Authority was set up on the orders of the Court. The National Hydroelectric Power Corporation (NHPC) paid a sum of Rs.300 crores to this Authority to construct the Lower Subanisiri Hydroelectric project in the state of Arunachal Pradesh.

This model of valuation relies largely on the polluter pays principle. While it has not been a deterrent to forest land diversion, it has ensured that the CAMPA coffers filled up with a large amount of funds which are not ploughed back to states where forest loss is taking place. Even though this money is to be used for conservation purposes, evidence indicates that the money is being used to set up tree plantations alongside purchase of vehicles, construction of buildings and many other administrative costs. Forest diversion continues and conservation activities leave a lot to be desired.

In the manner in which the Supreme Court has dealt with the corporate use of forests, the Court has been a facilitator of forest use by providing the Company with ways of legally obtaining access to contested forests by paying for or compensating for its loss and by undertaking remedial action in case of forest violations. This has been a disappointment for fores dwelling communities as the path taken by the Court is not very different from the government who sees its role as a facilitator of development and investment.

The National Green Tribunal

The future of the Godavarman case also links to the developments in the newly established National Green Tribunal which had its first hearing on 4th July 2011. As envisaged by the Ministry of Environment

and Forests, the NGT is to consist of expert members from the fields of environment and related sciences, who along with the judicial appointees have been empowered to issue directions for the compensation and restitution of damage caused from actions of environmental negligence. It would decide on a range of laws relating to pollution, diversion of forest land for non-forest use as well environmental clearances. The remedies that can be sought relate both to questioning the basis of the approvals as well as challenging the environmental and human health impacts of a project in operation.

Therefore challenges related to the violation of the FCA, as was the case with the Niyamgiri project would now be heard by the NGT. The NGT also has another extremely critical jurisdiction whereby environmental clearances granted under the Environment Impact Assessment (EIA) notification can be challenged by any person aggrieved by either the grant or rejection of such an approval. The NGT can also now hear any matter that raises a substantial issue related to environment. At present, it is dealing with the legacy of pending cases which were filed before the erstwhile National Environment Appellate Authority (NEAA) which is where the grant of environmental clearances were challenged till 18th October 2010.

Even though the NEAA was set up in 1997, it never really functioned with a full composition. Efforts were made by civil society groups since 2005 to revive this institution through tedious legal articulations in the Delhi High Court. The proposal of setting up the NGT was approved finally by Indian Parliament in April 2010, but took 15 months to start functioning. For the eight and half month period between 18th October 2010 to 4th July 2011, there was no forum where environment clearances could have been contested.

On the ground, there are very real implications of the delay in creating avenues for seeking justice. Some of the cases that the NGT has inherited relate to contested spaces along India's coast, forests and other significant ecosystems. One of them is the June 2010 environmental clearance to M/s OPG Power Gujarat Private Limited for setting up of 300 MW thermal power plant. This is part of the company's larger scheme of building a plant of 5000 MW capacity and was cleared with a list of 121 conditions under which the plant would need to be built and operated. This is unprecedented in the history of environment clearances. The fisherfolk of the Bhadreshwar coast in Kutch district of Gujarat have stated their categorical objection to the construction of the plant. There were mass protests as the power plant will have a severe impact on the ecologically fragile Randh Bander situated at the Bhadreshwar coast. The area is known to be the second largest fish production centre on the Kutch coast. Nearly 6000 fisherfolk from Bhadreshwar, Luni, Tuna and Sangad villages have been using the Bander for traditional fishing for over 200 years.

Another significant set of hearings relate to the 1750 MW Demwe Lower project on Lohit River in Arunchal Pradesh. The Lohit is one of the major tributaries of the Brahmaputra River, a lifeline for many states in North East India and Bangladesh. The Demwe project is one amongst at least 10 hydroelectric projects planned on the Lohit river basin with an installed capacity of around 8200 MW of electricity. Six of these projects are mega hydroelectric projects, all going to be built within a distance of just 86 km. A submission made by Kalpavriksh Environmental Action Group in June 2010 has highlighted that substantive portions of the downstream stretches of the Lohit river are part of forest land. While this land is not being physically acquired for the project, for all practical purposes the alteration of natural flow regimes for operation of the hydel project will drastically alter the downstream ecology and seriously impact both wildlife and people's livelihoods dependent on it. At the time this article was being written the NGT was in the process of listening to arguments on both sides.

Conclusion

The violations by corporates for their mining, industrial or hydropower projects is mounting with the growth in investments. While more and more projects are being located in forests, ecologically sensitive areas and where marginalised communties live, the procedures for studying their impacts and granting

clearances has been made quicker so as to not restrain or restrict the pace of investments. The efforts of the judiciary in resorting to the 'Polluter Pays' principle has only supported this trend as the 'penalties' have only helped to streamline this process rather than provide any justice to those aggrieved by such development. The new NGT can only alter this trend and become a source of real justice if it takes bold decisions to penalise violators severely as well as look into the root causes of violation that are within the routine procedures of environmental decision-making.

Mots-clés

environnement, protection de l'environnement, politique de l'environnement, justice, lutte juridique

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dossier

Environmental and social movements in India and Colombia

Notes

This article is available in French: *Mirages d'espoir : la réponse des Cours de justice indiennes spécialisées sur les conflits environnementaux*

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