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Critical Appraisal of National Green Tribunal Act, 2010

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Abstract

In India some initial legislative support for creating the National Green Tribunal already existed in the form of the National Tribunal Act 1995, though this went unimplemented, and also the National Environmental Appellate Authority Act 1997. The concept of environmental courts was initially and positively addressed in two major judgments of the Supreme Court of India. In M C Mehta v Union of India *the Supreme Court stated that as environmental cases frequently involve assessment of scientific data, it was desirable to set up environmental courts on a regional basis with a legally qualified judge and two experts, to undertake relevant adjudication. Similarly, in* Indian Council for Enviro-Legal Action v Union of India[i] *the Supreme Court again floated the establishment of environmental courts with both civil and criminal jurisdiction in order to deal with environmental issues in a speedy manner.*

Key words: *Supreme Court, establishment, legal right, Conservation, implementation*

Chapter: 1- object, origin & introduction of national green tribunal Act 2010.

Object:

An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It would deal with all environmental laws on air and water pollution, the Environment Protection Act, the Forest Conservation Act and the Biodiversity Act. With this effort,

India would join Australia and New Zealand, which have such specialized environment tribunals. It would monitor the implementation of environment laws.

Origin:

In India some initial legislative support for creating the National Green Tribunal already existed in the form of the National Tribunal Act 1995, though this went unimplemented, and also the National Environmental Appellate Authority Act 1997. The 1997 Act authorises the limited role of examination of the complaints regarding environmental clearances. However, since 2000, no judicial members have been appointed under the 1997 Act. During the Rio De Janeiro summit of United Nations Conference on Environment and Development in June 1992, India vowed the participating states to provide judicial and administrative remedies for the victims of the pollutants and other environmental damage.

The concept of environmental courts was initially and positively addressed in two major judgments of the Supreme Court of India. In *M C Mehta v Union of India*[1] the Supreme Court stated that as environmental cases frequently involve assessment of scientific data, it was desirable to set up environmental courts on a regional basis with a legally qualified judge and two experts, to undertake relevant adjudication. Similarly, in *Indian Council for Enviro-Legal Action v Union of India*[1] the Supreme Court again floated the establishment of environmental courts with both civil and criminal jurisdiction in order to deal with environmental issues in a speedy manner. Again, in the judgment of *A P Pollution Control Board v Professor M V Nayudu*[1] the Court referred to the need for established environmental courts. Such courts would have the benefit of expert advice from technically qualified environmental scientists, as part of the judicial process. It was suggested that the Law Commission of India should examine this matter in detail.

There lies many reasons behind the setting up of this tribunal. After India's move with Carbon credits, such tribunal may play a vital role in ensuring the control of emissions and maintaining the desired levels. This is the first body of its kind that is required by its parent statute to apply the "polluter pays" principle and the principle of sustainable development.

Introduction:

National Green Tribunal Act (NGT) was established in 2010, under India's constitutional provision of Article 21, which assures the citizens of India, the right to a healthy environment under Article 2 of the Charter of Fundamental Rights of the European Union, which affirms the right to life. The tribunal itself, is a special fast-track court to handle the expeditious disposal of the cases pertaining to environmental issues. The National Green Tribunal (NGT) was officially passed by the legislature on 19 October 2010 with its Chairperson, Justice Lokeshwar Singh Panta taking charge of his office here. By virtue of this law, the National Environmental Tribunal Act and the National Environment Appellate Authority Act were repealed. The legislate Act of Parliament defines the National Green Tribunal Act, 2010 as follows,

An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto[1].

Parliament passed the NGTA in June 2010[1]. The NGTA implements the commitments of India made in the Stockholm Declaration of 1972 and in the Rio Conference of 1992. India committed to take appropriate steps for the protection and improvement of the human environment and to provide effective access to judicial and administrative proceedings,

including redress and remedies. This included also the development of national laws regarding liability and compensation for the victims of pollution and other forms of environmental damage. In addition, and for the first time, the Act recognises the judicial exegesis of the right to environment as part of the right to life[1]. In consequence, the Act provides for the establishment of the National Green Tribunal (NGT). The Tribunal aims to adjudicate environmental protection and forest-conservation cases in an effective and expeditious manner, which includes enforcement of any legal right relating to the environment together with available relief and compensation for damages to persons and property.

The Tribunal is 'one element' of a reformist approach to environmental governance. There are some 5,600 environmental related cases pending throughout India. Consequently, the government proposes to create a circuit system for the new tribunal. The main bench is to be situated at Bhopal in recognition of the city's disastrous industrial history [1] . There will be four regional counterparts across the country. According to the Environment Minister; the main bench of the tribunal will be in Bhopal. This way the government and parliament could show some sensitivity to the people of Bhopal, the site of the worst industrial disaster. We can never obliterate that tragedy from our memories but by setting the national green tribunal in Bhopal, I think we would send a signal that we mean business. A circuit approach would be followed to enable access for people. The court will go to the people. People would not come to the court[1].

Chapter:2- composition & jurisdiction of NGT

composition:

A remarkable feature of the NGT is its composition. In view of earlier debate as to the specialist nature of environmental law and the multi-disciplinary issues relating to the environment, the Tribunal will consist of both judicial and expert members. The

judicial members will have been or will be judges of the Supreme Court or the High Court of India[1]. This reflects the significant, perceived status of the Tribunal and constitutes a commitment that the judicial bench will have the requisite legal expertise and experience. Expert members will include either technical experts from life sciences, physical science, engineering or technology [1]. Interestingly, there appears to be no room for social scientists with appropriate specialisation or familiarity with environment or occupational risk. Members will need practical experience of not less than five years or will be an administrative expert with not less than 15 years experience of dealing with environmental matters. The minimum number of full-time judicial and expert members will not be less than 10 with a maximum of 20 to each bench[1]. The Chairperson of the Tribunal will be appointed by the central government in consultation with the Chief Justice of India [1]. Members will be appointed on the recommendation of a selection committee in such manner as may be prescribed by the central government[1].

Although the 'appointment of members' provision appears appropriate there is a caveat. Action by the government to implement these provisions is essential. Hopefully, there will be no repetition of its inactivity concerning the National Environmental Appellate Authority (NEAA) as described above. Although the NEAA was constituted as a quick-redress process for public grievances in relation to environmental clearances, without leadership it remained ineffective.

The 'administrative experience of 15 years' clause also raises significant issues based on the historic field performance of such officers. The mismanagement and frequent failure to enforce the relevant legislative norms concerning the protection of the environment has contributed significantly to the backlog of complaints and current state of the environmental indifference. Had the enforcement officials proved

diligent and effective in their duties, it might be argued that the need for a new procedure and tribunal might not have been so apparent. It remains to be seen whether this 'administrative experience' can be utilised more effectively within the new parameters and procedures laid down in the NGT. There is a concern that these qualifications will allow the Tribunal to become a potential retirement home for senior civil servants who are not necessarily best placed to curb environmental maladministration. Much will depend upon the selection process, which must ensure that there is both transparency and accountability in the selection of tribunal membership. Public scrutiny minimises the possibility of cronyism and will encourage independent and impartial decisions leading to effective environmental governance

Jurisdiction:

The Tribunal has original and appellate jurisdiction to settle environmental disputes**.** The original jurisdiction covers all civil cases in which a substantial question relating to the environment is involved and which arises out of enactments specified in Schedule 1 of the National Green Tribunal Act[1].

A substantial question relating to the environment may be of two kinds. The first is where the community at large is affected or is likely to be affected by environmental consequences or where the gravity of damage to the environment or property is substantial or there is damage to public health as a result of direct violation of a specific statutory environmental obligation. The second relates to the environmental consequences that relate to a specific activity or point to the source of pollution[1].

The Act confers significant jurisdictional powers to the Tribunal but these require clarification. For example, substantial damage to the environment needs to be quantified and public health should be defined in a tangible form whereby a consistent and uniform approach

can be followed by the Tribunal. If precedent or guidelines are applied, this will reduce the likelihood of subjective and possibly contradictory conclusions in the determination of what constitutes the term 'substantial'. As unreported administrative decisions are prone to inconsistency, this is a matter of some importance. For example, there have been numerous grand judicial pronouncements concerning the environment but also some subjective statements by members of the judiciary which do not sit well with the overarching commitment to protect the environment[1].

Prashant Bhushan has rightly argued that: the right to environmental protection has thus been whimsically applied by individual judges according to their own subjective preferences usually without clear principles guiding them about the circumstances in which the court could issue a mandamus for environmental protection. It appears that when socio-economic rights of the poor come into conflict with environmental protection the court has often subordinated those rights to environmental protection. On the other hand, when environmental protection comes into conflict with what is perceived by the court to be 'development issues' or powerful commercial, vested interests, environmental protection is often sacrificed at the altar of 'development' or similar powerful interests[1]. The Tribunal cannot entertain an application for adjudication unless it is made within a period of six months from the date on which the cause of action in such a dispute first arose[1]. However, where there is sufficient cause, the Tribunal may allow a further period not exceeding 60 days. This time-limitation clause appears to be unduly restrictive in certain situations relating to health and pollution. The effects of pollution are sometimes subtle and may take years to develop. For instance, the effects of asbestos fibres take around 20 years to manifest illness and evoke reactions**.** Consequently, the NGT should be aware of long timescales before damage becomes apparent

and must consider carefully issues of manifestation and discovery.

The Tribunal will have appellate jurisdiction against orders or decisions under the enactments specified in Schedule 1 [1]. In contrast, civil courts will have no jurisdiction to entertain appeals in respect of any matter which the Tribunal is empowered to determine under its appellate jurisdiction [1]. Significantly, this places government departments under the scrutiny of the NGT in clearing projects having environmental impacts. An important power granted to the Tribunal is its ability to impose damages for the restitution of the environment and order compensation for the damage inflicted on property and on the environment[1].

Access:

The Act provides access for all aggrieved parties to approach the Tribunal to seek relief or compensation or the settlement of environmental disputes [1]. This obviously includes a person who has sustained injury or an owner of property to which damage has been caused or the legal representatives of the deceased where death has resulted from environmental damage. However, any person aggrieved has standing including, with the permission of the Tribunal, a representative body or organisation functioning in the field of the environment, making the provisions sufficiently wide to allow enforcement by non-governmental organisations (NGOs) of all legal rights relating to the environment. In the original Bill, the provision in regard to access was limited in that it was silent on the right of individuals to approach the Tribunal as an aggrieved party. This evoked criticism from activists, particularly NGOs[1]. It was also believed that the original Bill diluted the objectives of both the Stockholm Declaration and the Rio Conference. The later changes to the Bill have ensured compliance, therefore, with international commitments.

Chapter:3- procedure principles & of the tribunal

Procedural issues:

The Act provides for an appeal to the Supreme Court of India by any aggrieved person concerning the award or order passed by the Tribunal[1]. This right of appeal is limited to a period of 90 days from the date of communication of a decision. It can be on one or more grounds specified under s 100 of the Civil Procedure Code 1908[1], although the Supreme Court may allow an appeal even after 90 days if it is satisfied that sufficient cause exists. The appeal clause seeks to ensure that the Tribunal functions in accordance with the principles of fairness and does not act in a manner contrary to the public interest.

The Tribunal has the power to make such orders as to costs as it may consider necessary, including where the claim is not maintainable or false or vexatious[1]. On the one hand, this may act as a deterrent to those seeking to use the Tribunal for improper personal or economic reasons but equally, imposing costs might prove restrictive to impoverished individuals or organisations seeking to address the concerns of communities and affected peoples.

The NGTA provides a penalty for not complying with the Tribunal's orders both for individuals and companies. Failure on the part of an individual attracts imprisonment for three years or a fine of rupees 10 crores or both[1]. Corporate bodies are punishable by a fine of rupees 25 crores and relevant company officials may face personal liability[1]. The adequacy of corporate liability here needs re-examination in an era of corporate crime. The amount of rupees 25 crores seems to act as an insufficient deterrent in relation to irreparable environmental damage, biodiversity loss or serious injury to public health. In a situation similar to Bhopal, the inadequacy of a fixed penalty of rupees 25 crores, unless accompanied by very strict remediation conditions, may dilute the very purpose of the Act which seeks to penalise the companies in proportion to the damage caused to present and future generations.

Foundational principles:

It is mandatory for the Tribunal to apply the foundational principles of India's environmental jurisprudence, namely, the principles of sustainable development, precaution and the polluter pays principle [1] . The Supreme Court has declared and reinforced this commitment in several cases. For example, in *Vellore Citizen's Welfare Forum v Union of India*, popularly known as the Tamil Nadu Tanneries Case[1] the Court dealt with the concept of 'sustainable development' and specifically accepted 'the precautionary principle' and 'the polluter pays principle' as part of India's environmental law. According to the Supreme Court: We have no hesitation in holding that sustainable development as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists. We are, however, of the view that 'The Precautionary Principle' and 'The Polluter Pays Principle' are the essential features of 'Sustainable Development'.

According to the Supreme Court in that case, both the 'precautionary principle' and the 'polluter pays principle' are accepted as part of the law of the land since Article 21 of the Constitution of India guarantees protection of life and liberty[1]. The Court also elaborated what is meant by these principles and in particular ruled that the 'polluter pays principle' should be interpreted as meaning that: the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is a part of the process of 'sustainable development' and as such the polluter is liable to pay the cost to the individual sufferers as well as cost of reversing the damaged ecology. Similarly in *M C Mehta v KamalNath* [1] the court observed that 'It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts'. When combined with the

provisions of the Act, this case law ought to provide clear guidelines and limits to the Tribunal members and have the overall effect of strengthening the environmental regime.

Chapter:4- power & functions of the tribunal Power of the tribunal:

Section 19 (4) is concern with the power of the National Green Tribunal Act 2010. According to it following are the power vested upon the tribunal:

Sec. 19(*4*) The Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(*a*) Summoning and enforcing the attendance of any person and examining him on oath;.

(*b*) Requiring the discovery and production of documents;

(*c*) Receiving evidence on affidavits;

(*d*) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;

(*e*) Issuing commissions for the examination of witnesses or documents;

(*f*) Reviewing its decision;

(*g*) Dismissing an application for default or deciding its *ex parte*;

(*h*) Setting aside any order of dismissal of any application for default or any order passed by it *ex parte*;

(*i*) Pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard, on any application made or appeal filed under this Act;

(*j*) Pass an order requiring any person to cease and desist from committing or causing any violation of any enactment specified in Schedule I;

(*k*) Any other matter which may be prescribed.

Functions of NGT

The Tribunal would have 4 circuit Benches. The Tribunal shall

consist of both judicial and expert members. Judicial members must have been judges of the Supreme Court or High Courts. Expert members have to possess technical qualifications and expertise, and also practical experience. The Tribunal members would be chosen by a committee.

The Tribunal shall hear only 'substantial question relating to environment'. Substantial questions are those which,

(a) affect the community at large, and not just individuals or groups of Individuals, or

(b) cause significant damage to the environment and property, or

(c) cause harm to public health which is broadly measurable.

"Persons aggrieved" who can move the courts allow for individuals to approach the given tribunal. It also outline the "foundational principles" of polluter pays principle and principle of equity that would given the tribunal. The decisions of the tribunal can be appealed against in the Supreme Court. The Act now specifies territorial jurisdiction. It balances the number of judicial and expert members, 10 each, with the authority to break a deadlock vesting the chairperson of the tribunal.

Key amendments in the national green tribunal bill:

This bill was passed in the Lok Sabha only after some necessary reforms were incorporated by the environment minister Jairam Ramesh. Earlier, the bill had faced many objections from various political parties and other civil society groups.

A major amendment in the bill was incorporating benches of the tribunal on circuit basis and mobilizing these benches to make them approachable to the people living in far flung places.

Another amendment incorporated in the bill was modification of the criteria regarding those who can lodge a complaint with the tribunal. Earlier, the bill allowed only a representative association working in the field of environment to file a case. At present, any person

aggrieved, which also includes any representative organization, can file a case and claim for relief from the tribunal. The environment ministry has also included the three founding principles, which include:

- The tribunals will adjudicate against a framework of precautionary measures.
- The liability to pay for any financial loss arising from an incident is put on the offender or the polluter.
- The tribunal shall put the liability on the person or the group of persons under inquiry, to prove that their act will not cause any damage to the public or environment.

Chapter:5- problems & suggestions of the tribunal

Criticism:

High Court of Chennai has been approached with a Public Interest Litigation challenging the National Green Tribunal Act, 2010. A Division Bench of Madras High Court comprising Justice Elipe Dharma Rao and Justice D. Hariparanthaman have issued notice on the same just.

The petition has been filed by M. Naveen Kumar, a student pursuing B.A., B.L (Hons) Course at the School of Excellence in Law, The Tamilnadu Dr. Ambedkar Law University, Chennai. The petition has sought a declaration that the National Green Tribunal Act 2010 is unconstitutional. The National Green Tribunal Act, 2010 enacted by the Parliament provides for constitution of the National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection. Naveen Kumar appearing in person submitted that the constitution of the Green Tribunal and exclusion of all environmental matters from ambit of the jurisdiction of High Court and the Civil Courts would severely affect the right of access to justice to the poor and needy. It was further submitted that Section 3 of NGT Act only provides for constitution of a National Level Tribunal and Section 4(4) provides for circuit benches. It has been contended that there is no

provision under the Act for providing a Tribunal for each state. This would also make it difficult for the litigants to approach the tribunal as the redressal process would be expensive, burdensome and complicated, added the petitioner.

Pointing out that the procedure for appointment of the members of the tribunal, especially the expert members is not in accordance with the well settled principles of law, the petitioner sought the High Court to grant interim direction thereby directing the Union Government not to appoint any further members, including expert members in constituting the National Green Tribunal and not to transfer any pending or fresh matters from the High Court to the Tribunal.

The petitioner contended that the exclusion of the power vested in the High Court under Article 227 to exercise judicial superintendence over decision of all courts and tribunals within their respective jurisdiction by Section 22 of the Act is also illegal, unconstitutional and is against well settled principles of law.

Noticeably, another litigation arising out of an order of the Delhi High Court is pending before the Supreme Court of India where the government has assured the Apex Court to make appointments at the tribunal to make it functional. However, In exercise of the powers conferred by sub-section (2) of Section 1 of the National Green Tribunal Act, 2010 (19 of 2010), the Central Government hereby appoints the 18th day of October, 2010, as the date on which all the provisions of the said Act shall come into force.

Suggestions:

According to a critique by The Access Initiative-India (TAI-India), a global civil society coalition, the National Green Bill suffers the following limitations. The problems, along with their suggested solutions, include:

- The name "National Green Tribunal," as provided in Clause (1) must be changed to "National Environmental Tribunal Bill."

- There must be a tangible method for measuring or substantiating the impact on environment or public health - Clause 2 (1) (m).
- The bill must mention a fixed time period for the law to come into effect.
- The bill must specify that the tribunal can be considered functional only if it has a mix of judicial and technical members, the chairperson included. (Clause 3 and 4)
- Bill must have the power to revoke clearance granted in terms of compensation of damaged property
- Clause 16 (i) refers to "aggrieved person" as someone affected by action under the Forest (Conservation) Act and Water Act. However, this may end up benefiting violators, such as mining companies and industrialists. Hence, this provision must be deleted.
- Clause 18 (2) e vests too much discretion in the Tribunal, thus increasing chances of its misuse. Hence, the suggestion for deleting this clause.
- Clause 21 states that the decision of the tribunal is final. This, however, must be changed to provide for an appeal against its decision before the Supreme Court.
- Imposing of cost against litigants should be removed, since this may discourage people from approaching the body.

In fact, the bill requires complete reconsideration, deliberation and redrafting so that it meets the aims of securing environmental justice and offering relief to those affected by environmental degradation.

Conclusion:

It is interesting that the debate in India has focused on the technical and scientific content of the subject matter before the courts in environmental cases. The composition of the National Green Tribunal itself reflects this approach. One might argue that the technical content is no greater in this area than other areas of law

(such as intellectual property or competition law)[1]. However, the true case in India may be that scientific expertise on the Tribunal itself produces an equality of arms and prevents powerful, corporate interests from outgunning claimants in producing expertise which claimants cannot match in what is often public interest litigation.

It will be interesting to see both the type and volume of cases coming forward to the National Green Tribunal in India. This experience will also test the drawing of the boundaries in the Act in terms of what can be seen as 'environmental' and also, in an era of sustainable development, the extent to which environmental issues can be ring-fenced from wider social and economic concerns. Finally, as suggested by comments on the composition of the National Green Tribunal, there is no guarantee of resolution of wider systemic problems of environmental enforcement in India or of freedom from capture of the Tribunal by narrow sectoral interests. This suggests that the National Green Tribunal is unlikely to be a panacea for all environmental ills, but it could provide a lead in terms of new forms of environmental dispute resolution and do much to further the lead already given by the Sup development, the extent to which environmental issues can be ring-fenced from wider social and economic concerns.

References: