1 RMLNLUJ (2008) 141

Green Courts in India

by
Geetanjoy Sahu[*]

The recent media reports that the Ministry of Environment and Forest is planning to set up a national environment court and four more at the regional level, one each for the Northern, Southern, Eastern and Northeastern, and Central and Western regions consisting of judicial and scientific experts, is considered one of the long awaited requirements to deal with the flurry of environmental litigations across the country. Pursuant to the observations of the Supreme Court of India in four judgments, namely, *M.C. Mehta* v. *Union of India*, (1986) 2 SCC 176; *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 3 SCC 212; *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*, (1999) 2 SCC 718 and *A.P. Pollution Control Board II* v. *Prof. M.V. Nayudu*; (2001) 2 SCC 62, the Law Commission in its 184th Report[1] had recommended to set-up "multi-faceted" Environmental Court in each State of India with judicial and technical/scientific experts as they exist in Australia, New Zealand and other countries. Having regard to the complex issues of fact of science and technology which arise in environmental litigation and in particular, in the elimination of pollution in air and water, it is now recognised in several countries that the Courts must not only consist of Judicial Members but must also have a statutory panel of members comprising Technical or Scientific experts. The increasing number of environmental litigations in India and the acceptance of the fact by the Supreme Court in various cases that it does not have requisite expertise knowledge to deal with complex environmental issues and its continuous emphasis to set up an environmental court have compelled the government to propose such a kind of bill. According to media reports[2], the Environmental Tribunal Bill has been sent for Cabinet approval so that it can be brought in the coming session of Parliament.

Prospects

A close look at the different provisions of the bill raises hope for the advocates of environment whose efforts to initiate judicial process for the protection and improvement of environment will at least not be rejected on the ground that the environmental problem involves an intricate scientific and technical questions. The approach of judiciary, particularly towards the infrastructure projects, has been that of scrupulous non-interference basically on the premise these cases raised technical and scientific issues which are best left to expert authorities of the executive[3]. As a result, environmental groups have had to spend many frustrating years fighting the same issue in courts. The decade-long struggle of the Narmada Bachao *Andolan* against the Sardar Sarovar Project is a classic illustration. Despite the Supreme Court's directive that rehabilitation and ameliorative steps to minimise environmental damage must precede the construction of the dam, this has not happened. Thousands await rehabilitation even as the dam nears completion. Looking at the composition of the new courts, if enacted and implemented, the bill might change the approach of judiciary towards infrastructure projects. This is because, the new courts, besides the

chairperson and one member from judiciary, will have independent statutory panel of eight experts from the fields of physics, chemistry, botany, zoology, engineering, environmental economics and social sciences (either sociology or cultural anthropology) and forestry to help and advise Judges on regular basis. The inclusion of different experts to deal with different aspects of the environmental problem in the courts will undoubtedly look into multi-faceted aspects of an environmental problem rather than confining the decision making on cost-benefit of a project or a production unit and thereby can serve several long-term interests of the environment and development. The existence of an independent expert body will also help the tribunal to form its independent opinion and avoid taking recourse to the help of expert committees which is a long and time consuming exercise.

Again, the setting up of courts at the regional level will help the petitioners to bring to the notice of Court local environmental problems with minimum resources. Today, most of the environmental NGOs/activists, particularly those who work at the micro level fail to convince the Court about the scientific and technical matters revolving around the environmental problem, as they lack resources even though they raise a genuine issue to be addressed. The constitution of new

courts will give opportunity for affected citizens to question decisions taken by the authorities.

Most importantly, unlike the Environment Tribunal Act of 1995, the proposed "Environment Tribunal Bill" seeks to provide, the new courts, the power to adjudicate on the disputes. Previously, approved tribunals only had jurisdiction to award compensation and relief for damage to persons, property and the environment. The tribunals would adjudicate disputes relating to all civil cases where a substantive question of environmental protection including enforcement of legal rights relating to environment is involved. It means that the new courts will have the power to declare illegal and invalid any administrative actions and private party's claim if it militates against the provisions of the existing environmental laws.

Significantly, the new courts can review orders passed under the environment protection laws covering all environmental subjects such as water, air, forest and protection of wildlife. Again, no other court or authority will have the jurisdiction to entertain any application, claim or action that can be dealt with by the tribunals. This will make various government departments more cautious and put them under close scrutiny in giving licence to industries and clearing projects indiscriminately. This power of new courts can make them the strongest environmental court in comparison to all other environmental courts in different parts of the world.

The proposed bill also appears sound and strong when it says that any non-compliance with any directions or order of the tribunal would be an offence punishable with fine which may extend up to ten crores. It also emphasises that if non-compliance continues; the Courts can take away the offender's property and direct its sale for proceeds after three months have elapsed. The new courts' power to deal with polluters for non-compliance will strengthen the implementation process which in the present system looks very bleak. In the present system, no doubt, the intervention of judiciary in various environmental cases has laid down new policies and principles but it has failed to ensure the implementation of its directions and orders. As a result, there is growing dissatisfaction among the people towards the judicial approach in resolving environmental litigations. So, the existence of the regional tribunals can better ensure the implement process, as they will be closely monitoring its orders and

directions and appeals to the regional tribunals' decisions can be made to the national tribunal and the Supreme Court, respectively within 30 days of the judgment, which can expedite the decision-making process.

Problems

Notwithstanding all these enthusiasm of new courts' power and structure, the bill is not far from problems and contradictions. As far as the new environmental courts' power is concerned, these courts can make and bring radical changes among the three organs of the Government. These changes can be bad or good depending on the use of sweeping powers entrusted to the environmental courts. For example, the recent enactment of Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, which seeks to protect forest dwellers rights over forest lands and resources on certain criteria and allowing the State to keep around ten lakh hectors of forest land for development activities, could be reviewed by the new courts under the environment protection laws, if enacted and implemented in its present version. The directions of the Supreme Court in the on-going *T.N. Godavarman* v. *Union of India*[4] offer a well illustration. In this case, the Supreme Court has vehemently made it clear that no forest, National Park or Sanctuary can be dereserved without the approval of the Supreme Court. It was also directed that if any order to the contrary had been passed by any State Government or other authorities, that order shall be stayed. If the new courts continue to follow the precedents laid down by the Supreme Court, then it could result in fresh confrontation between the judiciary and other organs of the Government.

Similarly, given the enormous powers conferred upon the new courts and the past experience of judicial activism in selected environmental cases, there is a tendency to be skeptical of consistencies and uniformity in decisions by these new courts. For example, in a departure from air and water pollution cases, the Supreme Court has turned back to each one of the environmental challenges to dams, power and mining projects, holding that the policy decisions and fact-finding tasks are appropriate only for executive action or legislative enactments. The Supreme Court has even gone to the extent of justifying its decision to construct the dam on the Narmada Valley without ensuring the proper rehabilitation and resettlement of the displaced people. In the process of dealing with environmental cases, the new courts should not fall into such ideological dogma of the State[5].

Again, the excuse being used to set-up an environmental tribunal is that there are too many cases pending in courts. A Central Tribunal in Delhi and regional ones, it is argued, will take the burden off the Courts.

The plan is based on the assumption that the groups presently taking matters to court will be satisfied with the civil remedies that the Environmental Tribunal will offer. What is not so well known is that apart from communities with grievances, proponents of projects can use the tribunals to clear their projects, if they feel aggrieved that they

have been denied permission on environmental grounds. The Government would argue that such a set-up would obviate the need for specific committees as the tribunal could set-up its own committees to look into specific projects.

Finally, the new courts will be consisting of ten members, namely, two judicial and eight experts from different backgrounds. Now the question is what would happen, if the expert members give different opinions on environmental problems. In such circumstances, whether the court would rely on the majority opinion or the Judge could use his discretionary power to accept the opinion of any particular group and will reject the others or would there be still scope to seek the opinion of outside expert committee reports. If the opinion of the expert committee is final and binding then the selection of the expert committee becomes crucial. Since the executive will select the expert members, there is a possibility that it will design its own procedure to select the members. There should also be stringent guidelines for the appointment of expert members to these environmental courts based on certain criteria through consensus of different environmental groups, legal experts, Judges, and academics. The entire process should not be done in a state of secrecy but be amenable to public scrutiny and review by judicial bodies preferably by experts of different sections including scientists, technicians, Judge and NGOs. The expert members once selected must also rise above any other considerations to find out the reality and the facts of the matter must not be suppressed under any circumstances. The powers of these courts and expert groups should override all other departments judiciously and objectively. If this happens, and the expert body is empowered to take independent decisions, the Environmental Tribunals role will be effective for India's long term environmental regulation prospects.

———

* Post-Doctoral Fellow at the Centre for Interdisciplinary Studies in Environment and Development (CISED), Institute for Social and Economic Change, Nagarbhavi P.O., Bangalore-72, Email: geetanjoy@isec.ac.in.

1. *See*, "*186th Report on Proposal to Constitute Environmental Courts*", the Law Commission of India, 2003.

2. *See*, The Hindu, 23-3-2007.

3. For more details, *see* Videy Upadhyay, "Changing Judicial Power", *Economic and Political Weekly*, 2000, Vol. XXXIV, No. 43- 44, 3789- 3792.

4. *T.N. Godavarman Thirumulkpad* v. *Union of India*, (1997) 2 SCC 267 : A.I.R. 1997 SC 1228.

5. *See* Prashant Bhushan, "Supreme Court and PIL", *Economic and Political Weekly*, 2004, Vol. XXXIX, No. 18, pp. 1770-1774.