

ROLE OF THE NATIONAL GREEN TRIBUNAL IN BALANCING ENVIRONMENT PROTECTION AND ECONOMIC DEVELOPMENT : A CRITICAL ANALYSIS

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Sustainable Development in layman's language, means that the benefits arising from the earth's biodiversity would be conserved for future generations by greatly decelerating, and if possible, halting extinctions, habitat and ecosystem destruction, and also by avoiding the significant alterations in the global climate conditions, which if not done, would lead to subjacent opportunities available for future generations.

DEFINITION OF SUSTAINABLE DEVELOPMENT

The definition used most often comes from the report of the 'Brundtland Commission' which enumerates it as "development that meets the needs of the present without

compromising on the ability of future generations to meet their own needs".¹

THE NATIONAL GREEN TRIBUNAL
ACT, 2010

AN INTRODUCTION

The need for separate environment courts as a single adjudicatory authority for all environmental matters was felt in pursuance of the following factors .

- Mounting number of pending environment cases in various courts of India;
- Ineffective and inefficient working and discharge of functions by the National Appellate Authority set-up under the National Environment Appellate Authority Act, 1997.²
- The recommendations made by the Supreme Court of India in its judgements passed in the matter of A.P. Pollution Control Board v. M.V. Nayadu³ and
- Lastly, the consequent recommendations made by the Law Commission in its 186th Report.

¹Accessed at the web address

<http://www.iisd.org/topic/sustainable-development>
on 31/10/2016 at 03.00 pm

²Dutta Rithwik, (2015), Commentary on The National Green Tribunal Act, 2010. Delhi: Universal Law Publishing Co. Pvt. Ltd.

³ A.P. Pollution control board v M.V. Nayadu (1999) 2SCC 718 : SC 812:1999 AIR SCW 434 and A.P.Pollution Control Board v M.V. Nayadu, (2001) 2SCC 62:2000 AIR SCW 4573:2001 CLC 102

As a cumulative effect of all the factors narrated above, the National Green Tribunal Bill was introduced in Lok Sabha by the Minister of Environment and Forests on 31st July, 2009.

The National Green Tribunal act, 2010 came into force on 18th October, 2010 on issuance of a notification by the Ministry of Environment and forests, New Delhi⁴.

With the enactment of the National Green Tribunal Act, India has joined the esteemed league of countries like New Zealand and Australia which have such specialized environment tribunals. The enactment of this act and establishment of the Tribunal is a huge leap by India towards following the recommendations of the Rio Declaration and assist India in becoming environmentally friendly state.

Looking at the above provisions of law we hardly find any reason to criticize the relevancy of laid down laws regarding environment protection, but there are certain existing situations which need to be examined before accepting the working of the environment tribunals as satisfactory as these loopholes themselves may lead to erroneous decisions that may disturb the fine balance between environment protection and economic growth, and thus altogether prove contrary to the aims and aspirations for which they were laid down.

In the chapter 'Improving Human Health through a market friendly emissions scheme' it is enumerated 'many of the economic

activities that create air pollution from transport to industry and electricity production are themselves important for growth. Tight regulation using traditional models could therefore itself do harm by lowering living standards.⁵

The above discussion clearly enumerates the need for environment protection but with extreme caution and taking into consideration the diacritic features of the Indian Economy and its growing stature at the global level.

The issue was argued upon at the at the inaugural session of the National Green Tribunal's two day World Conference on Environment, government asking that the courts not play an "adversarial role". While Union finance minister Arun Jaitley stressed that India was at a critical juncture, awaiting growth in various sectors, attorney general Mukul Rohatgi went a step further to propose that the coastal zone regulation (CRZ), which restricts any development within 500 metres of the coast, be "debunked" as tourists were abandoning India for other Southeast Asian countries, and it was time for the government, judiciary and others to sit together and audit if the CRZ regulation was of any good.⁶

⁵Greenstone, Krishnan, Pandey, Ryan and Sudarshan (2011) Improving Human Health through a market friendly emissions scheme) presented at the International Seminar on Global Environment and Disaster Management :Law and Society published in the seminar volume, July 2011, Vigyan Bhawan, New Delhi.

⁶ Nandi, J (2017) Government says courts shouldn't be adversary on green issues. The Times of India (online) p.12 available at <http://epaperbeta.timesofindia.com/Article.aspx?eid=31808&articlexml=Govt-says-courts-shouldnt-be-an-adversary-on-26032017006006>

⁴ S.O. 2569 (E) dated 18-10-2010, F. No. 17-2-2010-PL, Ministry of Environment and Forests, New Delhi

Rohtagi said: "What I would like to propose is that we shouldn't see an environmental court or a tribunal as an adversarial jurisdiction. Today, it has become like an activist on one hand and industry on another hand...an industry is set up, millions of dollars are spent, and then it is challenged. It takes 5 to 10 years to go to the Supreme Court... why shouldn't we have a consultative process between stakeholders, something like an authority for advance rulings, which you have in income tax. For a mega project, involve NGT, involve government, proponent and stakeholders."

Jaitley said: "We still have a challenge of pulling out 25% to 30% of our population from below poverty line. Massive urbanisation is still to take place, India yet to see more highways, more rural roads, more airports. There will always be this question. All this development being inevitable, and obviously an adverse impact on environment would take place, what are best practices that can be followed?"

JUDICIAL APPROACH

The Judicial decisions have somewhat or the other have been toddling between the curious difference between sustainable development and environment protection, while the former mostly has economic considerations in question the latter is more inclined towards protection of the environment. This poses are serious problems in front of the judiciary and here is where the judicial mind has to be used with care and caution.

The Recent 'Okhla Bird Sanctuary' case⁷ is a prime example of the issue wherein the

National Green Tribunal cancelled environment clearance of 49 real estate projects in and around Noida and Noida Extension, this came as a blow to the booming economy of the city, 70000 flat buyers were left in a lurch, it was alleged by economic experts that the decision of the Tribunal was based on unscientific principles without taking into account the economic disaster it would prove to the economy.

The ministry of environment and forest itself reiterated the fact that it delineating 10 km radius as the eco-sensitive zone around the Okhla sanctuary did not make any sense recognising the extent of development that had taken place within ten kilometers of the sanctuary in Haryana, Delhi and Uttar Pradesh, the ministry reiterated the most feasible option was to consider areas around the sanctuary with similar wetland habitat as the sanctuary. This means that only areas with wetland characteristics will be demarcated as ESZ (Eco-Sensitive Zone).

The ministry clarified that the demarcation of ESZ is site specific and flexible. The National Board of Wildlife (NBWL) has, in 2002 decided that land falling in ten kilometers within boundary of sanctuaries and national parks should be notified as eco-sensitive zones in March 2005 however, the decision was revised and said that delineation of eco sensitive zones have to be site specific and not prohibited but regulated. The MoEF issued another notification in the year 2011 laying down specific guidelines for declaration of ESZ, and laid down that the extent of eco

⁷ Amit kumar v Union of India . original app

158/2013. National Green Tribunal

sensitive zones around protected areas has to be kept flexible and protected areas specific. The Times of India opined 'The blanket ban on development in a radius of 10km around the bird sanctuary is problematic for two reasons. First, given the location of this particular sanctuary, it is unrealistic to demand that no construction should happen within such a radius. More importantly, it is really unfair to retrospectively apply such a ban on projects already in the pipeline before the ban was imposed. That amounts to penalizing builders and individual investors for no fault of theirs. If the authorities or courts, in their wisdom, felt such a 'sanitized zone' was really necessary, clearances should not have been granted for these projects in the first place. Having given clearances, it is grossly unjust to pull the plug after investors have sunk serious money, in many cases their life savings, into these projects.'

The decision was widely criticized for lack of consideration and understanding the peculiar features of this particular eco sensitive zone. This led to huge losses to the city and people of the area since it is adjacent to the national capital, the following are the heads under which the losses can be grouped.

1. Employment opportunities that were lost to the local population and millions of hours of workman hours to all the labor force that was to be engaged for construction purposes ,

also the employment of skilled jobs which were to arise as and when the construction of buildings of Industrial or IT parks were completed .

2. The taxes and revenue that was to accrue from the completion of these projects and other taxes when they were completed and running was lost due to this order.
3. The common man who took loans from banks were caught in a double whammy situation with having to repay the loans and still not getting the possession of their homes. This led to defaults in bank payment, mental harassment to the people and there were reported cases of suicides in the aftermath of the trauma they suffered.
4. There were multiplicity of cases in the courts with banks suing the builders and defaulters, builders suing the Noida Authority and buyers suing the Builders etc. this led to a lot of pressure on the Judiciary and time wasted which could have been invested in dispensing justice ,thus attenuating the power of Judiciary .
5. Most builders turned bankrupt, the investors were duped of thousands of crores of rupees , left the projects in between or large tracts of lands were seen vacant and of no use after the order.
6. Most buyers had to make alternate arrangements of living and thus did not turn up to stay or buy flats when

⁸ Sinha P (2017) NGT order delays Noida flats. The Times of India (online) available at <http://epaperbeta.timesofindia.com/Article.aspx?eid=31808&articlexml=NGT-order-delays-Noida-flats-06062014007023> on 23rd March 2017

the stay order was vacated, thus leading to future losses to the economy of the city .

Another case which grabbed highlights was the Supreme Court banning the registration of new above 2000 cc cars in Delhi region citing alarming pollution levels. The order passed was criticized by various experts adducing studies which showed that smaller diesel vehicles were polluting more or similar levels in consonance with the SUV's.

The study reported in various newspapers and government affidavit claimed 'Data in a government affidavit filed with the Supreme Court shows that not only diesel vehicles with 2000cc engine and above emit Particulate Matter (PM) within the permissible limit of 0.06, but almost at same level that of vehicles with smaller engine capacity, 1300-1400cc. This clearly establishes that the size of the engine has no relation with pollution. It is the quality of engine which matters. A Land Rover discovery sports, which has a 2993cc engine, for instance emits PM at 0.019 gm/km, well within the prescribed limit of 0.06⁹.

The supreme court lifted the ban after eight months and ordering the consumers to pay 1 percent (of ex showroom price) in environment tax. "The deposit of the amount alone shall entitle manufacturers, dealers

⁹ Ghosh M .(2016) Size does not matter, smaller diesel cars as polluting as monster SUV's .Financial Express (online) available at <http://www.financialexpress.com/auto/news/size-does-not-matter-smaller-diesel-cars-as-polluting-as-monster-suvs/319746/> on 23rd march 2017

and purchasers to have the car registered in Delhi," said the bench comprising Chief Justice T.S. Thakur, and justices A.K. Sikri and R. Banumathi in its order, delivered on a petition by Mercedes-Benz India Pvt. Ltd.¹⁰ These orders seemed very cosmetic and not deterrent ,the amicus curiae in fact suggested the court that fuel tax charged on diesel should be on par with that of petrol, those having big pockets should be compelled to pay more on the fuel and not enjoy the fruits of subsidy , additional tax could also be recovered from SUV diesel car owners. Thus following the 'Golden Rule' and balancing the sustainability and economic development debate.

In another case following a petition filed by lawyer Vardhman Kaushik ¹¹the NGT banned diesel vehicles more than ten years old in Delhi, resulting in criticism and questioning the scientific basis on which the order was passed. A report published in the Environment and Forest Law Times quoted one Amit Bhandari (senior fellow at gateway house research saying ' an IIT study showing only 2 percent of the total Delhi Pollution was caused by vehicles, the National Green Tribunal should not arbitrarily remove all vehicles that are ten years old, a properly maintained vehicle that

¹⁰ Sen S. (2016) SC lifts ban on sale of diesel cars in Delhi ,imposes 1 % green cess.Live Mint (online) available at <http://www.livemint.com/Industry/yHP6xg0RFW8hT40xP5tywN/SC-lifts-diesel-car-registration-ban-in-Delhi-NCR-with-rider.html>

¹¹ Vardhaman Kaushik vs Union of India and others .original app.21/2014 National Green Tribunal order dated 16th September 2016.

meets emission criteria should be allowed and the rest can be phased out in say a period of five years.’¹²

The owners complained the order was passed without giving them a chance to be heard and present their case, thousands found their prized possession turn into scrap in a single day, making it difficult for them to survive and find new livelihoods which is a essential feature of the constitution of India under article 21 and is guaranteed and enforceable against the state.

Experts were divided on the extent of good it would do to the environment but most agreed that the order could have laid down a roadmap to phase out the old vehicles or envision a scheme to differentiate the polluting vehicles from the rest and not impose a blanket ban on all the vehicles.

The Supreme Court in the Taj trapezium¹³ case has recognized the issues involved in protection of environment and economic development and reiterated the need for sustainable development.

The permit issued by MoEF to allow proponent of Maheshwar Hydro Power Project over Narbada river to fill up reservoir upto 154 mtr. Was challenged in the appeal before the National Green Tribunal, which took recourse to section 20 of the NGT act and its duty to apply the principle of sustainable development, observed that a utilitarian path was to be

carved to strike the balance between development and environment. Thus allowing construction of the plant and rehabilitation and resettlement work¹⁴.

Even taking into account the foundation of International Environment Law which can be traced back to the Stockholm Declaration of United Nations Conference on the Human Environment, 1972 which sets forth that every every man has the fundamental right to freedom and equality and casts a responsibility on each individual and state to protect and improve the environment for present and future generations says in its Principle 8 “ Economic and Social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.”

A COLUMN PUBLISHED IN THE TIMES OF INDIA¹⁵ quotes
“At present, the National Green Tribunal has no guidance on calculating compensation for environmental damage. Revealingly, there do not appear to be any discernible distinctions between compensation, fines, and punitive damages either”.

¹⁴ Antarsik Patel v Union of India, decided by NGT on 9th August, 2012

¹⁵ Sakshi.(2017) Learn the right lessons from the Ennore oil spill, strengthen civil liabilities for environmental damages. The Times Of India (online) available at <http://blogs.timesofindia.indiatimes.com/toi-edit-page/learn-the-right-lessons-from-the-ennore-oil-spill-strengthen-civil-liabilities-for-environmental-damage/> accessed on 24th march 2017

¹² 2017 (7) FLT

¹³ M.C. Mehta v Union Of India, AIR 1997 SC 734 : (1996) 8SCC 462 (1996) Supp 10 SCR 973

In another case Noida Lok Manch vs Union of India¹⁶The application was filed by Noida Lok Manch¹⁷ which was a social working Non Governmental Organisation, The case was related to illegal sand mining going on the bank of River Yamuna on the borders of state of Uttar Pradesh and Haryana on the land belonging to Indian Air Force, Ministry of Defence. The orders of the NGT were although in favour of the environment and sustainability but lacked the teeth to bring the erring officials and state bodies found guilty of conniving with sand mafia thus the other side of the coin, wherein the NGT is seen taking too hard and unscientific decision also fell flat in this case, thus making the research issue more certain.

In the present case the respondent Air Force Officials and police personnel in Gautam Budh Nagar had failed/and or had intentionally not taken appropriate legal action against the sand mafia and thus had abetted and willfully connived in allowing such illegal sand mining, ought have been punished under penal provisions, but no such orders were made. The tribunal ordered stoppage of any mining work ,but False affidavits were filed by Noida Authority and Air Force officials that no mining was taking place in the area ,which was proved wrong after the police seized 23 and 34 Trucks from the same area later on , and in words of section 26, National Green Tribunal Act ,2010 were liable to be penalized and penalty imposed. Effective part of the section reads “Whoever, fails to

comply with any order or award or decision of the Tribunal under this Act, he shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten crore rupees.

The National Green Tribunal act,2010, in Section 20 requires that the Tribunal should apply the principles of sustainable development ,the precautionary principal and the polluter pays principal in its orders, decisions and awards, no such directions were issues against the erring Air Force Authorities or State Police/Administration to act as a deterrent and also provide finances to replenish the loss caused to the environment.

The illegal mining had been doing loss to the crops of the villagers whose land surrounded the Air Force Land where mining was taking place for the last at least ten years, no compensation was ordered by the Tribunal in this regard.

The committee as formed by the National Green Tribunal appeared to be against the principles of Natural Justice as a government office was asked to determine the loss occurred to the government by the actions of Government officials, a reputed private surveyor as suggested by the counsel of the petitioner could have brought forth the real picture. The petitioner social working organization claimed that the real loss was never unearthed .

The Tribunal did not lay down proper guidelines to oversee the replenishment of the area already having hundreds of pits due to mining, the sand mining was stopped no doubt, but as per the evidences brought forth

¹⁶ Original app. No. 290 of 2013, NGT

¹⁷ <http://www.noidalokmanch.org/>

to the researcher by the petitioner, the pits are still open and were never filled or replenished.

There was no team of experts that visited to assess the area after the application was finally disposed of by the Tribunal, thus the loss caused to the environment was never restored.

The case against the 'World Culture Festival' organized by the 'Art of Living Foundation' also brought to the forefront problems that exist and need to be rectified to provide a sound system of balancing the equations, the expert panel formed in the above case itself told the NGT that the rupees 120 crore penalty it recommended on the foundation had no scientific basis, quoting the head of the panel one Mr. Shashi Shekhar in a written document to the NGT. The Times of India in its article reproduced the same¹⁸ Shekhar described the estimate that Rs 120 crore would be needed to repair the likely damage as "tentative" and a "spontaneous suggestion", which got elevated as a "recommendation" because of an "inadvertent mistake". This inadvertent mistake was largely due to the fact that I was running high fever and could not see the entire report prepared by the experts," Shashi Shekhar, head of an NGT panel, wrote to the environment court.

¹⁸ TNN (2016) RS 120 crore fine on Art of Living Foundation had no scientific basis :NGT. The Times of India (online) available at <http://timesofindia.indiatimes.com/india/Rs-120cr-fine-on-Art-of-Living-Foundation-had-no-scientific-basis-NGT/articleshow/53390083.cms> accessed on 24th march 2017 .

In Vijay Bansal and others vs State of Haryana wherein the Hon'ble High Court of Haryana and Pujjab has held 'The Central or the state government are therefore, under an obligation to ensure the pressures of the changing needs do not trespass the balancing principles of sustainable development'.

In M.C. Mehta v Kamal Nath and others¹⁹ the Hon'ble Supreme Court observed as under:

"pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, Therefore, who is guilty of causing pollution, has to pay damages (compensation) for restoration of the Environment and Ecology. He has to pay damages to those who have suffered loss on account of the offender. But if the amount calculated is based on unscientific considerations as seen in the above case, this would lead to the case falling flat in appeal and thus the real objectives laid down in statute would not be met. Hence Judicial pronouncements of the Supreme Court and National Green Tribunal as discussed above show that there is a requirement of sound principles and guidelines that needs to be laid down by the highest court of the land or the legislature to bring a non partisan, non discriminatory ,ethical ,scientific and symmetrical regime of testing the real effects of the adjudications and its possible effects on the environment and economy so that only necessary orders are passed bringing the Industry and environment lovers together in the fight for sustainable development.

¹⁹ 6 SCC 213 , 2000

ANALYSIS

The Millennium Declaration²⁰ enumerates ‘ Each tool can fix something, no single tool can fix everything. It is no longer sufficient to try to understand environment problems of an international dimension in terms of philosophical paradigms. It is necessary to work directly towards evolving the problems’.

Sustainable development is thus maintaining the balance, a very fine one between the development process and the environment protection, in M.V. Naidu²¹ case the Supreme Court referred to the need for establishing environmental courts which would the benefit of expert advice from environment scientists, technically qualified as part of the judicial process, after an elaborate discussion of the views of jurists of various countries’ the above directions don’t seem to be followed in some of the cases discussed in this research paper wherein the ‘expert advice’ seems to be given less weight than judicial mind by the honourable Judges.

In his research paper, A. Hussain²² discusses how low income countries should be more vigilant towards the balance so as to not

allow the already developed countries to dictate terms to them as regards the ways in which to achieve sustainability, comparing data as regards energy usage he points out ‘Whilst low-income economies with 61% of the world population account for around 15% of world energy consumption, high-income economies with 17% of world population account for around 66%’.

The discussions and cases mentioned above do not suggest that the NGT has not been working well, but there are certain instances and areas where improvement is needed, burning a hole in your own pocket may be justified only when it is absolutely necessary , but there have been instances wherein the NGT’s interim orders have caused heavy duty losses to the economy and later retracted easily by the Tribunal after a the losses to the economy cannot be reversed. The Okhla Bird Sanctuary case as discussed is one of the prime examples wherein the the economy marked huge losses as also the common man suffered irreparable mental harassment ,not counting the loss of precious time the judiciary had to waste to hear cases coming out of the disputes due to the order among various parties. Later the order was retracted but the damage had been done.

Similarly the Art of Living Case was a hot topic in the media and an amount first declared as compensation was later retracted and the NGT itself accepting that it was based on unscientific calculations made the case of public opinion on the NGT working very weak. The ban on new diesel cars

²⁰ The Millennium Declaration UNGA/Res/55/Paras 21 and 23

²¹ A.P. Pollution control board v M.V. Nayadu (1999) 2SCC 718 : SC 812:1999 AIR SCW 434 and A.P.Pollution Control Board v M.V. Nayadu, (2001) 2SCC 62:2000 AIR SCW 4573:2001 CLC 102

²² Hussain A. (1991) Environment Protection and Economic Development. In: Takeuchi K., Yoshino M. (eds) The Global Environment. Springer, Berlin, Heidelberg.

registration was also widely criticized when it was held that they were hardly responsible for the killer pollution engulfing the city, when in fact other hard measures should have been taken and government pulled up for their inefficiency, Industry had to bear losses.

The discussion above does not mean the research paper aims to criticize the NGT rulings against the economy and in favour of the environment but the balance and scientific temper, so essential in such cases was allegedly found missing in the orders. Also the Indian economy is not far afield international economy, if the industry giants and MNC's abroad are hurt, they may not want to set up more industries and business here and that would lead to serious long time impacts on the country's growth rate!

Objectives are important but they should not be achieved by twisting the provisions or not taking them seriously or making hasty decisions.

CONCLUSION

It emerges from the above discussion that approaches undertaken by the NGT are at variance and need a comprehensive plan to provide for the best possible outcome, beneficial for both the economy and the environment.

It is not the case as elaborated before that the economy be given higher dues or vice versa but the balance need to be established in between and not necessarily holding one

as evil and against the other. As rightly pointed by Justice Krishna Iyer²³ "contemporary scientific and technology revolution has significantly transformed the relationship between man and nature. It has rightly been said that man is nature's best promise and worst enemy".

Whenever a power is used more or unscientifically than it should be used it may cause rift and problems in the long run, thus to achieve sustainability we need to take cautious steps, as the industry itself is a big requirement not only for development purposes but also for the climate mitigation processes as it provides technology and capital to help take remedial measures, thus a way out may be to engage the industry in environment protection method rather than closing doors altogether for the industry. This would be a progressive step.

In an Article published on the issue of globalization and our topic of research²⁴ quotes expert Ottmar Edenhofer saying "For Africa to reach living standards similar to those in Latin America, the United States would have to reduce its per capita incomes by 80 percent," he said. "Resulting social conflicts would be severe." This shows the importance of economic development and proportional, equity based decisions by the courts so that the developed

²³ Krishna Iyer V.R. Environmental pollution and the law, 1994 p 93 .

²⁴ Becker A. (2013) Economic Growth vs environmental Protection. (online) available at <http://www.dw.com/en/economic-growth-vs-environmental-protection/a-16878236> on 25th of march 2017 at 08.00 pm

countries do not remain forever ahead and others like India forever behind. Thus the NGT needs to find a cohesive balance between the economic demands of the country and environmental issues, not taking decisions in a haste and later retract them in certain cases after the damage has been done. It is suggested the expert members are given a more say in the decision making process and a expert team is given ample time to look into the peculiar circumstances of the case looking into the losses the intervening order may cause to the economy as well as the environment, thus taking a stabilized approach.

To conclude ,it would also be in interest of justice that things are made clear at the earliest available opportunity by the Apex court or the legislature so that the guidelines are used by the Tribunal to better understand the problems and pass orders and judgements in a more associated and tenacious way ,neutralizing the effects of climate change ,and making it possible for sustainable development to take place in the way intended .

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