

Environmental Regulation in India

Moving 'Forward' in the Old Direction

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In a bid to fast-track environmental clearances for industrial projects, the Narendra Modi government constituted a high-level committee in 2014 under T S R Subramanian to review key environmental laws. In the context of the controversial recommendations made by the T S R Subramanian Committee to ease environmental norms and dilute people's participation in environmental governance to stimulate economic development, the article takes a critical look at the functioning of the Environmental Impact Assessment regime in India since its inception in 1994.

The last year has been eventful for environmental regulation in India. Following what was described by many as an unusual and exceptional election result, the Narendra Modi-led government set out to carry through its campaign promises. One was to "fast-track" the process for appraisal of projects seeking environmental approvals from the Ministry of Environment, Forest and Climate Change (MOEFCC) (Mohan 2014; Kohli 2015).

Over the year, even as specific notifications related to environment regulation were modified independently, the environment ministry began the process of selectively implementing the suggestions made by the committee it had set up to review six major environmental laws. This committee, chaired by former cabinet secretary T S R Subramanian, submitted its report in November 2014. It contains a wide range of suggestions related to how industrial and infrastructure projects should be appraised for their environmental impacts, how pollution control technologies and penalties for violations should be put in place, and what should be the institutional framework for environmental regulation in India (MOEFCC 2014).

The proposed changes will have a bearing on how such regulations are viewed politically and implemented administratively in future. However, we need to consider whether the proposed changes are based on an understanding of the context in which environmental regulations operate. And whether these reviews and proposed institutional reforms offer greater possibilities for effective regulation given the changes in India's demography and socio-economic profile over the last two decades. This article attempts to discuss these questions in light of the functioning of the formal Environmental Impact Assessment (EIA)

regime in India over the past two decades (1994–2014).

Debates on Environmental Clearance

Since its formation in 1985, the MOEFCC has played an important regulatory role, guiding environment- and forest-related approvals of infrastructure projects through a range of laws dealing with impact assessments, forest conservation, restriction of hazardous substances, and protection of wildlife areas.

One such regulation, which is popularly known as "environment clearance," refers to the procedures under the EIA notification, 2006. This notification was first issued in 1994 under the Environment Protection Act, 1986. It mandates that a step-wise process be followed by industrial, mining and infrastructure related operations. This includes preparation of EIA reports, engagement with project-affected communities through public hearings, and an appraisal of project documents by a group of experts. Since then, EIA procedures have been at the intersection of development and conservation discourses.

Over the years, many actors including project developers, affected communities, EIA consultants, scientists, researchers, lawyers, and non-governmental organisations (NGOs) have engaged with the EIA process in a range of ways. While project developers and affected communities often find themselves at two ends of this regulatory spectrum, many others play the role of facilitators, advisers or advocates depending on where they locate themselves. To understand the working of the EIA process in India and the roles of various actors involved, we need to look at the quality of EIA reports, citizens' participation in the process, and the role of experts in decision-making.

Quality of EIA Reports: From their inception, the EIA reports have been an area of debate and contention in matters of quality. Researchers and NGOs have regularly brought this to the notice of the MOEFCC, and the ministry has acknowledged this to be a major lacuna (Menon and Kohli 2007; Kohli and Menon 2005). Court battles continue to be fraught with questions of inadequate baselines and

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biased assessments (Dutta 2014).¹ Red flags have been raised about the independence of EIA consultants—who do impact assessments on behalf of project developers—and their funding, which is directly tied to their client's satisfaction and success in getting clearances (Rajshekhkar 2014; Kohli 2012; Dutta 2014).

Citizen's Participation: The second set of issues pertain to the public consultation process. Public hearings were first made mandatory in the EIA notification issued in 1997 (Kohli and Menon 2005). Since then, this has been a one-time event, when project authorities, EIA consultants, regulatory agencies and affected people interact in the same space. The problems with public hearings have been brought out in several writings. They continue to plague the EIA process in India. Civil society groups have raised issues related to free, fair and transparent hearings. They have questioned selection of sites and the timing of hearings and have protested against the use of force, coercion and threat (Dutta 2014).

One crucial aspect differentiates the public consultations held according to the 2006 notification and public hearings envisioned in the 1997 notification. According to the 2006 framework, the public consultation process is a platform to seek responses of the project-affected people, "those with a plausible stake in the project," to the content of the draft EIA report presented to the public. Written comments on the EIA document could be from anyone. The goal is to incorporate these comments into the draft report, a mandatory requirement, before it is sent for appraisal or placed before the expert appraisal committee (EAC). The objective of holding public hearings is, therefore, reduced to a mere formality, the completion of which is necessary for the finalisation of the draft EIA report. This militates against the original purpose of providing the affected communities a space to express their concerns, which in turn could influence the outcome of the project. The final EIA report is never shown to anyone, except the regulatory agency and its expert committees.

Role of Experts in Decision-making:

The role of experts in the EIA process has been a much-debated issue. Questions have been raised regarding the composition of EACs and whether their members apply their mind adequately before recommending that a project be approved. Media stories on the one hand and court action on the other have highlighted that sometimes selection of the heads of these committees exhibits a conflict of interest (Kohli and Menon 2005; Dutta 2014; Ghosh 2013). In 2005, several press releases indicated that chairpersons of various river-valley and mining-related expert committees also served on the board of directors of companies, engaged in construction of power plants and development of mines, that were in queue for environmental clearances. The National Green Tribunal (NGT) delivered a detailed judgment on the composition of expert committees in 2014 (Application No 116 (THC) of 2013).²

The government and courts have responded to the above-mentioned problems through incremental measures. For instance, the concerns related to the quality of EIA reports resulted in the setting up of a voluntary system of accreditation of EIA consultants hired to carry out impact assessments. This process was initiated by the Quality Council of India (MOEF 2009). As of 11 November 2015, the Ministry of Environment and Forests (MOEF) had a list of 164 EIA consultants, who were accredited to carry out EIAs for specialised industries or sectors. Despite this system, complaints about poor quality of studies have not come down. In fact, litigation to contest EIA content has only increased (Dutta et al 2012).

Orders of the NGT have clarified the importance of the public hearing process as well as set protocols for how expert committees are to address concerns raised by affected people. In *Samata & Anr vs Union of India*, the southern bench of NGT, in a judgment dated 18 December 2013, ordered the expert committee to record their responses to all the concerns raised during public hearings, prior to taking a decision on the project.³ But in the last few years, public hearings have been reduced to a farce and decision-making on a project takes little account of objections raised

by the project-affected people. The public discontent is reflected in rising complaints about the way public hearings are conducted and an increase in litigations related to environmental clearances (Kohli 2014a; Dutta et al 2010).

Second Generation EIA Issues

The past four decades have seen a rapid diversion of both wild and cultivated land for industrial purposes. With the Indian economy's emphasis on manufacturing, mining and power generation, regulatory processes like the EIA are often at the heart of industrialisation debates. As demands for land use change continue, they present a unique set of challenges for impact assessment and public participation. To add to this, the new government's attempt to dilute environmental laws in order to fast-track clearances for industrial projects have given rise to a new set of issues. We term these as second generation challenges facing environmental regulation.

EIA's New Geographies: In the recent phase of industrial expansion, both Indian and foreign corporations have extended themselves deep into the mountains and far along the coastline. Their projects include constructing dams in the remotest parts of Himalayas, sprinkling the entire coastline with port infrastructure, and mining out the central Indian forests. India's industrial developers have fast moved into new geographies, and the regulatory model has been unable to catch up with them to restrict environmental damage and social impacts.

Some new areas where "cascade" hydropower projects and large-scale mines are proposed today are tribal reserves or protected zones—be it Dzongu in Sikkim, Siang in Arunachal Pradesh or Bastar in Chhattisgarh. These areas are governed by special constitutional provisions contained in the Fifth (Article 244 (1)) and Sixth Schedules (Articles 244 (2) and 275 (1)) of the Constitution of India (CPR 2013). These provisions call for special or autonomous administration of designated areas either through tribal councils or autonomous district councils. These areas have been earmarked for special protection due to their sensitive sociocultural conditions.

However, the complex realities of these places are reduced to simplistic facts or data in project-specific EIA reports. These reports relegate the constitutional exclusivity of these areas to background information, having no bearing on scientific understanding of environmental impacts. The proposed projects are presented as efforts to promote inclusion, remove backwardness and provide opportunities for growth in these areas. The local people, however, see these government manoeuvres as the cause of their misery.

Project-affected communities, participating in public hearings, raise issues of cultural prejudices and insensitivity to their needs and their inability to calculate compensations for the loss of traditional common lands, water and forest resources in the region. In areas such as Dibang in Arunachal Pradesh, the communities have resisted public hearings and it had to be cancelled 14 times (Mimi 2013). The project was not able to complete regulatory formalities for over six years. In coastal stretches of Kutch, communities have questioned why the EIA report does not refer to them and their fishing commons while land-based livelihoods are documented (Mundra Hit Rakshak Manch 2013).

The EIA formats have no answer to such nuanced issues raised at public hearings. They continue to be designed using the same parameters and do not take into consideration site specificities, knowledge, and views of development held by local people and their preparedness to transform their lives. It is no surprise then that EIAs are seen as an imposition or a sinister ploy.

EIA Process Begins Too Late: For most industries, the process of acquiring land or finances for their projects is delinked from the process of getting an approval under the EIA notification. Knowing that regulatory procedures could alter the fate of proposed projects, most project proponents purchase private land or seek transfer of land, which has been earlier acquired by state governments, well before the EIA process begins. Project proponents and state governments enter into various contracts and agreements with each other even before the EIA

process begins. In some cases, advance payments are made to state governments to secure land or permissions (Jishnu 2008), and in others there are commitments to keep the area free of encumbrances (Kohli 2014b).⁴ By the time the scrutiny of EIAs begin and public hearings are held, proponents have already invested time, money and personnel into their projects.

The fact that the EIA process starts only at the downstream end of the decision-making process has been raised with the environment ministry before (Planning Commission 2006), but there has never been a response. Instead, governments have continued to tie themselves to projects much before their environmental impact has been determined and the affected people have had a chance to point out their concerns. The ministries of mines or industries carry out their planning separately from the environment ministry. The latter's role begins only when the project authorities seek the environmental approval under the EIA notification. It is at this stage that many conflicting and difficult questions are asked, which relate to displacement, forest loss, loss of access to fishing grounds, etc.

When impact assessments are questioned and further clarifications sought, the environment clearance process gets viewed as causing delays to the project and a deterrent to industrial growth (Rajshekhar 2014). So far, no government has addressed the fundamental problem of EIAs being at the downstream end of the decision-making process. In contrast, steps have been taken the world over to conduct strategic impact assessments or options assessments when industrial and infrastructure projects are being initially planned (Bond et al 2012).

Looking Beyond Its Preventive Role: Since the beginning, EIAs have been considered and implemented as a tool to safeguard environment. It was a process undertaken for new projects whose environmental impacts were to be studied, publicly debated and appraised by a committee of experts.

Broadly, there are two kinds of projects that require clearances. First, there are expansion projects which

entail increasing the capacity of old ports or mines that were set up during the 1960s and 1970s. Second, there are new projects which are to be set up in regions that are either critically polluted or on the verge of being so. In both these instances, there exist long-standing problems of environmental compliance, which need to be addressed. EIA reports and their appraisals for expansions or addition of new components do not take into account the history of non-compliance of the project prior to taking decisions to grant approvals.

Compliance with conditions, outlined in the environment clearance process, remains a core issue that the next generation of environment regulations need to address (Kohli and Menon 2009). Both corporations and governments need to comply with this legal requirement prior to considering any further expansions or allowing for additional projects in an area where non-compliance remains unchecked. While affected communities often raise issues of prior non-compliance and their related environmental impacts at the time of public hearing, both EIA reports as well as expert appraisal committees ignore them in the decision-making process.

All environment clearance letters also carry a condition that an approval can be revoked if any of the conditions listed are not complied with. However, there has not been a single instance where this has been done by the MoEF despite scathing evidence of non-compliance recorded by the ministry's own committees (MoEF 2013).

The Same Direction

If these three second-generation challenges that face environmental regulation, especially EIAs, are not addressed, they could erode the very legitimacy of the government to regulate. Scores of projects are ending up in courts for tedious litigation only to be sent back to the expert committees for reviewing. It is this impending impasse between the administration and judiciary that the Modi government hoped to avert by the environmental law review process.

The TSR Subramanian Committee report has made recommendations regarding

how the EIA framework should operate from now on. There are specific technical suggestions on how there should be sector-specific terms of reference (TORs) to carry out EIAs and how a comprehensive database should be created, which the EIA consultants can rely on. A new institutional structure at the state and central level would appraise projects, with the ministry keeping its powers to intervene in strategically important ones. It has also recommended doing away with the requirement of public hearings where there is no habitation and fast-track approvals for linear projects. These procedural fixes belie the magnitude of the problems faced by the EIA mechanism in terms of its incapability to address citizens with rights and instead treat them as passive recipients of development.

For greater compliance, the review committee offers solutions such as higher financial penalties and the monitoring of pollution through the use of technology. These, however, fail to address a range of factors such as political influence, social exclusion, corruption and dismal administrative capacity due to which non-compliance has thrived. For affected communities, time is of essence and so is a clear remedy. None of these find a place in the review committee's recommendations.

The review and other efforts to address the problems of environmental regulation need to go beyond addressing the procedural lacunae. The discussion on what kinds of outcomes we would like to see from environmental regulations is imperative. Interactions that deliver dignity, equality and respect to all citizens are as important as regulations that grapple with new geographies and decades of non-compliance in industrialised regions. The government's proposal to change environmental regulations will achieve little that is new if it does not address these challenges.

NOTES

- 1 Judgment of the National Green Tribunal (NGT) in Appeal No 50/12, *T Muruganandam & Ors vs Union of India & Ors*, dated 10 November 2014.
- 2 Judgment of the National Green Tribunal dated 17 July 2014 in *Kalpavriksh & Ors vs Union of India*, Application No 116 (THC) OF 2013.
- 3 Judgment of the NGT dated 13 December 2013 in

Samata & Anr vs Union of India and Ors (Appeal No 9 of 2011).

- 4 Memorandum of Understanding between the Government of Orissa and M/s POSCO for Establishment of an Integrated Steel Plant at Paradeep dated 22 June 2005.

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