T S R Subramanian Report

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This article takes forward Manju Menon and Kanchi Kohli's criticism of the TSR Committee Report, "Executive's Environmental Dilemmas: Unpacking a Committee's Report" (EPW, 13 December 2014). This piece focuses on the operational aspects of the report and scrutinises the efficacy of the measures it proposes.

Manju Menon and Kanchi Kohli's article "Executive's Environmental Dilemmas: Unpacking a Committee's Report" (EPW, 13 December 2014) assesses the T S R Subramanian-headed High-Level Committee report on forest- and environment-related laws. The authors point out the institutional structure proposed by the committee for nurturing efficient environmental governance, and promoting economic growth is likely to come into conflict with the environment. They rightly criticise the report for taking a "techno–bureaucratic view of the environment." The report, they argue, places the environment "…outside the economy… (it is a) mechanical system 'out there' to be fixed."

This comment takes their criticism forward. It focuses on the operational aspects of the report (Williamson 2007). This article examines the efficacy of the compensatory actions, monitoring and compliance standards and enforcement and information management systems proposed by the report.

Environment and Economics

The report takes the internationally-accepted view of balancing environmental conservation and enhancing its quality, while seeking to promote economic development (EU 2004; Everett et al 2010). It stresses on the need to maintain a "dynamic equilibrium between environment conservation and development" (p 9, Sec 1.8), while enhancing "…environmental quality parameters and maintenance of ecological balance" (p 9, Sec 1.7). It hopes that the combination of measures it proposes—compensatory actions, monitoring and compliance standards, enforcement and information management system—will promote both environment and economic development. The report takes a Coasean view of the environment (Coase 1960).

Acting on behalf of the affected stakeholders and environment, the administration accepts that the development activities will result in pollution and environmental damages. However, it is able to quantify the level of damages of development activities on the local environment—for example, on eco-sensitive zones. The onus of providing information to assess the damage lies with the project proponent. The administration places "utmost good faith" in the information given by the project proponent and verifies it through information management systems, databases/research centres.

The report enjoins the administration to assess the level of damages. The administration then has to ask the project proponent to undertake compensatory actions to "conserve" the environment. The proponent has to pay upfront compensation to the administration for damages—this includes environmental reconstruction costs (ERC), environmental reconstruction fund (ERF), rehabilitation and resettlement costs and costs of social/compensatory afforestation (CAG 2013).

Management Authority

The report seeks to strengthen the monitoring and compliance mechanisms. For this purpose, it has called for reordering of the existing institutional structure into National Environmental Management Authority (NEMA) and State Environment Management Authorities (SEMA). Both NEMA and SEMAs will subsume the pollution control boards and become "standing technical organisations, manned with professionals, supported by appropriate technology, which will have the primary responsibility for processing all environmental clearance applications, in a strictly time-bound manner" (p 49, Sec 7.8). SEMAs are given the primary task of monitoring development activities under "control and superintendence" of NEMA (p 59, Sec 7.18).

Further, a "single window clearance" (p 11, Sec 5) has been recommended for environmental clearance of development activities. This is mainly to have a "unified, integrated, transparent and streamlined process, which would also significantly reduce the processing time" (p 11, Sec 5).

A "voluntary self-disclosure on compliance" (p 59, Sec 7.18) mechanism is

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in place. Such disclosure is mandatory and the developer has to provide compliance-related information. This information is placed in the public domain for public scrutiny.

Enforcement

Enforcement is part of the proposed Environment Law (Management) Act. Special environmental courts will be established at the district level (Sec 12). Here NEMA/SEMA officials will be given first preference. A person aggrieved by a final decision of the Ministry of Environment, Forest and Climate Change (MOEF&CC) or of the final decision of SEMA can appeal before an appellate board (Section 13.1 to 13.6) constituted by the government. The National Green Tribunal's (NGT) powers are "subject to limitations applicable to judicial review of administrative actions by the High Courts and the Supreme Court of India" (Section 16). Section 15 suggests a bar on jurisdiction for NGT and others, wherein government's decision cannot be "…enquired into by any court or tribunal, either suomoto or at any ones behest on any ground what so ever."

The report rightly recognises that the present status of environmental information is poor. Therefore, it emphasises on information gathering, research and dissemination for better environmental management.

Assessment

First, the report implies that as long as the project proponent is willing to pay an ex ante compensation for the expected damages to the environment, the proponent is allowed to go on with development activities. By doing so, the report is putting its eggs in one basket. It is placing its "utmost good faith" in the project proponent, and to an extent, on administration's own efficiency for technical verification. Although, utmost good faith has its basis in insurance law, the report does not take into consideration its economic constraints—adverse selection and moral hazard that have detrimental influence (Laffont and Tirole 1993).

Further, valuing the environment and quantifying the level of damages and then converting it into compensatory amount requires ascertaining total economic value (TEV, sum of direct-use value, indirect-use value, options value, non-use value and intrinsic/existence value). It also requires ascertaining monetarily quantifiable levels of pollutions/degradation over the lifetime of development activity (Ekins 2002). The technicalities required in the Indian context are enormous, both in terms of information gathering and research.

To get over this particular information problem, the report suggests the use of markets to discover the cost of negative externalities and for placing a value on the environment. But efficiency of the marketplace for price/value discovery is often skewed. Several factors—demand and supply, number of buyers and sellers of green services—can cause obscurity in the market for valuing the environment.

Second, irrespective of the type of institutional structure, greater monitoring and compliance is the need of the hour. Whether that helps environmental governance, needs to be closely studied (Williamson 1973). Further in the Larfarge case, the Supreme Court has said that a regulator should be in place "…to appoint an appropriate authority, preferably in the form of regulator…, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters."[1] But NEMA and SEMAs are technical organisations, without regulatory powers.

Third, enforcement section basically aims to "restore to the executive the will and tools to do what it is expected to do by the statutes" (Chapter 1, p 8). Section 15 is the key, which makes the administrative branch supreme, while limiting the powers of the judiciary. Further, a special judicial court is set up but preferential access is given to administrative officers. The appellate board is administrative in nature, managed by government officials, with every possibility that decisions will follow government policy. The NGT's powers are straitjacketed for only judicial review of administrative actions.

Fourth, information system and database are not widely accessible, and are aimed solely at reducing delays in environmental clearance. It is suggested that the NEMA should charge a price "for data mining and accessibility," "which will provide for the cost of regular updation in terms of technology and manpower" (p 85, Sec 9.9). Further, it is stated that only project proponents and consultants can access database "on payment basis" (p 86, Sec 9.12). This will reduce free flow of information to stakeholders—local communities, non-governmental organisations and other stakeholders—limiting their ability to play an active role in environmental governance.

Conclusions

The report does not take into consideration two vital points—monitoring and compliance regimes and poor information systems. A cursory analysis of the MOEF&CC-run-Environmental Information System (ENVIS) will reveal the patchy data gathering and monitoring capabilities. Without these systems in place, any pre/post-environmental clearance compensatory mechanism will not work. This lacuna also limits our ability to value the environment. Compensatory and market mechanisms protect and conserve the environment, ultimately limiting judicial interference, only when compliance and monitoring regimes are technologically and scientifically equipped to value the environment.

NOTE

1 Supreme Court of India, *T N Godavarman Thirumulpad vs Union Of India & Ors* on 6 July 2011.

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