Executive’s Environmental Dilemmas
Unpacking a Committee’s Report

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The High-Level Committee set up by the Narendra Modi government to review the major laws relating to environment protection has, in its recommendations, worked towards two sets of objectives: one, to separate business from the messiness of governance, and, two, to redraw the line of demarcation between the judiciary and the executive.

The Government of India’s “trade-offs” between environment and social justice and economic growth have been a heightened point of debate in the last few years. In the second term of the United Progressive Alliance (UPA) government, businesses had become vocal about the role of the environment ministry in slowing down growth rates by delaying or holding up approvals (Kumar and Bhuchar 2012). At the same time environmental and human rights organisations put out data on rates of forest diversion and steady approvals to prove that the ministry was appeasing the industry (Dutta 2012; CSE 2012; Menon and Kohli 2009).

Even as the 2014 elections were approaching, UPA ministers had begun stating that the economic slowdown in the country was not a result of bad policies or governance but of judicial overreach, which disallowed several sectors like coal, iron ore and communications to grow at the desired pace (Sardesai 2013). A new environment minister had been brought in the last days of the government to clear the approvals that had been held up.

The NDA government under Prime Minister Narendra Modi promised to fix this problem even before it came into power (BJP 2014). Soon after it assumed office in May 2014, there were clear signals from the Union Minister of Environment, Forests and Climate Change, Prakash Javadekar, that approvals will be eased and legislative changes to institutionalise were on the anvil. That the government would do this without compromising the environmental cause (Hussain 2014; Anon 2014). The Ministry of Environment, Forests and Climate Change (MoEFCC) proposes to bring in these changes in the budget session of Parliament next year (Sethi 2014).

With this mandate, the MoEFCC began making changes to environment and forest regulations from June 2014 (Kohli 2014). Even as a series of office memoranda, circulars and guidelines continued to be released, the MoEFCC set up a High-Level Committee (HLC) to review the major environment and forest laws of the country. This HLC set up under the chairmanship of ex-cabinet secretary, T S R Subramanian, submitted its report to the MoEFCC in mid-November.

Mandate of the HLC

The laws that the HLC was to initially review included the Environment (Protection) Act (EPA), 1986, Forest (Conservation) Act (FCA), 1980, Wildlife (Protection) Act (WLPA), 1972, Water (Prevention and Control of Pollution) Act, 1974, and Air (Prevention and Control of Pollution) Act, 1981. During the course of the review the committee was also asked to bring the Indian Forest Act, 1927 into its ambit through a communication dated 18 September 2014. The committee set up on 29 August 2014 was given two months to work and on their own request, the government extended it by a month with the term ending on 28 November 2014.

The terms of reference (ToR) of the committee include assessing the status of implementation of these laws, to examine and factor in the judicial pronouncements related to these laws, recommend and draft amendments needed to bring these laws in tune with “current requirements to meet objectives”. Contrary to this brief ToR, the committee’s task was neither small nor straightforward. These laws have formed the backbone of environmental regulation in the country to manage pollution, restrict forest diversions, assess impacts and solicit public opinion on industrial and infrastructure project approvals as well as expansion. They are several decades old and have their own conflictual and controversial histories. They have been debated several times over on questions...
of their design, objectives and implementation (Dutta 2010; ESG 2007; Kohli and Menon 2009; Menon et al 2007).

The committee in its report acknowledges upfront that they “could not address all the laws, regulations, rules and executive instructions comprehensively within the time span available to it”. Within this period they met with “government and interest groups” and had meetings in seven cities, including New Delhi. These consultations were held amidst many concerns over the lack of clarity of what it means to bring the laws in line with current requirements. Genuine concerns were also raised around the committee’s composition and its process of consulting with some groups and individuals selectively (Menon 2014; Nandi 2014). The committee’s report was submitted 10 days prior to the extended time given to it.

Towards Environmental Law Reform?

This was the first time that a committee had been asked to look at the implementation of six environmental and forest laws and suggest amendments to them. All past attempts at review have been undertaken for individual laws or notifications. In fact, one notification under the EPA, the Coastal Regulation Zone (CRZ) Notification, is presently under review and one member of the HLC serves on that committee too which is headed by the Secretary of the Ministry of Earth Sciences, Shailesh Nayak.

The ToR makes it appear that the HLC was expected to conduct a routine evaluation of a set of bureaucratic practices against clear, measurable targets that they were meant to achieve. But that is precisely the difficulty for any comprehensive environmental law review. Our environmental laws have no specific, positive environmental outcomes attached to them. All they have are broad, pell-mell objectives or vision statements. In the absence of committed outcomes, these laws are assessed on the basis of the number of decision-making committees set up, how frequently they meet and the number of approvals granted. All of these are output driven and quantitative in nature. So it is not possible to tell if the state of the environment is such because of or despite these laws.

While the six laws on forests and the environment on the committee’s ToR are discreet instruments, their implementation is influenced by issues at the scale of the local, national and international; the material resources that are interconnected such as farmland, rivers, soil, forests and fish, and ideologies of development, growth and progress. Due to the HLC’s brief to look into these laws together, its work was expected to be an environmental law reform with overarching influence on the environmental governance regime of the country. Because environmental laws operate in a contentious space of individual rights and national interest, the recommendations of this committee for reassembling environmental governance would have implications for large sections of society and economic sectors. The committee recognises this and agrees with many of the popular views stated at the outset of this process that this exercise is not designed for a more nuanced and careful undertaking that environmental governance deserves.

The committee’s meetings with a varied set of actors in different cities are reflected in the early sections of the report where the problem of environmental governance is located within the larger developmental questions of poverty, population, pollution, regional disparity and economic growth. The executive’s role is seen as successfully delivering at the same time efficiency demanded by the markets and justice sought by the polity. However, the promise of what this conversation between political economy and the environment could have been does not appear after the initial pages of the report. The challenge to government is instead recognised by the high levels of dissatisfaction it has created in two parties; business on the one side and litigious environmentalists and affected communities on the other. While the former complains of delays and arbitrariness in government’s decisions, the latter brings up faulty data and unlawful practices in the decision-making process.

The Executive and Its Discontents

The HLC settles quickly into a mode of finding solutions by focusing on the following most vocalised and visible problems attached to this “sector”. First, that environmental and forest approval process for projects is fraught by bad data, time “delays”, insufficient expertise and arbitrary decisions. Second, that there are abysmal levels of compliance and enforcement of laws and poor environmental management. Third, the need for clarification and consolidation of the legal framework of acts, rules, definitions and operational guidelines. The committee is caught up by these issues that are symptomatic of deeper dilemmas. These three areas of focus are indeed important, but these constitute the lowest denominator of problems in environmental governance. This may have been identified by the committee’s own admission that its approach to this exercise is “practical and pragmatic”, rather than be “in pursuit of perfection”.

The HLC’s concern becomes a bureaucratic one, that is to relieve the paralysing pressures on the executive. It does this by distancing the executive from both business and the judiciary, and populating this space with professional experts. It recommends the introduction of technical bodies for decisions on project approvals and an appellate mechanism for conflict management. However, the executive is expected to influence both these newly proposed domains when it needs to. The specific solutions offered by the committee can be categorised under these two sets of objectives: one, to separate business from the messiness of governance, and two, to redraw the line of demarcation between the judiciary and the executive.

The HLC proposes to relieve business of environmental concerns because they should be left to do what they are best at. It suggests that all environmental matters should be handed to qualified experts. It recommends the setting up of the National Environment Management Authority (NEMA) at the centre and the State Environment Management Authority (SEMA) at the states as the primary institution for environmental matters. These are meant to be
full time, technically qualified expert bodies that will be engaged in data collection and mapping, developing standards for pollution control, appraisal of project documents, formulating conditions of clearance and consent, monitoring of the compliance of these conditions and enforcement of penalties in case of violations (Section 7.9, p 50).

These bodies are to perform the above functions presently done by Pollution Control Boards (PCB) and Environment Impact Assessment (EIA) committees along with the task of monitoring compensatory afforestation. These bodies are not to be independent but are to function under the central government (for all project approvals) or state governments (Section 7.12.2) in keeping with the requirement of the Supreme Court's Lafarge judgment dated 6 July 2011. The committee has drafted an Environment Law Management Act (ELMA) to provide a legal framework for the setting up and functioning of these new institutions.

The HLC believes that good scientific data collected by NEMA/SEMA when made available to consultants preparing EIA documents, for a fee, could result in good decisions. Recommending a slew of changes to existing procedures such as a single window system of approvals, limiting the scope of the public hearing in terms of stricter norms of who can speak and what may be spoken, exemptions from conducting public hearings to industrial zones and for projects that are not located close to human habitations, the committee hopes to insulate technical project decision-making from both corruption and popular pressure for quick and consistent decisions.

Business is offered the privilege of “utmost good faith” where its approvals will be granted, and compliance will be judged on its own pre-stated terms and commitments. Project proponents are expected to pay for the costs of environmental management and restoration, but are not responsible for generating the results. The NEMA/SEMA will maintain compliance data such as effluent discharge through the help of instruments and even a roster of “tree lands” that can be turned in for compensatory afforestation on account of projects requiring forest clearance. The monitoring of projects will not be done through PCBs or MoEFCC’s “inspectors” but routinely communicated to NEMA/SEMA through technology and instruments. The expert bodies will use the Environment Restoration Fund created from project costs for environment management and restoration activities. These proposals free up business from the consequences of environmental governance and locate it in the domain of experts.

The second objective that occupies the HLC is to relieve the executive from the “overreach” of the judiciary. The committee agrees that the judiciary has come to take a major role in implementing environmental law because the “opaque, suspiciously tardy or in express mode, arbitrary” state has failed to perform (Section 1.5, p 8). The committee’s task is to offer ways by which the government can regain credibility in the eyes of the Supreme Court as well as the powers it has ceded to it to handle environmental matters on its own. To do this, the committee first locates the environmental concern within India’s developmental planning history to show that such concerns are neither new nor unfamiliar to the government (Section 3.3.1, p 14). It recommends the provision of good data, technology and experts, higher penalties for identified violations and restoration costs to the environment management system so that the environmental effects of a growing economy can be kept under check.

The HLC hopes to redraw the line between the judiciary and executive by consolidating the legal framework that is comprised of guidelines, executive orders and directions and reducing ambiguity. A major suggestion is to revisit the Supreme Court’s definition of the “forest” in the T N Godavarman case and limit it to forestland notified under Indian Forest Act and recorded as forest under the FCA, 1980. On 12 December 1996, the Supreme Court in Writ Petition 202 of 1995 extended the jurisdiction of the FCA to all lands on which the dictionary meaning of forests could apply. Since then the Court’s Godavarman bench has given itself the continuous mandamus to monitor matters related to forest, forest diversions and the felling of trees.

The committee also suggests the establishing of appellate boards at the centre and other locations as required. These will act as the first forum of appeal against decisions of NEMA/SEMA so that the judiciary’s role in environmental management is curtailed. With the enactment of the National Green Tribunal (NGT) Act in 2010, affected people or project authorities were given the first right of appeal before the tribunal when they were aggrieved by any decision taken of the executive related to a range of environment laws. Many of these were also under the review of the HLC. In its four years, the NGT has sat in judgment many such decisions and given directions for executive functioning.

**Two Inconveniences: Principles and People**

The HLC’s recommendations may go a good distance to make the process of decision-making of approvals efficient by granting it to expert bodies. These bodies are the antiseptic barrier against arbitrary decisions. But the committee is at pains to maintain this barrier right away. It acknowledges certain “politico-economic strategic” concerns that the government may exercise in decision-making (Section 7.16, p 58). These could be related to regional disparity, areas with specific problems, national security and relationship with neighbouring countries. These considerations are a black box – what these could be specifically, when they will be exercised and towards what specific ends, remains the discretion of the union government. The committee already begins this by using flimsy rhetoric of growth to recommend fast-tracking of power and mining projects.

The influence that these concerns have upon the government’s decisions could continue to be questioned by the judiciary. While the committee mentions various judicial principles such as sustainable development and intergenerational equity that have been used in environmental matters, it does not offer suggestions on how to assess government’s decisions against two registers, political expediency and legal principles.

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A peculiar feature of the HLC’s report is its near complete denial of the existence of people living within the environments that are to be managed. They are only referred to as “population” that the economy must cater to. To that effect, the report errs on the side of denying rights to those who would claim forest rights if they come in the way of linear projects (Section 5.10/7.15; pp 34/56) or to those who would like to participate in public hearings for projects that have been exempted from holding them.

How does the committee see the negotiation between experts and citizens when lands are to be kept aside or released for conservation, compensation or industry? The monitoring protocols prescribed by the HLC do not include affected parties as actors with agency to partner with the government to resolve long-standing environmental problems that have transformed their lives. The committee recommends that zoning efforts could identify sites for industries in advance. It further suggests the clear demarcation of no-go areas for industry which would include forest areas with more than 70% canopy cover. Are not these classical modes of spatial planning the very cause of regional disparity that we now expect economic growth to overcome?

The problem of the environment is understood as the fallout of economic growth for poverty alleviation, livelihood security and developmental justice (Section 3.7, p 22). The committee perceives environmental concerns as outside of the economy that manages the needs of a growing population rather than one that is internally related to the economy’s design and form. To the HLC, the environment is a mechanical system “out there” and one from which we are extracting too much. Its destabilisation could be managed if we restore the machine as we use it. The HLC navigates the problem of environmental governance with a techno-bureaucratic approach but this could result in constraining all new environmental decision-makers with the very predicaments that it seeks to free them of.

REFERENCES