TOWARDS A GREEN FUTURE OR A GREEN SIGNAL FOR VIOLATORS?

THE NATIONAL GREEN TRIBUNAL BILL, 2009

The Access Initiative

The present critique is a joint effort of members of 'The Access Initiative – India' (TAI-India) Coalition comprising of over 30 individuals and NGO's from across the country. TAI-India is part of a global civil society coalition, comprising of over 150 civil society groups which works for effective enforcement of Principle 10 of the Rio Declaration i.e., Access to Information, Pubic Participation and Access to Justice.

The drafting of the present critique was a joint effort of lawyers, activists, academicians and administrators from both within and outside the country. This is based on their past experiences of dealing with environmental tribunals and public interest litigation in India and elsewhere.

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INTRODUCTION

The National Green Tribunal Bill, 2009 ['NGTB' or 'Green Tribunal"] was introduced in the Lok Sabha by the Environment Minister Sri Jairam Ramesh on July 29 2009. The decision of the Ministry of Environment and Forests to set up a National Green Tribunal 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 landmark judgments, namely, *M.C. Mehta vs. Union of India*[1]; *Indian Council for Environmental-Legal Action Vs Union of India*[2]; *A.P. Pollution Control Board Vs M.V. Nayudu*[3] and *A.P. Pollution Control Board Vs M.V. Nayudu II*[4]:, the Law Commission in its 186th Report 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 recognized 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 Supreme Court had in *M.V Nayudu* cited the example of the *Land and Environment Court* of New South Wales as a model to be followed.

The stated reason of the current Bill according to its' "Statement of objects and reasons of the Bill", is the increasing number of environmental litigations pending in various courts and other authorities in India and the involvement of multidisciplinary issues in such cases.

The proposed National Green Tribunal will have the same powers as a civil court. It provides for the establishment of a tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation

[1] 1986 (2) SCC 176
[2] 1996(3) SCC 212
[3] 1999(2) SCC 718

[4] 2001(2) SCC 62

for damages to persons and property and for matters connected with it. A draft of the Bill has been around since the year 2006. The Bill comes in response to the 186th report of the Law Commission of India which had noted in September 2003 on the 'Proposal to Constitute Environmental Courts' that, "the National Environmental Appellate Authority constituted under the National Environmental Appellate Authority Act, 1997, for the limited purpose of providing a forum to review the administrative decisions on Environment Impact Assessment, had very little work. It appears that since the year 2000, no judicial member has been appointed. So far as the National Environmental Tribunal Act, 1995 is concerned, the legislation has yet to be notified despite the expiry of eight years. Since it was enacted by Parliament, the tribunal under the act is yet to be constituted. Thus, these two tribunals are non-functional and remain only on paper." The Bill would replace above mentioned environmental authorities.

Many provisions of the Green Tribunal Bill contain crippling limitations on the claims that can be litigated, as well as unacceptable drafting errors. Enactment of the Bill in its present form could produce results far worse than no legislation at all.

This critique is offered because there are serious reasons for concern about the content and effect of the "Green Tribunal" Bill. Despite a multitude of serious flaws, the Bill may be gaining public support and credibility on the basis of little more than its promotional title and peoples' legitimate longing for remedies that may help stem the increasing environmental damage generated by uncontrolled activities in the name of 'development'. Howsoever legitimate the motives that prompted the authors of the Bill, good intentions can still do grave and even irreparable damage when the results threaten to defeat the very goals generating the public support.

Many provisions of the Green Tribunal Bill contain crippling limitations on the claims that can be litigated, as well as unacceptable drafting errors. Enactment of the Bill in its present form could produce results far worse than no legislation at all. The following offers a summary of some of the more serious problems, and many more could be listed.

Of particular concern are the narrow and limited scope of jurisdiction, and the narrow scope of remedial orders, that would confine the Tribunal's powers. There is a real danger that a weak tribunal will further inflate the regulatory and developmental agencies' perception that their arbitrary disregard for environmental obligations is simply beyond any rigorous review. Resultantly despite the Tribunal they would continue to operate with a comfortable sense of invincibility as they react to economic and political pressures for hurried and unscrutinised project approval.

It should also not be forgotten that the existing Authority i.e the National Environment Appellate Authority and the National Environment Tribunal have been dysfunctional because of the apathy of the Ministry of Environment and Forest itself. The National Environment Tribunal was not operationalised despite a lapse of 13 years of its enactment. As far as the NEAA is concerned, the lesser said the better: Filled with retired bureaucrats with no experience in either law or the Environment Impact Assessment process, the NEAA has dismissed every single Appeal filed before it in the last 12 years, and its service conditions were so downgraded that no retired Judge would ever accept the post. It remains among the darkest chapters in the saga of the evolution of India's environmental law as well as in terms of Judicial Institutions. The fact is that it is always easy to bring about a new law promising a bright future. Yet, it must be noted that had a little effort been put to ensure that both these institutions (NETA and NEAA) were made functional, the need for a new Bill would not have arisen.

A perusal of the provisions of the Green Tribunal Bill reveals that it will not serve as a effective forum for protection of the environment but rather just the opposite. It is a classic 'Trojan Horse'. Giving the impression of 'Green' but in reality will be of the greatest use to violators, who can avoid prosecution as well as rejection of approvals by rushing to the 'Green Tribunal'.

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opposite. It is a classic 'Trojan Horse'. Giving the impression of 'Green' but in reality will be of the greatest use to violators who can avoid prosecution as well as rejection of approvals by rushing to the 'Green Tribunal'.

It is our sincere hope that the concerns raised in this discussion paper which are based on inputs from people and NGO's active at the field level as well as national and international lawyers and academicians would serve as a timely reminder and motivate the Government to encourage wider discussion on it, leading to fundamental changes made in it so that it actually becomes an effective judicial forum for the protection of environment and the upholder of the legal rights of the people who depend on the environment.

Concerns with the Green Tribunal Bill

The key concerns with the Green Tribunal Bill relates in particular to the following clauses of the Bill:

CLAUSE 1 (1) – TITLE OF THE BILL

The title of the Bill should be The National Environment Tribunal Bill, 2009 and not a subjective, vague and loaded term like a 'Green' Tribunal. This is to reflect clearly the object and purpose of the proposed Tribunal. This also shall be necessary in the light of a need for universal understanding of the title, when it shall require translation and appreciation at the local and village levels. There is even a fear that the term 'green' may rather mean an institution meant to give 'green signal' to all projects impacting adversely the environment.

CLAUSE 1 (2) – COMING INTO FORCE OF THE ACT

Clause 1 (2), empowering the executive to bring the law into operation, is a highly discretionary and arbitrary power vested in the central government. This section, though common in many laws, has allowed the executive to pick and choose when to implement a law. This is a matter that ought to be decided by the Parliament and not by the executive. At the very least the clause must provide for a maximum time limit of say 3 months after its enactment when the law should necessarily come into effect. This is to offset recurrence of situations like the still born National Environment Tribunal Act, 1995, which never came into operation.

The Parliament should stipulate a fixed time frame for the law to come into effect otherwise the proposed Tribunal would face the same fate as the National Environment Tribunal Act which was passed by Parliament in 1995 but was never set up

CL.AUSE 2(1) (J) – DEFINITION OF A 'PERSON'

The Definition of a 'person' as it exists does not seem to cover a government agency. This omission needs to be addressed since as per the current trend it is the decision of a government agency which often require adjudication by the Courts and Tribunals.

CLAUSE 2 (1) (m) – "SUBSTANTIAL QUESTION RELATING TO ENVIRONMENT"

The Bill limits the jurisdiction to "*substantial questions relating to environment*" i.e., situations where the damage to public health is 'broadly measurable', or 'gravity of damage' to environment is 'substantial' or relates to 'point source of pollution'. . The environmental questions cannot be left to the subjective assessment of an individual to judge as to what is 'substantial' or not? Similarly the "environmental consequences" cannot be restricted to either "specific activity or to a point source of pollution" as is being proposed in the Bill because non-point source of pollution and a bundle of industrial activities leading to cumulative impacts on the environment require as much adjudication as specific activities with obvious impacts.

> There is no tangible method by which the 'gravity of the damage to environment' and public health can be either "broadly measured" or termed as 'substantial' in general

The Bill as it exists is regressive since it only includes instances where the "community at large" is affected or likely to be affected—but excludes 'individuals' or 'groups of individuals'.[Clause 2 (1) (m) (i) (A)] This is contradictory to the settled principle of locus standi where the courts have emphasised on liberal approach to be followed when environmental matters are concerned. Environmental impact and conflict need not be only limited to the "*community at large*" but may also affect groups of individuals and individuals—who deserve as much protection—in equal measure as the "*community at large*" which itself has been left undefined.

CHAPTER II – INSTITUTIONAL STRUCTURE

The Bill unfortunately seems to follow the 'tried, tested and failed technique' of appointing retired bureaucrats and irrelevant technocrats as 'technical members'. It follows the same formula which led to the limping status of the present National Environment Appellate Authority, where by filling it with retired bureaucrats it has dismissed every single appeal in the last 12 years of its existence. The Bill considers Master of Engineering, Technology and administrative experiences only as technical qualifications. There is no provision for ecologists, environmentalists, hydrologists and civil society / NGO's who have been active in the field of environment. More over the appointment and short listing of candidates will be done by the Ministry of Environment and Forests alone which is unlikely to select and appoint any person who could be considered to be tough on the Ministry. The main suggestions are:

- **The Bill will have to stipulate the maximum as well as minimum number of Expert Members as well as Judicial Members**. In the absence of the same, it is unlikely that the Authority will be able to effectively function. The purpose of the proposed Tribunal is to be a specialised adjudicatory body so far as Environmental issues are concerned and for that purpose it must clearly stipulate a minimum number of technical members. It is suggested that a minimum number of three (3) expert members should be desirable with a maximum of 7 (seven). This is not out of context as the Central Empowered Committee (CEC) of the Supreme Court functions with 7 expert members whereas the Central Information Commission has around 10 members.

- **The Bill should clearly stipulate that the Tribunal cannot be considered functional unless it has a mix of technical and judicial members present, including the Chairperson**. Thus the Bill could use the words like 'provided that no matter can be heard by the Tribunal unless it has both the Judicial and Expert members present'. This is to offset unfortunate situations like the current state of NEAA where one single technical member is seen competent or good enough to discharge both the technical and the judicial functions of the Authority.

- **Judicial Member can be an Advocate/ Jurist/ Professor:** With respect to Judicial Member there is no need to limit the same to only a Judge of the High Court. Even the Constitution of India allows for the appointment of lawyers directly as Judges of Supreme Court. In such case, the Bill could

make it clear that a lawyer (or a professor of Law) with about 15 years of practice / experience in the field of environment and public interest law will be eligible for appointment as Judicial member.

- The Clause should also stipulate that any person who has been working at the MoEF or has been member of any authority whose decisions could be a subject matter before the NEAA cannot be made an Expert Member.

APPEAL AGAINST THE ORDER OF THE TRIBUNAL

The Bill should clearly provide for statutory appeal against the decision of the Green Tribunal before the Supreme Court. This will be in tune with the decision of the Supreme Court in [**M.C Mehta Vs Union of India and Shriram Foods and Fertilizer [1986 (2) SCC 176]** wherein the Court emphasised that need for environmental courts with a provision for regular appeal before the Supreme Court.

> The organisation structure of the Green Tribunal be so modified so that there are regional Tribunals and the decision of the Regional Tribunals are appealable before the National Green Tribunal and further appeal lies before the Supreme Court.

The need for a statutory appeal before the Supreme Court is also important in view of the fact that the decision of the proposed Tribunal will still be subject to challenge before the High Court under Article 227 of the Constitution. So although, Clause 21 states that every order of the tribunal shall be final, it does not take away the power of the High Court under Article 226, 227 for Judicial review of the decision of the proposed Tribunal. Thus there is bound to be multiplicity of litigation. The scenario will be as follows: decision of the Green Tribunal will be challenged before the single Judge of the High Court; the decision of the single Judge can be challenged before the Division Bench of the High Court and then the Special Leave Petition (SLP) before the Supreme Court. Thus there will be multiplicity of forums as well as delay in the decision making process.

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CHAPTER III – JURISDICTION, POWERS, AND PROCEEDINGS OF THE TRIBUNAL

The Bill prescribes questionable time frames for approaching the Tribunal. It is

a) 30 days for challenging an order under the Tribunal's appellate jurisdiction [Clause 16] ;

b) Six months on disputes of substantial questions related to environment [Clause 14 (3)] and

c) Five years for seeking compensation and relief. (Clause 15 (3)]

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Such arbitrary and limited time frame defeats the whole purpose of the Bill since many adverse environmental impacts especially from hazardous industries such as asbestos, silicosis takes years to manifest themselves. This Tribunal will thus not then have jurisdiction over them. Additionally matters of environmental impacts and damages cannot be equated with simple civil injuries and damage controls. It is suggested that adjudication on environmental matters may not be time barred by limited time frames for action.

Jurisdiction arises out of implementation (?) of Enactments in Schedule I

The National Green Tribunal Bill states that it will have *"jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved and such question arises out of the implementation of enactments specified in Schedule I.* [Clause 14 (1)]. **This must be a drafting error**. It is not the implementation (which is what the state is obliged to do) but a violation of the enactments listed in Schedule I (the environment acts) which creates the "substantial question relating to the environment". It is the current or future activity which is or may cause the environmental damage and violate the provisions of various Acts listed in Schedule I, which creates the substantial question relating to the environment. Consequently, what is meant (or should be meant) is that the "substantial question relating to the environment" must arise out of an activity which infringes, or may in the future infringe / violate the requirements contained in the enactments in Schedule I. The Bill should be drafted more clearly to reflect this intent.

The focus merely on individual compensation and restitution of property and Environment in Clause 15 will inevitably make the Tribunal ineffective and helpless in stopping environmental damage. [CLAUSE 15 (1) (a), (b), (c)]

Even if the Tribunal is effective in obtaining individual compensation and restitution of damaged environment (the term 'restitution' remains undefined), the costs of damaging the environment are likely to be less than the profits made by corporations by damaging the environment. Mining is a good example of this. There are huge profits to be made by mining that breaches the environment laws. Even if it should be shown that environmental damage was caused by mining that breaches the environmental laws, the Tribunal would have no power to stop it. Further, it is unlikely that the threat of having to compensate individuals or to restitute the environment would be sufficient threat under a cost-benefit analysis. The Bill should specifically provide in Clause 15 for a power to stop such damaging activity through revoking and quashing approvals if any.

It has the potential to act as a "Clearing House" for Industries and other projects through ill advised defining of an Aggrieved Person [CLAUSE 16]

The Bill inexplicably and unfortunately expands the definition of an 'aggrieved person' who can approach the Tribunal, to include any person aggrieved by an order 'refusing the grant of environmental clearance'. [Clause 16 (i)] It has to be clearly ensured in the Bill that only those affected adversely by grant of approvals orders under enactments mentioned in Schedule I which impact their environment (including forests and biodiversity) can approach the Tribunal.

… the Green Tribunal will unfortunately serve as an effective mechanism for ensuring that even the miniscule percentage of orders/ decision of the Ministry of Environment and Forest wherein Environmental Clearance are not granted is overruled by the Tribunal. A 'Green Tribunal' is supposed to come in aid of those who want to protect and preserve the environment and not those who are affected by enforcement regulation.

This is because the Tribunal is meant for protection of environment. Hence it must redefine an aggrieved person to mean a 'person' who has been wronged through damage to the person's natural environment or suspects (on valid grounds) that such damage is likely to happen unless prevented. Thus Clause 16 (i) should be deleted as being misplaced in a bill devoted to environmental protection. Provision of appeal if any, against refusal to grant environmental, forest or biodiversity clearances / approval under the enactments mentioned in schedule I, should lie elsewhere, than this Tribunal.

Apart from individuals or owner of a property, who suffer injury or property damage, the only applicant which Section 18 permits to file which might represent broader concerns about unlawful or ill-advised clearances, is "any representative body or organization functioning in the field of environment." **But such an organization is allowed to file an application only "with permission of the Tribunal**." [Section 18(2)(e)]. It is all too easy to imagine the Tribunal invoking that provision to impose strict "standing" limitations. Moreover, while Section 18 says that these applicants may file "without prejudice" to the appeal provisions of Section 16, it nevertheless ALSO says that any claim for a "grant of relief" - apparently even in appeals -- is available to only the listed

four categories of parties. The obvious contradictions in these sections demand clarification and redrafting.

There is a danger that the Tribunal could also easily interpret the above provision under Section 18 to conclude that "any representative body" refers solely to organizations that act as personal "representatives" for persons who fit the first four categories under that Section – that is, persons who suffered personal or property injury. That, of course, would rule out challenges to unlawful clearances or other unlawful authorizations.

CLAUSE 19 (1) – TRIBUNAL NOT TO BE BOUND BY THE PROCEDURE LAID DOWN BY CPC 1908

While we welcome the clause as it will help take away the rigid formalities of a civil court proceedings as required under CPC 1908, we suggest that the guiding principles for the Tribunal may not just be limited to principles of natural justice, but may also encompass the much needed 'Precautionary Principle' as well as the 'Doctrine of Public Trust' both of which have been accepted to be a part of the Indian law when the question of environmental protection is taken into account.

CLAUSE 22 (2) – IMPOSITION OF COST

The issue of costs to be awarded against a losing party is a clear deterrent against affected people taking to litigation to protect their environment. The Bill seems to indicate that costs will only be awarded against litigants who bring claims that are not maintainable, false or vexatious. This is a serious aspect and will greatly discourage people from approaching the proposed Tribunal.

The Bill's arrangements for cost penalties against unsuccessful parties, indicates that the drafters believe that aggrieved persons and defendants operate on a level-playing field. This is not correct. The vast majority of cases in India are taken by those representing the poorer sections of society against environmental damage or potential environmental damage by industry.

Further, ordering costs against impoverished litigants who bring genuine claims will simply dissuade them from bringing claims in the future. Costs orders against such individuals, or against groups working in the field of the environment is unimaginable and should not be provided for in the Bill.

In any case the standard practice of courts making orders as regards costs is already provided for in Clause 22 (1) which alone should be retained.

CONCLUSION

As has been highlighted above that the Bill in its current form is unlikely to become the much awaited legal instrument of any great utility for either protecting the environment or upholding the rights of the communities and the people affected by the damage caused (or likely to be caused) to their environment. The whole Bill thus needs to be reassessed and redrafted in a transparent manner and through a much wider consultation process so that it actually becomes an agent for securing environmental justice as well as to provide voice and relief to those who are affected by environmental degradation of their environment. **The Bill as currently drafted is intended to be green in a different sense: to give a Green Signal to all violations.**

It is painfully clear that a major exercise in rewriting of the Bill is essential. Reconsideration must deal with both the objectives and with drafting problems --- to ensure the accuracy, clarity and consistency in drafting that are essential in any competent legislative process.

It is painfully clear that a major exercise in rewriting of the Bill is essential. Reconsideration must deal with both the objectives and with drafting problems --- to ensure the accuracy, clarity and consistency in drafting that are essential in any competent legislative process. What this Bill seeks could readily enhance the existing framework of environmental laws; but it is not easy to conceptualize or to draft. The current version provides a starting point, but virtually every provision needs further thought and careful redrafting.

KEY PROBLEMS WITH THE GREEN TRIBUNAL BILL[5]

Clause	Subject	Required Changes
1	National Green Tribunal	Should be titled as the "National Environmental Tribunal Bill"
1(2)	Coming into force.	The Parliament should stipulate a **fixed time frame** for the law to come into effect otherwise the proposed Tribunal would face the same fate as the National Environment Tribunal Act which was passed by Parliament in 1995 but was never set up
CLAUSE 2 (1) (m)	"substantial question relating to environment"	There is no tangible method by which the 'gravity of the damage to environment' and public health can be either "broadly measured" or termed as 'substantial' in general. **The Tribunal should have jurisdiction over matters concerning the protection of environment.**
Clause 3 and 4	Appointment of Chairperson and Vice Chairperson and Members	The Bill should clearly stipulate that the Tribunal cannot be considered functional unless it has a mix of technical and judicial members present, including the Chairperson.

[5] This is not an exhaustive list and merely some of the key issues. The others mentioned in the nmain body also needs changes.

		Technical members should be ecologists, environmentalist etc
Clause 15 (a, b and c)	Provides for compensation and restitution of property damaged.	The Bill should specifically provide in Clause 15 for a power to stop such damaging activity (present or future) through revoking and quashing approvals if any. **At present there is no explicit power to revoke a clearance granted**
Clause 16 (i)	"Aggrieved Person": broadly defined to include those who are affected by action under Water Act, Forest (Conservation) Act etc. Thus all violators be it industrialist, mining companies etc will come within the definition of 'Aggrieved Person".	It must redefine an aggrieved person to mean only a 'person' who has been wronged through damage to the person's natural environment or suspects (on valid grounds) that such damage is likely to happen unless prevented. Thus Clause 16 (i) should be deleted as being misplaced in a bill devoted to environmental protection. **If this clause is present the Green Tribunal will end up giving "Green Signal" to all violators. The Tribunal will end up becoming a Clearing House for projects**
Clause 18 (2) e	Organisations allowed to file only with permission of the Tribunal	Should be deleted as too much discretion is vested in the Tribunal and there is likelihood of its misuse by

		the Tribunal
Clause 21	Decision of the Tribunal Shall be Final	The Bill should clearly provide for statutory appeal against the decision of the Green Tribunal before the Supreme Court.
Clause 22 (2)	Imposition of cost against litigants	This is a serious aspect and will greatly discourage people from approaching the proposed Tribunal.