Constitution of India and Environmental Governance

Administrative and Adjudicatory

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Lecture 20

Environment Impact Assessment Law_ Why EIA Evolution of EIA

As we commence a new module, module number 4, we embark upon a different kind of a journey, a journey of inquiry into how the environmental conservation concerns get meshed that the demands of development in the legal regime. This could be put in the form of a question. If environmental concerns have to be accommodated in developmental decisions, how does the legal order go about it? How does environmental legal regime accommodate the demands for development, what kind of environmental safeguard measures are put in place before green lighting any developmental activity.

Apart from the state regulations, are there environmental conditionalities imposed by anyone from whom for mega projects, even the nation, the government takes a loan from developmental agencies internationally. Do they lay down conditions of environmental concerns and protection?

And finally, apart from the state regulation, and those that are imposed by international donor financial institution, are there any kind of measures put in place as a self-regulatory mechanism by the developmental entity itself, by the industry itself? These are the questions we attempt to find answers to in this module and we start with the law concerning environmental impact assessment, the law of environmental impact assessment.

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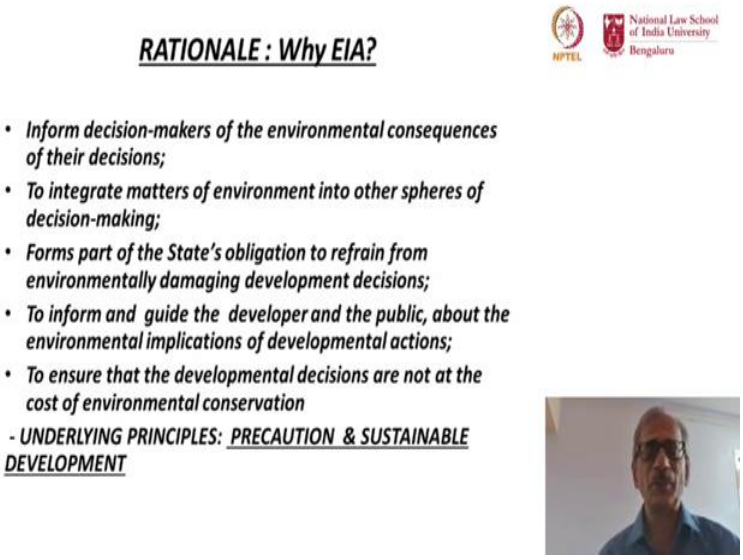

What is this law concerning environmental impact assessment? And why should there be an impact assessment law at all? To put it in simple terms, when it comes to a developmental activity, how do you assess the kind of stress, the developmental activity is going to have on the environment, and to what extent such a kind of a stress on the environment is tolerable, permissible? Is there any yardstick for that and the entire legal regime is a non environmental impact assessment of providing you the yardstick by measuring rod as to what kind of developmental activities are permissible, when, how, in what manner, and what are those that do not really get approbation by the state agencies. Even if it is a development activity wherein a lot of employment could be generated and a lot of money could be made out of it, but which will affect the environment very badly.

In simple terms, the environment Impact Assessment law is about laying down the basic rules, the basic rules of responsibility of carrying on a developmental activity in an environmentally benign and responsible way. The rationale for a law is to make the decision maker whenever projects proposal come before him that these are the kinds of environmental consequences are there before you take a decision, be careful.

And also, it is very necessary that environmental concerns should permeate into different kinds of activities, and developmental activities is not confined to any single department. It may be something in relation to water resources. It may be something to do with industrial development. It may be something else that deals with power projects. Like that several ministries, several departments may be engaged in carrying out developmental activities.

And the basic idea behind this Environment Impact Assessment law is to ensure that these environmental conditions or safeguard measures are put in place inach and every one of those departments where developmental decisions are taken. So, to integrate matters of environment into all spheres of decision making so as to make their decisions more environmentally friendly also.

It is indeed a basic obligation on the part of the state as a public trustee. That way you allow all kinds of activities to go on with regard to the resources that are there in the public domain, make sure that those activities do not cause irreversible, irreparable damage to them. So, it is part of the state's obligation to refrain from environmentally damaging developmental decisions and actions and for which they must have regulations. The other rationale is also a kind of an education and a guide that if I am a developer, or if I am an ordinary member of public, I need to be educated about the impacts and implications of any developmental activity on the environment.

So, that even before any kind of measures taken in putting that into application, there is enough forethought, enough introspection to judge and weigh amongst themselves as to how this would be beneficial not just to the humanity, but to the environment as a whole and not cause damage to it.

So, it is a kind of an information base and also a guide to the developer that please ensure that these basic non-negotiable minimum requirements are conformed to before you carry out a developmental activity. It is a member of the public that well developmental decisions are taken, but they have already taken care of your health, hygiene, wellbeing and the environmental protection concerns, and so feel free.

It is well taken care of by the public trustee, the government and so you have development, you have environmental protection as well. And so, the underlying principle is that all developmental decisions need have to weigh in balance, the pros and cons of the consequential impacts of a developmental activity and putting in balance the benefits and the burdens and then decide on those benefits; economic, social, environmental far outweigh the burden, even if there is a burden, that is a little bit of a stress, manageable, tolerable, repairable, recoverable, then go ahead. So that is the basic idea.

The entire body of law concerning environmental impact assessment was an integral aspect of the law that was awarded for the first time in United States way back in 1969, which is called as the National Environmental Policy Act, NEPA for short. It was made part of the law in US, but there are several legal systems all over the world, which have a protection act like India does, and within that, you have an EIA law, environment Impact Assessment law as an integral aspect of it. There are other legal systems something like Malaysia which has made the environmental impact assessment as the overarching law, with a niche environmental protection is also one of the subsets.

Whichever way you look at it, the idea is to balance; the balance between the benefits, the ecological, social, economic with the burdens affecting the environment. So, the underlying principles as a discerning should be able to make up by now are two principles which I have discussed earlier, the principle of precaution. Think before you act, sustainable development, that we will promote development without compromising on environmental concerns, and so accordingly take a decision in that regard.

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Having seen that rationale as to why a law of this kind is required We move on to a little bit of a peep into the historical background, to contextualize this whole body of law concerning environmental impact assessment in India. The first major environmental impact assessment law that came into existence in India was in the year 1994.

The question comes, was there no impact assessment law at all? Well, as a matter of fact, till the year 1994 each and every department, and each and every heads of departments, and each and every policymaker in relation to them, would have an internal assessment done as to the cost and benefit of it, environmental concerns were not very well worked out are no guidelines in that regard were there.

But invariably after the environment ministry came into existence in 1980, a set of administrative guidelines were evolved, and you know administrative guidelines are just for guidance, they are not binding, but administration will have to take cognizance of these guidelines before they allow for any developmental activity to take place.

So, the ministry has to come up with a set of administrative guidelines, what a binding law, but more a kind of a direction. And the ministry, if there is a mega major developmental activity, would send queries to those developers, to those governments. Look, please answer these questions, we want to make sure that is not going to harm the environment in any adverse way.

And based upon which some kind of an appraisal, they used to have a committee called as an Environmental Appraisal Committee. And that would tell us and come up with recommendations, okay, you can vibe with activity and have some of these safeguards put in place, but more of a guideline, a direction, not a binding law.

It was only there 1992 when the second summit took place in Rio de Janeiro, wherein the importance and the need for having a very focused, clear law, a comprehensive law on environment impact assessment was friend. And coming back from that particular event, the Government of India went into making of a law through a notification under the Environment Protection Act in the year 1994 and came up with EIA notification 1994.

What did it do? It laid down the detailed procedure for EIA, all the developmental activities in this was given, the financial outlay cap was also laid down, not every project, but projects which have very significant impact on environment, needed to have environmental clearance and for that a particular mechanism was awarded.

The nodal agency and each and every state happened to be the pollution control board, and to the pollution control board these applications will be made and then some kind of an appraisal made by committee constituted their recommendation would go to the central government. And at the central government level decisions are going to be made and then give what is referred to as environmental clearance.

At the time when the 1994 law was made, engaging people in either uprising them or in getting their opinions heard, was not contemplated. It actually led to a number of court cases

that look, you are taking developmental decisions, it is all at the government level that very local people, where these developmental activities are going to be cited. The people there are not in the know of things, should they not know, what is there in store for them? Should they not know as the beneficiaries of this development activity that certain kinds of developments would roll out of this particular activity and should they not have a say, and that such a kind of developmental activity should be there for them or not.

So, the need for democratizing the very entire process of decision making was expressed often on, especially when it was found that many of these decisions were taken arbitrarily, and rules were there on paper, but hardly in effect. In practice, these were not observed and so a hue and cry led to a public interest litigation, and then the Supreme Court.

A Gujarat based NGO brought an action before first the High Court and then later the Supreme Court, that please make public hearing mandatory on developmental decisions by the government. And the court responded very positively, and said that involving people is not going to be a hurdle in your decisions.

In fact, involving and informing people and getting them on your side when the decisions are made, is very crucial for making development reach them and for their benefit, and since all these activities of public interest for public good, and for public well being, the court came up with a set of guidelines as to how these public hearings are to be conducted, what procedures needed to be observed and later it was made a part of the EIA law. So, this is a law still in the making, the 1991 notification did not have all these guidelines put in place when it came into existence.

Over a period of time it started acquiring muzzle substance and form through various amendments brought to it either on its own by the government to smoothen the processes and procedures or whenever the courts of law intervened and gave them a little bit of their wisdom as to how much they should go about the clearance process, clearing environmentally unrelated developmental activities. And then additions were made to the law and that happened in a little while after the 1994 modification was made with further elaboration to the court orders over a period of 4 years time.

In 1997, there was other amendment made, industry raised a human cry that your notification that you have issued in 1994 is draconian, it is imposing a lot of restrictions and hence there is a lot of gestation period, you want a detailed project report to be submitted by us beforehand to the authorities for them to use and then take a call.

And for preparing this detailed project report, we needed to come up with an assessment, an assessment of environmental impact over a period of one full year. And so that means we

need not to look into the climatic conditions in summer, in winter, in any season and the kind of impacts this particular developmental activity to have, a detailed environmental impact assessment study.

And if sufficient, eat away much of overtime and time is money for us. Why do not you really ease in this process, and in 1997 an amendment came and the government stated that okay, if time is the essence, then no detailed project report is required, either give an EIA Environment Impact Statement report or an environment management plan that should do, even if we need any more clarification, we will see from you and then take a call. And then this also led to a lot of arbitrary exercise of power and the industry taking advantage of it and causing a lot of harm.

And so this led to the court cases again, and court cautioned the government to be very careful so this amendment was reversed very same year. In 2002, a big amendment came to this law wherein, many new industries, many new industries that would come into existence were exempted from this EIA process if their investment was less than 100 crores, 10 billion rupees, this was highly criticized.

At one breath, you come up with a law which actually makes somebody responsible environmentally. And, it is not a hurdle for developmental activity, but at another breath, because of the pressure and the lobbying done by these very same industries, you try to dilute the effect of this law by exempting those which have an investment of less than 100 crore.

That means, if the investment is less than 100 crore in many of these projects, then even if environment is harmed, it does not matter, is that what you intend then in the event, it is better not to have an environment ministry or even a law, if I am exercised, it was very heavily criticized. And this also led to within 6-7 months and amendment of the law.

And in that amendment, they knew notification made it clear that whenever you are carrying on activities, whether it is for 100 crores or less or whatever, location sensitivity also should be taken into consideration by the authorities before they take the decision and the environmental clearance process, the various stages of clearance needed to factor the location sensitivity, how sensitive the socio ecological conditions in this area before you take a decision of clearing this project.

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Then there were many amendments in the same year, within a few months, another amendment took place. And it was actually reversing the earlier amendment whereby the list of activities that were actually taken away and exempted, many of them, mega projects were brought under the purview of this law, like power, irrigation and flood control projects were also included irrespective of the financial outline, and they needed to go through EIA process was the requirement in the May 2003 notification.

Just a couple of months later, another amendment came and this was once again necessitated by an intervention of the higher judiciary, both the High Court and Supreme Court, in a number of cases, when they were approached by public spirited citizens that look, there are certain industries which are coming up very close to eco sensitive areas like a wildlife area or a forest.

And although there may not be much of a human habitation there, the kind of adverse impact on this is something immeasurable and incalculable, incalculable and so, for that reason one needed to be far more circumspect before one takes a decision of locating them anywhere near that. And following court orders another amendment came to this law that was in August 2003, the environment clearance is required for any project located within 15 kilometres radius of reserved forest, bio reserve or ecologically sensitive area irrespective of whether it has 10 crores or 100 crores investment made to it. Whatever may be the amount, if it is closer to this area it has to go through the microscopic scrutiny of the clearance process under this law.

A month later several other projects were also included, site clearance was made mandatory for Greenfield airports, petrochemical complexes and refineries. And when it came to offshore projects, anyway, these are projects that are going to be in national interest of course, and these are going to be in places which are surrounded by the sea where obviously there is no human habitation. And so, getting the communities of people to be in the know of things or to be engaged in the entire process is not necessary, and so no public hearing for offshore projects.

In 2004, one year later, an amendment was made to the EIA law because around that time construction and industrial estates were proliferating in India in a very big way, causing huge air pollution problems and problems of environmental degradation. And since built into those kinds of activities, there was nothing like an environmental clearance because many of them were for 10 crore or 20 crores or anything like that and so EIA was not required. And because of, once again, a lot of pressure that was put in by the public and through courts' intervention, another amendment came to this law, and EIA was made mandatory for construction and industrial estates.

One more amendment took place and that was one year later, in 2005 where in the enthusiasm of liberalizing our economy, the government came up with a new notification that no environmental clearance is required for projects related to expansion or modernization of nuclear power and related projects. In fact, nuclear power projects were always out of the purview of this law because of defence and national interests in question. River Valley projects were also included, ports and harbours and thermal power plants with a lease area of more than 5 hectares.

And in this regard, the only arbiter or the only decision maker would be the central government, which would decide in public interest on a case by case basis, we will take a call whether to require the environmental clearance to be done or relax the requirement of environmental clearance.