

**Constitution of India and Environmental Governance:
Administrative and Adjudicatory Process**

Professor M.K. Ramesh

Professor of Law

National Law School of India University, Bengaluru

Lecture 54

National Green Tribunal - III

(Refer Slide Time: 00:14)

III. RESPONSES, CRITIQUES AND ACTIONS



GOING BY THE RESPONSES AND REACTIONS, FROM VARIOUS QUARTERS THAT MATTER, THE VERY SUCCESS OF THE NGT, IN CHAMPIONING THE ENVIRONMENTAL CAUSE, APPEARS TO HAVE BEEN IN THE NEGATIVE!, AS THE FLOWING INDICATE:

- Its decisions are being challenged in various High Courts under Article 226 (power of High Courts to issue certain writs) with many asserting the superiority of a High Court over the NGT, claiming "High Court is a constitutional body while NGT is only a statutory body!" – by entertaining such petitions, the HCs have fuelled such debates in informed circles that the NGT has exceeded its jurisdiction, by taking on too many things that it was not meant to deal with*
- some truth exists in such a critique, especially when NGT began entertaining proceedings suo motu - such jurisdiction is not contemplated in NGT Act and such measures are, under the Constitutional Scheme are the exclusive preserve of the higher judiciary*



We come to the last part here. And that is what is the result, what has been the response. Other critiques to its actions or has that been accepted whole heartedly, warmly with great appreciation it is actually mixed bag. It has been a mixed bag for a variety of results. And that is what we are going to examine now. And then where exactly it stands is what we are going to examine.

If you just look at the hosts of responses and reaction from various contours that matter it look as thou that the very success of NGT in championing the environmental cause appears to have been its own undoing. The indications for that are given in narration of a few of those, for you to comprehend, understand and draw conclusions. One; its decision are being challenged in various high courts under article 226. You must know a little bit of the Constitution here.

The law says under the NGT Act, any order, decisions made by NGT, only appeal will lie to the Supreme Court. But under the Constitution there is a power vested in the High Court just like in the Supreme Court to take up any issue, any case which has something are the other to do with public interest, human rights, fundamental rights and entertain them notwithstanding anything that is there in law to that effect.

So, jurisdiction of high court are never ousted. Higher judiciary as the sentinels and custodians and the guardians of constitutional rights to issue writs to enforce them, is never compromised. There cannot be a law which will take away their powers. And so many a time very interestingly governments and corporate entities against whom orders are issued by NGT have been challenged either as violation of fundamental right or something against public interest, something which is not going to really serve the purpose of the public under Article 226.

And even the High Courts have entertained such petitions. And here a kind of psychological game is played by those petitioners who found it very inconvenient to digest decision given by NGT by coming up with these kinds of argument that the high court superiority over NGT. Actually, this is never an issue but this was actually touted as pitting high court against NGT high court is a constitutional body while NGT is only a statutory body.

And so you cannot say that NGT decisions NGT orders and instructions can never be challenged in the high court. When the law was made in 2010 when it said that the appeals from the orders of NGT would lie with the Supreme Court. It never said anything about this kind of a thing. By entertaining such petitions the high court have assured such a debate in very well inform circles that NGT might have exceeded its jurisdictions by taking out too many things that was it was not meant to deal with.

There may be an element of truth in it or it may even be exaggerated, both are possible. These needs have to debated and these needs have to be sorted out not in the manner in which it is been attempted here as to really decry one institution in order to ensure that business as usual would continue, unfortunately the end result has been that. But there is no denying that there is some truth in such a critique.

Like for example, NGT began entertaining proceeding Suo-Moto that is on its own accord even without any complaint being filed or even when complaint on certain issues are filed it started issuing orders on subjects which were not directly related to the issue on hand. Actually, Suo-Moto powers are exclusively with the High Courts and Supreme Court under this law Suo-Moto powers is not contemplated.

(Refer Slide Time: 05:50)



- (- as it happened in, the Application of K.J. Paulose, in 2013)- the NGT issued directions to the State Pollution Control Board (SPCB) for prevention of pollution of the river Periyar by Industries and to take appropriate action in case of violation, including closure of the units, after following due process of law)*
- Bureaucracy at the higher level of administration has also taken kindly to some its actions- like, summoning the Chief Secretaries of States and reprimanding them for poor record of performance in waste management- leading to even, imposing fines etc., on State Govts., in this and quite a few other instances!*
 - The absence of a formula based mechanism in determining the compensation has also brought criticism to the tribunal- the amounts fixed by the NGT, at times, do not have rational basis or a clearly evolved criteria, leading to the criticism that they are arbitrary!*



And it is more like a constitutional power wasted in the higher judiciary in the form of High Courts and Supreme Court. But NGT started entertaining such actions. I am just giving you an example that is case of K. J. Paulose and this was in 2013. What did NGT do? Issued directions to the state pollution control board for prevention of pollution of the river Periyar by industries and to take appropriate action in case of violation, including closure of units, after following due process of law.

This was not an issue on hand, on its own NGT took it up and this actually created a lot of ill will. Second; how did the bureaucracy react to the action of NGT? At the higher levels of administration especially the chief secretaries and secretaries where they were repeatedly summoned, reprimanded questioned order they did not and they could not take kindly to some of its actions. They were summoned, they were reprimanded for poor record especially on waste management.

Even fines were imposed on state governments and this made the entire bureaucracy to be viewed in poor light and especially when the higher officials or the ladder in bureaucracy are taken to task. You cannot expect them to take things lightly or lying down and the back lash was imminent and that was happening and you do not see either non-corruption or some actions to climb the wings of NGT. I will come to it little later.

The other major problem with NGT was absence of a formula-based mechanism in determining the compensation by the tribunal. There are instances as we have seen earlier of imposing pay 25 crores, pay 100 crores, pay 500 crores that kind of a thing done by the tribunal. And what is the criterion? They invariably referred to the principle of polluter pays, principle is only a principle. But you need an operative tool of working the principle. And what is the tool? The tool is number 1; a formula. How do you calculate the environmental damage??

How do you calculate the environmental cause? How do you calculate the repair cost? you needed to have a kind of check list on the basis of which you may determine the quantum of payments that are to be made for redressal, recovery, restoration, retrieval or positive action. But the amounts fixed by NGT do not have that kind of rational basis are clearly of all criteria and it is by natural that there was criticism that they are arbitrary. As a matter of fact, one may agree that the orders passed by them may appear to the heart but we are talking of law. We are talking of money, we are talking of investments, we are referring to something which is in economics, we are talking of something which need have to be related to each other, the cause and effect, and the impact. And so, the thinking mind refuses to recognize them in absence of the clear set parameters for such a calculation.

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- *As a matter of fact, some of the Orders “ appeal to the heart” although, the thinking mind refuses to recognise them, in the absence of clear set of parameters for such a calculation (-see the following examples:*
- *In Manoj Mishra Vs. Union of India(13.1.2015), that concerned clean and rejuvenated Yamuna River in Delhi, NGT issued directions to the Civic and Municipal authorities of Delhi to charge every household an environmental compensation fee as part of the property/house tax; - in Krishan Kant Singh Vs. National Ganga River Basin Authority (16.4.2014), NGT directed, the defaulting industrial unit to pay a compensation of Rupees Five Crores to the concerned State Pollution Control Board- based on the Polluter Pays Principle- to enable the authority to undertake remedial activities to ensure river conservation and in the case of R K Patel Vs. Union of India(18 February 2014), the NGT directed for environmental compensation of Rupees Ten Lakhs to be paid to the aggrieved farmers at Vapi, Gujarat due to the hazardous waste pollution)*



Take the example of Manoj Mishra versus Union of India. Clean and rejuvenate Yamuna River. That is what the NGT should directions to the stimulant municipal authorities. And what were the direction? Collect so much of money on every household as environment compensation fee as part of the property or house tax. This is a done thing everywhere but how do you really calculate that follow polluter pays that is what it said.

Without actually laying down the criteria. In Krishan Kant Singh versus National Ganga River Basin Authority, what did NGT do? It directed the defaulting industrial unit to pay a compensation of 5 crores to the state pollution control board. Once again, basis - polluter pays or it enabled the authority to undertake remedial activities to ensure river conservation and in Patel versus Union of India in 2014 order it directed the environmental compensation of 10 lakhs. Look at the language used - environmental compensation.

What does that mean? How do you calculate that? 10 lakhs to be paid to the aggrieved farmers of Vapi, in Gujarat due to hazardous waste pollution, pollution is occurred nobody is denying it. How do you calculate? Whether it is 10 lakhs or 10 crores please give us the rational basis upon which you collect the cause and effect and quantify the amount of money to be paid. Somehow that was not done. A very cleverly way in which it was done and this is something that has actually raised many an eyebrow. And on a number of occasions the decisions given by NGT are not fully complied with or implemented by the stakeholders of the government on the plea of

non-feasibility of giving effect to them within the time frame fixed by it. We could have done it but you have fixed too short period of time.

(Refer Slide Time: 11:35)



- *On a number of occasions, the decisions given by NGT are not fully complied with or implemented, by the stakeholders or the government, on the plea of non-feasibility of giving effect them, with in the time-frame fixed by it*
- *Its Decisions are also criticised and challenged due to their repercussions on economic growth and development!*
- *There is also a quite a bit of hindrance, in the effective working of the Tribunal, mainly because of exclusion of some of the important environmental issues under the law- Wildlife Protection Act, for instance, is one such law that gets excluded from the purview of the scrutiny and jurisdiction of NGT- this becomes problematic when it is required to deal with matters concerning Forest Conservation and the rights of the Forest-dwelling Communities of People, as the relevant laws are intimately intertwined in their working with the Wildlife law*



No time to think deliberate and act upon. Sorry, we cannot do and we can only do this much. The decisions are also criticized and even challenged because the kind of repercussions they will have on economic growth and development; by who? Even by government departments who should act and of course by corporate entities. This is an ideal situation that you are coming with this may work in Germany, it may work in United States but look at Indian conditions and in Indian conditions to work it will be economically ruin for us.

And when once the issue of economy comes when the issue of development comes the political leadership would suddenly wake up and will start criticizing orders and will put hurdles for the working of any of the decision given by NGT. And that is what actually happen. All this had its backlash from the administration. The administration started acting in such a manner where it would hurt, hurt badly hurt in such a manner that NGT would be paralyzed and will not be able to function properly.

Because it is giving too many headaches to so many people all the while and it started putting hurdles in the working of NGT. How could it do? It could do this in a number of ways but it took

advantage of what is not provided under this law. And over which NGT started acting upon. Like for example, you can if you just look at the list of the laws that are there which comes within the care and purview of NGT Wildlife Protection Act is kept out.

But invariably many of the orders and action of NGT have bearing upon wildlife law. And so challenges have come to high courts but look this is an issue high courts are better in competent to deal with and NGT should not, they have actually transgressed their limits. So please entertain petitions and courts have entertained petitions. On the actions NGT as been beyond their capacity and the argument have different orders.

And this is become bit of a problem because if you only deals with forest, and forest rights. How do you really deal with them without bringing in the other related laws within the purview of this authority; either you review them all of them or you include every one of them. Somehow the other the law is not helpful when it was planned and visualized in 2010, in picking some laws putting them within the purview of NGT and leaving out some laws which are very closely related to them out of its purview.

So, there is a bit of a manufacturing defect in the law as to hinder the effective working of this tribunal and also helping administration and corporate entities to take advantage in this gap in the law. But much more so is what the Ministry of Environment and Forest has been able to do or not has been able to do with or did not do. On a number of occasions in no subtle manner it hinted the tribunal “Look, there is a lot of resentment please limit your jurisdiction, please confine yourself to a recommendatory role especially on matters concerning environmental clearances they have liquating to the all these issues. We have given clearances, please give us recommendations, do not give instructions to us, do not issue orders upon us.”

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- MoEFCC has, on a number of occasions, in no subtle manner, hinted to the tribunal to limit its jurisdiction, by confining itself to a recommendatory role to it, especially on matters concerning Environmental Clearances, instead of issuing directions like a judicial body – rejecting it, the NGT, instead, criticized the Ministry for its poor decisions or actions – see, for instance, in POSCO case: Prafulla Samantray v. Union of India (30.3.2012), the Tribunal asked the Environment Ministry to review the Clearance, when some local villages refused to consent to the project, as it violated the Forest Rights Act, 2006)
- **THE BACKLASH, ESPECIALLY BY THE MINISTRY, IS ALMOST CRIPPLING: SINCE, 2018, A NUMBER OF VACANCIES HAVE OCCURRED IN NGT- MINISTRY HAS NOT BOTHERED TO MAKE THE APPOINTMENTS, TILL NOW- RESULT: THE WORK OF NGT HAS SLOWED DOWN IN RECENT TIMES**



But you know that in a number of cases I have just referred in this slide the case of Prafulla Samantray versus Union of India a POSCO case. The tribunal has rejected all these pleas of the Ministry it had as the environment ministry to review the clearance process especially when the local community have refused to consent to the project. How could you overlook that and take decisions and clear projects; because it is violating some of other laws like forest rights act.

So, it is very understandable that because of this either on account of overreach or enthusiasm or whatever there has been a lethal paralyzing reaction affecting the working of NGT. The ministry's action has been almost crippling like since 2018 a number of vacancies have occurred in NGT. And the ministry has not made appointments till now.

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- REPEATED DEMANDS HAVE BORNE LITTLE FRUIT-THE LURKING FEAR IS THAT THIS BODY MAY MEET THE SAME FATE AS THAT OF NEAA!
- ON BALANCE, IT CAN BE ASSERTED THAT THE WORKING OF NGT SHOULD BECOME MORE PROFESSIONALISED, BY WAY OF ORGANISATION, PROCEDURES AND CLEAR AND REASONED DECISIONS(- LIKE, "SPEAKING ORDERS", IN THE CASE OF ADMINISTRATION)
- HOWEVER, FOR ITS WEAKNESSES AND SHORTCOMINGS,THIS GLORIOUS EXPERIMENT IN ENVIRONMENT JUSTICE DISPENSATION SHOULD NOT BE MADE TO DIE AS, NGT REMAINS THE ONLY AND FINAL HOPE FOR THE PROTECTION OF ENVIRONMENT IN INDIA!



So, what is the result? The result is its work has been hampered and the repeated demands not just in NGT not through emissaries sent by NGT to the government that fill in these vacancies even these issues are raised in High Court and Supreme Court but it has borne little fruit. The real fear that one would have is that this body may meet the same fate as that of NEAA, National Environment Appellant Authority. You already know as we have discussed how it work between 1997 to 2000 the National Environment Appellant Authority.

But from 2000 onwards how its work was crippled. The same is the trajectory of development taking place with regard to NGT as on balance. It can be asserted that the working of NGT whatever one may argue required a little bit more professionalized by way of organization procedures and clear and reasoned decision like we expect. That is the case of administration when they issue orders, the order should be speaking. They are called as speaking orders that when you issue an order the reasons for why you have come up with this kind of an order should be an integral aspect of the order so that people would know why such orders are issued why such direction are issued some or the other in recent times or even right from the very beginning as we have seen in many cases this has not happened.

In just issuing the order giving instructions "Do as I say" that would not work. So may be a little bit more tact. A little bit more diplomacy perhaps would have helped the NGT to sail over the troubled waters that it has gotten into. But all said and done, in conclusion it must be stated that

whatever there are weakness and short comings in NGT, this glorious experimented environment justice dispensation, unparalleled anywhere in the world should not be made to die because NGT remains the only and the final hope for the protection of environment in India.