PENALISING ENVIRONMENTAL VIOLATIONS
An Analysis of The Ministry's Proposal

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Abstract

In October 2015, the Ministry of Environment, Forest and Climate Change released a Draft Environment Laws (Amendment) Bill 2015 proposing amendments to the Environment (Protection) Act 1986 and the National Green Tribunal Act 2010. The stated objective of the Bill is to provide 'effective deterrent penal provisions' and to introduce the concept of monetary penalty. It also aims 'to minimise the exercise of discretion and make an unambiguous framework'. This paper summarises the text of the Bill and analyses whether it will complement the environmental objectives the parent laws espouse. It discusses some of the major concerns relating to the proposed amendments under three broad themes: environmental damage and penalties, adjudicating authorities and rule making powers. It concludes that although penalties that effectively deter violators are certainly the need of the hour, the proposed amendments are unlikely to achieve this objective.

About the author

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Introduction

Environmental governance in the country is in desperate need for reform – and has been for a while. Environmental quality is worsening across the country. While there are several reasons for the state of India's environment, a significant cause for environmental degradation in the country has been the inability of the law to deter violators. Penalty provisions in Indian environmental laws are lenient, hard to impose, and unlikely to affect 'business as usual'. The situation is aggravated by other problems – a slow justice delivery system, poor monitoring and enforcement capacity of regulators, and lack of comprehensive databases to evidence violations, among others.

It is in this context, that the Draft Environment Laws (Amendment) Bill 2015 [the Bill] dated 7 October 2015 released by the Ministry of Environment, Forest and Climate Change (MoEFCC) to amend the Environment (Protection) Act 1986 and the National Green Tribunal Act 2010 gains salience. This article summarises the text of the Bill and analyses whether it will complement the environmental objectives the parent laws espouse. Although the article focuses on the text of the Bill as proposed, admittedly, there are several aspects of environmental regulation that the Bill does not address and that need urgent – and simultaneous – rethinking.

Elements of the Bill

The stated rationale for the Bill is limited to a short introductory paragraph. According to this, the objective of the Bill is to provide 'effective deterrent penal provisions' and to introduce the concept of monetary penalty. It further states that 'to minimise the exercise of discretion and make an unambiguous framework', the regulatory framework would be fleshed out through subsequent rules.

The Bill proposes amendments to facilitate mainly four major changes to the current regulatory framework: first, defining types of environmental damage; second, prescribing varying monetary penalties based on the type and extent of environmental damage; third, setting up adjudicating authorities to adjudicate and impose monetary penalties; and fourth, empowering the Central Government to impose fees for various services it provides.

Defining types of environmental damage

The Environment (Protection) Act 1986 [the EP Act] does not define offences or what constitutes damage to the environment. It penalises the contravention of provisions of the Act, and the Rules made and orders or directions issued under the Act. The punishment prescribed is an imprisonment of a term up to five years, or a fine which may extend to one lakh rupees or both.[1] If the contravention continues, there is additional punishment.

The Bill defines three types of environmental damage – substantial damage, minor violation and non-substantial damage. 'Substantial damage' is the damage to environment by, *inter alia*, pollution due to which the environment is affected or likely to be adversely affected. This could occur due to a direct violation of a specific statutory provision; any act or omission of the occupier or negligence on his part (whether by accident or otherwise); or carrying out any project or activity by the occupier.

Minor violation includes an act causing damage to the environment due to non-compliance of the provisions of the Act or Rules made, or orders or directions issued thereunder, and is not a substantial damage or non-substantial damage. Non-substantial damage has been defined along the lines of a minor violation but also includes failure to meet the terms and conditions of any clearance, approval, authorisation, permission or registration given under the EP Act which does not cause substantial damage and is not a minor violation.

There is no further guidance in the Bill with regard to the categorisation of environmental damage, and the Central Government has been given the powers to frame rules that would prescribe the manner of determining the three types of environmental damage.

Monetary penalties

Depending on whether the damage is substantial or non-substantial, or it amounts to a minor violation, the Bill proposes a scale of monetary penalties that will be imposed by (proposed) adjudicating authorities. These penalties are summarised in Table 1.

[1] Section 15, EP Act.

Table 1: *Proposed monetary penalties and adjudicating bodies*

<table>
<tr><th>TYPE OF DAMAGE</th><th colspan="3">PENALTY</th><th>ADJUDICATING BODY</th></tr>
<tr><td rowspan="4">Substantial</td><td>DAMAGE CAUSED IN AN AREA</td><td colspan="2">AMOUNT OF PENALTY</td><td></td></tr>
<tr><td>Not exceeding 5 km radial distance from the outer boundary of the project area</td><td>5 to 10 crore rupees + additional 50 lakhs rupees per day the damage continues</td><td rowspan="3">Additionally, imprisonment for a term of not less seven years and could extent to imprisonment for life, and a fine of not less than ten crore rupees + additional 50 lakh rupees per day the violation continues</td><td rowspan="3">Adjudicating authority appointed under the proposed amendments

Additional punishment of imprisonment and fine to be decided by courts</td></tr>
<tr><td>Beyond the area of 5 km but within 10 km radial distance from the outer boundary of the project</td><td>10 to 15 crore rupees + additional 75 lakhs rupees per day the damage continues</td></tr>
<tr><td>Beyond 10 km radial distance from the outer boundary of the project</td><td>15 to 20 crore rupees + additional 1 crore rupees per day the damage continues</td></tr>
<tr><td>Minor violation</td><td colspan="3">1,000 to 10,000 rupees + additional 5,000 rupees per day the violation continues</td><td>Delegate of the Central Government [Section 23, EP Act]</td></tr>
<tr><td>Non-substantial</td><td colspan="3">1 lakh to 5 crore rupees + additional 1 lakh rupees per day the violation continues</td><td>Adjudicating authority appointed under the proposed amendments</td></tr>
</table>

In cases of substantial damage to the environment, along with the monetary penalty imposed by the adjudicating authority, the person causing the damage will also be liable for a further punishment of imprisonment and fine (as indicated in Table 1). Presumably this additional penalty will be imposed by a court, as neither the adjudicating authority nor the National Green Tribunal [NGT] have the power to award imprisonment sentences.

Under the present law, if an offence is punishable under the EP Act and any other law, the offender would be liable to be punished under the other law.[2] The Bill amends this position and states that the offender would be liable under the law which imposes a greater punishment, though it is not clear how such comparisons might work across disparate types of punishments.

Setting up Adjudicating Authorities

The Bill proposes the appointment of adjudicating authorities by the Central Government to adjudicate and impose penalty for violations under the EP Act, the Rules made or orders or directions issued under it. These violations must cause substantial or non-substantial damage. Currently, violations under the EP Act are adjudicated by the NGT or in some cases by the courts. It is not clear whether there will be one adjudicating authority for the country, or for each state, district or some other territorial division. The adjudicating authorities will consist of two members appointed by the Central Government based on the recommendations of a specially constituted selection committee. A person who is, or is qualified to be, a District Judge, or is an officer of the Central or state government and meets the qualifications stipulated in the Bill is qualified to be a member of the authority.

The Bill identifies factors that the authority has to consider while determining the amount of penalty: the amount of damage to the environment, the amount of disproportionate gain or unfair advantage made as a result of the damage, the repetitive nature of the damage, the continuance of the default, and the extent of injury caused or likely to be caused.

Any person, authority, board or government can file an application before the authority for imposition of penalties, and it would have to decide the application within six months. An appeal against a decision of the adjudicating authority would lie before the NGT.[3] Significantly, if a penalty is being challenged, the Tribunal would not be able to entertain the appeal until 75% of the penalty amount is deposited with it. The Bill proposes the setting up of a fund by the Central Government in which the penalty amount will be deposited. The amount collected is to be utilised for the protection, improvement and management of

[2] Section 24, EP Act.

[3] No appeal mechanism has been proposed for the imposition of penalty for minor violations.

the environment, though not necessarily in the area from where the penalty has been recovered. Non-payment of the penalty could result in imprisonment or a further fine (presumably imposed by a court).

Fees for services

The Bill also introduces provisions to empower the Central Government to levy fees for various services that it provides under Rules issued under the EP Act, including for any application, amendment of document, issue of certificate, giving of clearance or approval,[4] grant of registration and authorisation, supply of statistics, preparation and use of national databases etc. The fees recovered for such services shall be paid into the public account of India in the Reserve Bank of India, or into an account identified in consultation with the State Government and notified in the Official Gazette.

The Bill proposes amendments to the National Green Tribunal Act 2010 [the NGT Act] to the extent that appeals against decisions of the adjudicating authorities may be filed before it.

Analysis

The EP Act is an umbrella legislation. It empowers the Central Government to take necessary measures to protect and improve the quality the environment, and to prevent, control and abate environmental pollution.[5] This includes issuing rules and notifications to regulate new forms and sources of environmental degradation. Enforcement provisions of the EP Act apply to these rules and notifications and are crucial to their implementation. Therefore, the proposed amendments in effect impact a very wide range of present and future environmental issues.

The Bill was placed on the MoEFCC's website and comments were invited from the public within fifteen days. This period for consultation is very short even by the Ministry's own standards. The 1986 Rules framed under EP Act require the Central Government to place draft texts of proposed notifications in the public domain, and to give members of the public sixty days to respond. The MoEFCC recently issued Draft Rules for the management of solid waste, plastic waste, bio-medical waste and e-waste for which the

[4] Interestingly, fees appear to be conditional on the final outcome of a approval granting process – i.e. the grant of the approval, and not on the initiation of the process itself.

[5] Section 5, EP Act.

public was given sixty days to respond.[6] The MoEFCC could have adopted a similar time-frame for the Bill and engaged in more rigorous public consultation.

There are several concerns with regard to the proposed amendments, and it is helpful to discuss them under three broad themes: environmental damage and penalties, adjudicating authorities and rule making powers.

Environmental damage and penalties

If the proposed amendments carry through, the EP Act would contain a variety of sanctions for environmental damage. Arguably the regulator would enjoy certain flexibility in selecting the appropriate sanction depending on the nature of the offense. However, for such a system to work effectively, the offenses, the various sanctions, and the criteria to determine the trigger of each sanction would have to be clearly defined and should also complement the legislative objective. The Bill does not do so.

First, the Bill does not provide a rationale for including a gradation in offenses and consequential penalties. The three types of environmental damage are poorly defined.[7] The definition of substantive damage focuses on pollution and does not recognise other impacts (such as on biodiversity) to constitute substantive damage to the environment. As the proposed amendments replace the existing penalty provision in the EP Act, the Bill effectively does away with punishment for any contravention or environmental damage that is not envisaged in the Bill.

Minor violation and non-substantive damage to the environment are similarly defined, yet the proposed penalty procedures are very different for the two categories of offences. The rationale for having two categories of offenses that are otherwise quite similar is not clear.

[6] Public Notice on Draft Waste Management Rules, 2015, available at http://www.moef.nic.in/sites/default/files/Public%20Notice%20on%20Draft%20Waste%20Management%20Rules%20updated.pdf

[7] It is possible that the Bill is implementing one of the recommendations of the High-level Committee (HLC) chaired by former Cabinet Secretary T.S.R. Subramanian constituted to review the EP Act (along with five other laws).

Second, the factors that have to be considered by the adjudicating authority while determining the amount of penalty are insufficient and may even be unsuitable to achieve the aims of the EP Act. The geographical extent of damage cannot be the primary basis for calculating the penalty slabs. It may be one of the considerations. The impact of a pollutant or poor environmental conditions may vary depending on the pollutant or the nature and extent of environmental degradation. Pollution may be concentrated near the source, or may have a far greater impact (because of proximity to densely inhabited areas, or fragile ecology) even if restricted to a five kilometres radius. In such cases, the law should not statutorily bar the adjudicating authority from imposing a proportionate penalty by stipulating slabs.

Third, as several factors, subjective and objective, are to be considered while quantifying the penalty amount, there cannot be an upper limit on the penalty amount as suggested in the Bill. Penalties cannot be designed to allow potential polluters to factor in the cost of pollution as an input cost, pass on the increased costs to the consumer and avoid undertaking actions for effective prevention of pollution as well as restoration of degraded environment. There must be a degree of flexibility (and unpredictability) in the calculation of the penalty amount which could correspond to, *inter alia*, the magnitude and capacity of the polluting industry,[8] the historical compliance record of the non-conforming industry, as well as the nature – not just the amount – of damage.

Fourth, the adjudicating authority can impose a penalty for environmental damage only on the occupier (as defined in the EP Act) or any other person in default. This could limit the scope of application of the law. For the law to be an effective deterrent, the Bill should expressly empower the adjudicating authority to impose penalty not only on the occupier but also on any person who was in a position to prevent or regulate the pollution. This could potentially address one of the reasons for the abysmal enforcement of Indian environmental regulation: the complicit role of the regulatory agencies that are known to deliberately ignore instances of adverse environmental impacts despite being repeatedly notified.

Finally, while a mix of regulatory responses (sanctions) could allow for a more efficient and effective regulation, it also allows the government to regularly adopt the lowest cost (or least onerous for industries) option, at the expense of environmental quality. The government has to be legislatively

[8] As held by the Supreme Court in *MC Mehta v Union of India* (Oleum Gas Leak case) (1987) 1 SCC 395 and *Deepak Nitrite v State of Gujarat* (2004) 6 SCC 402.

mandated to prioritise environmental protection and appropriate action against offenders. For instance, the government must issue directions under Section 5 of the EP Act for closure of any polluting unit for immediate relief, rather than await the conclusion of a civil penalty proceeding. It must not *a priori* consider monetary penalties as a preferable (and only) enforcement route in every case.

Adjudicating Authorities

The introductory paragraph to the Bill does not explain the inadequacies in the current (civil) adjudicatory mechanism under the NGT Act that justify the introduction of another layer of environmental adjudication. The NGT has wide ranging powers under the NGT Act, and with judicial and expert members on the bench, it is well placed to comprehensively decide environmental cases. The Bill does not explain why the newly constituted authorities would be in a better position to impose monetary penalties than the NGT. Currently the NGT can order restitution, relief and compensation under Section 15(1) of the NGT Act. The power to impose monetary penalties could have been included through an amendment.

In the past, environmental institutions in India such as the National Green Tribunal, the Pollution Control Boards, and the Coastal Zone Management Authorities have faced, and in some cases continue to face, serious institutional challenges particularly on issues of personnel, funding, infrastructure, and autonomy. These issues are well documented and have been frequently brought to the notice of the government. In this context, constituting a new set of institutions without assessing the capacity of the government (central and state) to make them effectively functional appears to be ill-advised.

The composition of the adjudicating authority proposed by the Bill raises some questions about the competence, independence and credibility of the members. First, the presence of a 'judicial' member is not mandatory, even though the authority will be adjudicating legal issues while determining regulatory compliance and imposing penalties. Second, a person is qualified to be a District Judge if he or she has been an advocate for at least seven years. Given the nature of disputes that could be brought before the adjudicating authority, seven years of experience at the Bar, that too without any requirement for exposure to environmental issues, seems an inadequate qualification for a member. Third, government officials with 'adequate experience of handling the matters relating to environment' are not a very large group of persons. They are most likely officials from the MoEFCC, the Pollution Control Boards, or the

State Environment and Forest Departments who may have already engaged with issues that will be raised before the authority. Furthermore, once they demit their office in the adjudicating authority, they may go back to their parent departments. This could lead to a clear conflict of interest and adjudication by these officials, in the absence of any provision to ensure independence and credibility in the decision making process, will be justifiably suspect.

The Bill is likely to make access to environmental justice harder. As the adjudicating authority can only impose monetary penalty, victims of environmental degradation would have to approach the NGT in parallel with compensation claims. And if they are aggrieved by the order of the adjudicating authority, they will have to file a separate appeal before the NGT. Furthermore, as the punishment for non-payment of monetary penalty is imprisonment, the person who complained against the environmental damage would now have to approach the competent court for an appropriate order. The claim before the adjudicating authority is also likely to add at least nine months to the time taken for environmental adjudication to achieve finality: the authority has been given six months' time to decide an application before it, and then the aggrieved party has another three months to approach the NGT. Currently, similar claims can be instituted in the NGT directly.

Rule making powers

The Bill aims 'to minimise the exercise of discretion and make an unambiguous framework', and therefore the details about the categorisation of the violation and the process of quantification of the penalty and other relevant provisions are to be fleshed out through subsequent rules. Presumably, rules have been chosen as the preferred mode as they are, in theory, subject to greater scrutiny as they are placed before the Parliament.[9] They are therefore less likely to be questioned than other executive orders such as circulars, notifications or office memorandums that the MoEFCC often issues to introduce changes in the regulatory framework.[10]

[9] Section 25, EP Act.

[10] For instance, the MoEFCC has frequently clarified and amended the Notification governing the environmental clearance process (EIA Notification 2006) for various reasons. The ease with which the MoEFCC is able to do this has been criticised in the past.

While there is merit in preventing arbitrary executive action by requiring formulation of rules, the Bill creates a different yet equally serious problem. It enhances the rule making powers of the Central Government but does not include sufficient guidance in the text of the parent Act for the exercise of these powers. The determination of substantial and non-substantial environmental damage and minor violations, critical to the implementation of the law and its deterrence effect, depends significantly on the way the offenses are defined. The Bill leaves this determination entirely to the discretion of the executive. Unfortunately, the result – likely to be affected by political, economic and other extraneous exigencies – may not support the environmental cause.

Another problematic rule making power introduced by the Bill is the power to levy fees for preparation and use of national databases on environment. The Central and State Governments should actively prepare and update national databases on various environmental indices, as policy making in the country needs to be based on accurate information. While the dissemination of such data to certain classes (such as industries) may be at a price, the preparation of the databases themselves cannot, and should not, be made contingent on external demand and payment of fees.

Conclusion

There is no doubt that enforcement mechanisms under the EP Act, as under other environmental laws, have failed. However, a reform process cannot be undertaken hastily, or without considering the environmental impact of poorly designed and implemented enforcement mechanisms. Penalties that effectively deter violators are certainly the need of the hour, but the proposed amendments are unlikely to achieve this objective. They need to be reconceptualised in a manner that truly serves an environmental agenda.