

Special Comment

THOUGHTS ON ENVIRONMENTAL PUBLIC HEARINGS

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Though not expressly written into the Constitution of India, the Right to a Clean Environment has been read into Article 21 of the Constitution of India through landmark judicial pronouncements of the Supreme Court of India over the last two decades. An important aspect of this right is public participation in the management and sustainable use of the environment. Environmental Public Hearings in the case of large projects that have the potential to cause large scale and long term change to the environment are an important embodiment of this principle. The concept of public hearings itself is based on the duty to hear the other side (audi alteram partem) and the duty to give reasons, which are two important pillars of natural justice. The author, a Judge of the Supreme Court of India, discusses these issues as well as the procedure for Public Hearings as envisaged in Indian Law. Finally, the essay discusses the relevance of Environmental Public Hearings in the light of the principle of sustainable development and the precautionary approach in environmental law.

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I. INTRODUCTION

The Constitution of India is amongst the few in the world that contains specific provisions for the protection of the environment. This national commitment to protect and improve the environment is explicitly enunciated in Article 48A of the

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Constitution of India.¹ The Judiciary has also strengthened this mandate through decisions of Supreme Court of India over the past two decades.² The Government of India, recognizing the principle embodied in the Constitution to protect the environment of our country, has introduced a system of obtaining clearance for certain categories of industries and development projects. A notification under the Environment (Protection) Act, 1986 has been issued, in respect of any person who desires to undertake any new project or the expansion or modernization of any existing industry or project. Under this notification, persons are required to seek environmental clearance for a proposed expansion or modernization activity, if the resultant 'pollution load' is to exceed the existing levels. The 'pollution load' in the above context covers emissions, liquid effluents, and solid and semi-solid wastes generated. The project controller will have to approach the State Pollution Control Board ("SPCB") for certifying whether the proposed modernization or expansion activity is likely to exceed the existing pollution load. The project proponent will have to submit an executive summary incorporating in brief the essence of the project details and findings of environmental impact assessment study which could be made available to concerned parties or environmental groups on request. The concerned parties or environmental groups should be *bona fide* residents located at or around the project site. A Public Hearing is contemplated in case of projects involving large displacement of people or having severe environmental ramifications.³

II. PUBLIC HEARINGS AND THE PRINCIPLES OF FAIRNESS AND NATURAL JUSTICE

This system of public hearing was introduced from 1994 based on the broad principle that bodies, like the Pollution Control Boards, entrusted with the power of enforcement of pollution control laws should not arbitrarily exercise such power without first hearing the persons who are likely to be affected by the proposed project. The conduct of public hearings ensures that the public, particularly those likely to be affected by the industrial activity, get a chance to obtain the right information about the project. In most cases, the industry seeking sanction will normally assert that their project is environmentally sound and there is no likelihood of significant pollution. The Pollution Control Board, however, may not have the benefit of the views and perspectives of the persons who could be the victims of the potential pollution, or who may be residing in the area where the industrial activity is proposed to take place.

¹ CONST. OF INDIA art. 48A: "Protection and improvement of environment and safeguarding of forests and wild life- The State shall endeavour to protect and improve the environment and to safeguard forests and wildlife of the country."

² See, e.g., *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1988 S.C. 2187; *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420, 424; *M.C. Mehta v. Union of India*, (1992) 3 S.C.C. 256, 257; *Virender Gaur v. State of Haryana*, (1995) 2 S.C.C. 577.

³ See Ministry of Environment and Forests Notifications: dated Jan. 27, 1994 - S.O.60 (E), dated May 4, 1994 - S.O.356 (E) and dated Apr. 10, 1997- S.O.318 (E).

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It is on the basis of a fundamental rule of fair procedure – *audi alteram partem*,⁴ or hearing all sides before taking a decision – that the scheme for public hearing has been formulated.

The project proponent will have to submit an executive summary incorporating in brief the essence of the project details and the findings of the environmental impact assessment study. This is made available to concerned parties or environmental groups on request.⁵ The purpose of conducting a public hearing is to gather the opinion of the public including the nearby residents, environmental groups, and other affected parties. By conducting a hearing, the public has a chance to have prior information about the project and to express their views on the subject. The summary of the project is made available to the public for their information and for eliciting their views on the project while conducting the hearing. It may also be noted that the people have a fundamental right of information, and the concept of a public hearing is in line with this principle as well.⁶

A proper hearing, according to Lord Denning, must always include a “fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.”⁷ If the right to be heard is to be a real right, worth anything, it must carry with it a right in the public to know about the project proposed by the proponent. The public must know what are the materials produced by the project holders to substantiate their claim and only then can it be said that public have been given a fair opportunity of hearing.

A public hearing will normally be an oral hearing. However, in some matters, it may suffice to give an opportunity to make representations in writing. Where any adverse material is disclosed and provided, the test is that the demands of fairness should be substantially met. The public attending such a public hearing should see that their objections are put in writing so that any important points made by them are not omitted by the authorities concerned. They should also produce evidence like reports, photographs, newspaper reports etc. to support their claim.

⁴ See *M.P. Industries v. Union of India*, A.I.R. 1966 S.C. 671; *North Bihar Agency v. State of Bihar*, A.I.R. 1981 S.C. 1758.

⁵ SHYAM DIVAN & ARMIN ROSENCRANZ, *ENVIRONMENTAL LAW AND POLICY IN INDIA—CASES, MATERIALS AND STATUTES* 418, 419 (2d ed. 2001) [hereinafter *DIVAN & ROSENCRANZ*].

⁶ See generally *Raj Narain v. Union of India*, A.I.R. 1975 S.C. 865; *Dinesh Trivedi M.P. v. Union of India*, (1997) 4 S.C.C. 306; *Union of India v. Association for Democratic Reforms*, J.T. 2002 (4) S.C. 501.

⁷ See *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322 (per Denning, L.J., citing approvingly from *R v. Hendon Rural District Council ex parte Chorley*, [1922] 2 K.B. 696).

The authority responsible for conducting the public hearing will have to consider all the objections raised by the public. One would expect that authority does not come for the hearing with a prejudged view. Fairness demands that the public authority consider only the relevant factors and ignore the irrelevant ones.⁸ Moreover, public hearings are not meant to be a mere formality to be conducted in haste but conducted fairly keeping the interests of justice in mind.

III. DUTIES AND FUNCTIONS OF THE AUTHORITY

The authority empowered to conduct public hearing performs a quasi-judicial duty while functioning under the Act. The law provides that if no increase is likely in the existing pollution load as a result of the proposed project, the project proponent is not required to seek environmental clearance. A copy of such certificate issued by the SPCB will have to, nevertheless be submitted to the 'impact assessment agency' which is normally the Ministry of Environment and Forest, for further action.⁹

The Board should nevertheless keep in mind that a person opposing a project on environmental grounds is most likely to suffer in the event of an environmental problem. Above all, the authority should be guided by the constitutional duty required of citizens to protect the environment.¹⁰ At the same time, the authority as a quasi-judicial body, while not normally required by a general rule of law to give reasons, should do so in the interests of fairness and justice. Courts have held in a series of cases, that statutory tribunals must give satisfactory reasons.¹¹ This will, no doubt allow the losing party to decide whether it should appeal on a point of law.

IV. TOWARDS A CONCLUSION: WEIGHING THE INTERESTS OF INDUSTRY AND THE CITIZEN

While there is no doubt that there is an important duty imposed on industry to meet the requirements of the law (if not to exceed them) there exists a similar duty in spirit, if not in law, on the general public. Through hearings, the general public is made knowledgeable about pollution, which they may be exposed to. In my opinion, there exists a duty to utilise this facility in the right manner. The purpose of conducting public hearings is to minimise the negative impact of the project right from the planning stage to the implementation stage. The benefits and impact should be weighed in the right spirit to support or object to the project proposal or even to suggest or demand changes in the project proposals.

⁸ See generally *Associated Provincial Corporation Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223, for a discussion of the rights and powers of administrative bodies.

⁹ DIVAN & ROSENCRANZ, *supra* note 5, at 810.

¹⁰ See generally *M.C. Mehta v. Kamal Nath*, (1997) 1 S.C.C. 388.

¹¹ See, e.g., *L. Chandra Kumar v. Union of India*, A.I.R. 1997 S.C. 1125.

Thoughts on Environmental Public Hearings

The traditional notion that development and ecology are opposed to each other is no longer a good principle after the Brundtland Report.¹² "Sustainable Development" has come to become the accepted norm both in India¹³ and abroad.¹⁴ Adhering to the principle of inter-generational equity, sustainable development as envisioned by the Supreme Court suggests that the needs of the present must be met without compromising the ability of future generations to meet their own needs.¹⁵ 'Sustainable development' has come to be accepted as a part of Customary International Law,¹⁶ even though its salient features have yet to be formalized.

Pollution control boards must anticipate, prevent and attack the causes of environmental degradation. Approving the so-called 'precautionary principle,' it has been held by the Supreme Court that where there is a threat of serious and irreversible damages, lack of scientific certainty should not be used as a reason, for postponing measures to prevent environmental degradation.¹⁷ People are at the center of 'sustainable development.'¹⁸ They are entitled to a healthy and productive life in harmony with nature.¹⁹ In order to achieve sustainable development, environmental protection constitutes an integral part of the development process and cannot be considered in isolation from it. It essentially requires that the state and citizens co-operate in good faith and in a spirit of partnership. The Indian Constitution obliges citizens and judges alike to protect and improve the natural environment.²⁰ The system of the public hearing as embodied in India's environmental laws is the acceptance of the right of people to be informed as to the state of their air, water and land.

¹² See G. BRUNDTLAND, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 95 (1987) [hereinafter BRUNDTLAND REPORT].

¹³ See the preamble to the NATIONAL CONSERVATION STRATEGY AND POLICY STATEMENT ON ENVIRONMENT AND DEVELOPMENT (Ministry of Environment & Forests, Government of India, June 1992) ¶¶ 1.1, 1.4 where sustainable development is clearly stated as the applicable norm.

¹⁴ See DIVAN & ROSENCRANZ, *supra* note 5, at 583-586 for some of these instances.

¹⁵ See *State of Himachal Pradesh v. Ganesh Wood Products*, A.I.R. 1996 S.C. 149, 159, 163.

¹⁶ Certainly it has been accepted by Indian courts as such, see, e.g., *Vellore Citizen's Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715.

¹⁷ *Vellore Citizen's Welfare Forum*, *id.* at 2721; *S. Jagannath v. Union of India*, A.I.R. 1997 S.C. 811, 846 (Shrimp Culture Case); *A.P. Pollution Control Board v. Prof. M.V. Nayadu*, A.I.R. 1999 S.C. 812, 819.

¹⁸ See Agarwal, *Politics of Environment-II, as in THE STATE OF INDIA'S ENVIRONMENT (1984-85): THE SECOND CITIZEN'S REPORT (1986)* at 362. See also BRUNDTLAND REPORT, *supra* note 12, at 95.

¹⁹ This has been held concomitant with the Right to Life as guaranteed by CONST. OF INDIA art. 21. See *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420, 424; *M.C. Mehta v. Union of India*, (1992) 3 S.C.C. 256, 257 (Delhi Stone Crushing Case). See also Rosencranz & Rustomjee, *Citizen's Right to a Healthful Environment*, 25 ENV. POL'Y & L. 324 (1995).

²⁰ See, e.g., CONST. OF INDIA art.51A (g).