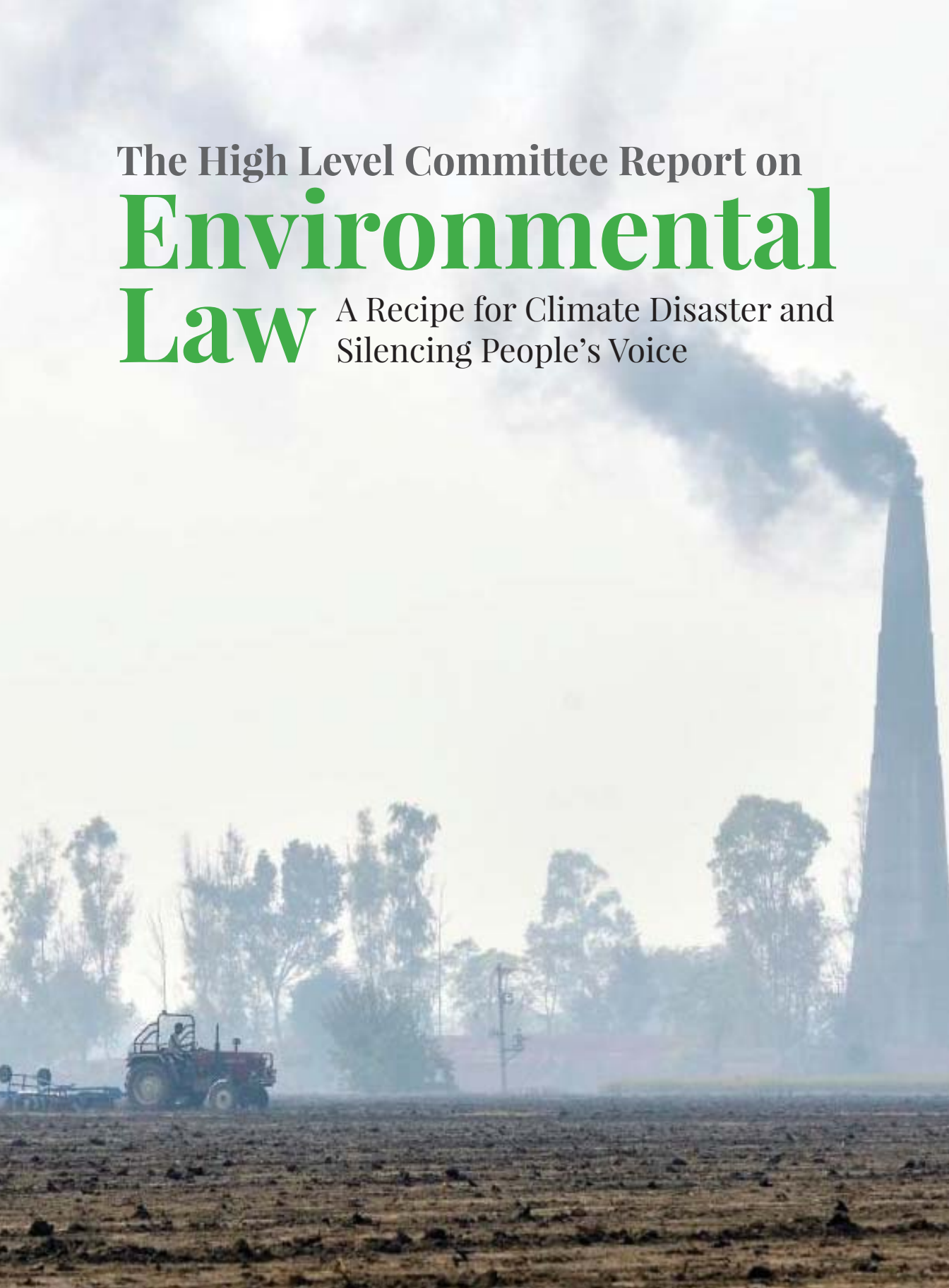
# The High Level Committee Report on Environmental Law

## A Recipe for Climate Disaster and Silencing People's Voice



# The **High Level Committee Report** on Environmental Law

## A Recipe for Climate Disaster and Silencing People's Voice

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# Overview

The High Level Committee to review Environmental laws that was constituted on 29th of August 2014 by the Ministry of Environment, Forests and Climate Change (MoEF&CC) to review various environmental laws, submitted its report to the Central Government on 20-11-2014. The High Level Committee ('HLC' in short) comprised of former Cabinet Secretary T.S.R Subramanian as Chairperson, with former Secretary to Government of India Vishwanath Anand, former Judge of the High Court, Justice A.K Srivastava and former Additional Solicitor General of India K.N Bhat as members. The Committee was entrusted to review the Environment (Protection) Act, 1986, the Forest (Conservation) Act, 1980, the Wildlife (Protection) Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, and the Air (Prevention and Control of Pollution) Act, 1981. The Indian Forest Act, 1927 was added subsequently to this list. Terms of Reference of this committee were:

(i) To assess the status of implementation of each of the aforesaid acts vis-à-vis the objectives;

(ii) To examine and take into account various court orders and judicial pronouncements relating to these Acts;

(iii) To recommend specific amendments needed in each of these Acts so as to bring them in line with current requirements to meet objectives; and

(iv) To draft proposed amendments in each of the aforesaid Acts to give effect to the proposed recommendations.

To perform the above task the HLC was given merely 2 months time. It later sought an extension by a month, which was given.

At first glance, if one reads only the Preamble and the Recommendations of the HLC, one may be tempted to conclude that the report may actually help to protect our environment and biodiversity. However, the devil lies in the details. Though the report liberally quotes from the Isha Upanishad and highlights the need for 'transparency', 'accountability', 'inter generational equity' and 'sustainable development' one finds that there is little connection between the stated philosophy and the recommendations.

At the end what the HLC really prescribes is a series of recommendations to expedite projects. The recommendations include a 'single window' approval process, a 'fast track treatment' for linear, power and coal projects, 'a special procedure' for 'strategic' and 'national projects'. There is implicit trust in whatever information is submitted by the business entities under the borrowed Principle of 'utmost good faith'. At the same time, there is a sense of suspicion on the community by requiring the people to prove their 'bona fide' and by limiting public participation to only those the HLC describes as 'genuine local people'.

**Calling the HLC report 'radical' is an understatement – it is revolutionary, but a revolution against the environment, the voice of the people, and democratic processes**

The procedure adopted by the HLC in undertaking the consultation was piecemeal and cosmetic. RTI responses from the MOEF In their response, the ministry has enlisted a total of 30 meetings held by the HLC. Of the 30 meetings, only seven were held with 'civil society, non-governmental organizations (NGO) and prominent citizens' across Delhi, Bangalore, Mangalore, Bhubaneswar and Patna. Details show that in many of the meetings meant for civil society and NGO's, representatives of trade bodies and industry were attendees. In addition, the information shows that the HLC did not hold any meetings in key states such as Maharashtra, Rajasthan, Chattisgarh, West Bengal and entirely skipped the environmentally sensitive north-eastern region entirely1

In sum, in less than three months the HLC has not only suggested radical changes that would undermine all of the laws it was tasked to review, is has also recommended changes to render less effective a number of laws it was not charged to review and has also recommended a brand new piece of legislation to be strangely called as the Environmental

1 http://www.dnaindia.com/india/report-moef-has-no-minutes-of-30-panel-meetings-2053483

Laws (Management) Act or ELMA, which the HLC suggests, they suggest, would prevail over all contrary court judgments issued in past decades or the provisions of any environment law promulgated till date.

Calling the HLC report 'radical' is an understatement – it is revolutionary, but a revolution against the environment, the voice of the people, and democratic processes.

# Haste Makes Waste

A reading of the HLC Report clearly brings out the fact that it has been prepared in great haste. As a result it is replete with factual inaccuracies, wrong and misleading conclusions and the incorrect interpretation of the laws it was meant to review.

Access to justice and public participation – two of the pillars of sustainable development - have been sacrificed in the name of 'special procedure' and necessity of providing 'fast track treatment' to a range of projects.

Whilst it is nobody's case that doing business should be made difficult, to dismantle the foundation of environmental laws in order to facilitate business in India will only lead to environmental conflicts and would be in violation of the Constitution of India.

The process adopted by the HLC while preparing the report was marred by controversy. To begin with there was no real public consultation.

One of the specific Terms of Reference for the HLC was to to examine and take into account various Court orders and judicial pronouncements with regard to the Acts it reviewed. The HLC Report does not contain any such analysis.

There is no doubt that the framework of environmental laws needs reform. However, the reform should aim at strengthening the environmental law framework rather than weakening and diluting it. It should not be forgotten than India's environmental laws are a result of peoples struggle and evolution over decades.

A reading of the HLC Report clearly brings out the fact that it has been prepared in great haste. As a result it is replete with factual inaccuracies, wrong and misleading conclusions and the incorrect interpretation of the laws it was meant to review. The HLC comes to conclusions on many issues without any scientific and legal basis. Despite the fact that the Report categorically begins by stating that the existing system is plagued by "rent seeking", there is a clear bias in favour of both the industry and the government – the very parties seeking and paying 'rent' and a definite sense of suspicion and disdain towards the public at large and especially the Gram Sabhas. Access to justice and public participation - two of the pillars of sustainable development - have been sacrificed in the name of 'special procedure' and necessity of providing 'fast track treatment' to a range of projects. The HLC clearly states that the primary aim of the reforms suggested is to help 'doing business easier in the country'.

It is nobody's case that doing business should be made difficult, or that the environmental governance in India is all hunky dory. However, to dismantle the foundation of environmental laws and to tinker in haste with the existing laws primarily to facilitate business in India will only lead to environmental conflicts and would be in violation of the Constitution of India. In fact the cure suggested by the HLC is worse than the disease itself.

**Introduction of high-sounding concepts such as 'utmost good faith', 'tree land trading', 'unique identification' does not hide away from the fact that the only thrust of the report is to dilute the existing environmental laws.**

The HLC report notes that there is an increase in environmental conflicts but fails to identify any cause except "rent-seeking" for the same. The diagnosis of the HLC is completely erroneous. In fact, the records reveal that one of the major reasons for increasing environmental conflicts is the social discontent caused by the rapid rate at which projects have been granted environmental and forest clearances without meaningful public participation as well as comprehensive and sound impact assessments.

The ongoing public agitation with respect to the POSCO Steel Plant in Orissa, the Subansari Hydro Electric Project in Assam and the Kudgi Super Thermal Power Project in Karnataka, to name a few, are a direct outcome of the decisions taken in haste without following the environmental laws in letter and spirit. The HLC report, rather than addressing these crucial issues, has recommended an even speedier

approval process thus adding to increased conflicts over the protection of Mother Nature.

In the hurry to meet the very short deadline, the HLC failed to follow its Terms of Reference and in its over enthusiasm to speedily submit its report has gone over board and recommended amendments in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the National Green Tribunal Act, 2010 – which were not even included in its Terms of Reference. It is tragic that the HLC has chosen to dilute the two most effective and landmark environmental legislations that have empowered communities across the country and have been hailed as model legislations throughout the world.

The fact that the HLC has exceeded its Terms of Reference by addressing these laws seems almost irrelevant in the context of its larger attack on sound environmental management and public participation in environmental decisions.

**One of the specific Terms of Reference for the HLC was to to examine and take into account various Court orders and judicial pronouncements with regard to these Acts. The HLC Report does not contain any such analysis**

One of the specific Terms of Reference for the HLC was to to examine and take into account various Court orders and judicial pronouncements with regard to these Acts. The HLC Report does not contain any such analysis. The Report only lists a few environmental cases decided by the Supreme Court more than 20 years ago. There is no reference or analysis to any of the recent decisions of the Supreme Court except a very limited reference to the Lafarge Decision [T.N Godavarman Thirumulpad v. Union of India, 2011]. The 'species best interest standard' highlighted by the Supreme Court in the Lion Translocation case [Centre for Environment law v. Union of India, I.A No 100 in W.P 337 of 1995] finds no mention in the report. The necessity to undertake comprehensive cumulative impact assessment as highlighted in Alaknanda Hydro Power v. Anuj Joshi finds no reference. The Niyamgiri verdict (Orissa Mining Corporation v. Union of India), which mandated Gram Sabha consent, is similarly absent. One glaring omission is the total absence of reference to any of the judgments of the National Green Tribunal. It is pertinent to point out that over the last three and a half years, the National Green Tribunal has delivered a number of significant decisions on both forest and

environmental clearances that has exposed the total non application of mind as well as the ad hoc and hasty decision making process of the Ministry of Environment and Forests. The NGT has been critical of the extreme haste in approving projects by the Ministry of Environment and Forests (Samata v. Union of India) and the tendency to consider the statements made by the project proponents as 'gospel truth'. The HLC, for reasons best known to itself, has not referred to even a single decision of the NGT. Yet ironically, it has proceeded to suggest amendments in the law, which would drastically curtail the powers of the NGT.

## Acknowledging the Problem and Yet Recommending to the Contrary

Chapter 1 of the HLC clearly accepts that there is a failure of environmental governance in the country. Yet none of its recommendations or analysis later on addresses these issues which it flags initially. Some of its observations are worth quoting

1.1 "a mere tinkering with the Acts would not be adequate to provide a coherent approach to enhance the quality of management of environmental issues"

1.2 "changing drivers such as population growth, economic development and consumption patterns have mounted pressure on environment, while serious and persistent barriers to sustainable development loom large"

1.3 "Often triggered in the implementation phase by rent seeking impulses, these piecemeal and sectoral legislations with their subordinate instruments, have failed to comprehend the need to address the holistic nature of the environment"

1.4 "that environment is sacrosanct; that the knowledge and application of science warrants harmonious use of natural resources without destabilizing the cycles of nature; that purity of air, water and land has been inherited by a generation in mortgage for children of tomorrow; that it is implicitly imperative for each generation to leave the environment to the next generation in a better state than they found it"

1.5 "are we going to see with increasing frequency and intensity a Kedarnath or a Srinagar valley disaster, somewhere or the other?"

1.6 "We need to take heed of the very recent Intergovernmental Panel on Climate Change (IPCC) call from Copenhagen that the earth is flirting with danger – the alarm flag has been hoisted."

"A knee-jerk attitude in governance, flabby decision making processes, ad hoc and piecemeal environmental governance practices have become the order of the day. The legal framework has not delivered"

1.7 "The Committee's aim is to restore to the Executive the will and tools to do what it is expected to do by the statutes"

1.8 "Our businessmen and entrepreneurs are not all imbued in the principles of rectitude – most are not reluctant, indeed actively seek short-cuts, and are happy to collaboratively pay the 'price' to get their projects going"

1.9 "The legislations are weak, monitoring is weaker and enforcement is weakest"

1.10 "All the Acts under review of this Committee fail the litmus test"

1.11 "The time has come requiring replacement of the present ad-hocism and piecemeal approach, by a systematic, comprehensive, non arbitrary, transparent ad accountable procedure for environmental conservation and management practices aimed at demonstrable and empirical enhancement in the quality of forest cover, air and water quality standards, through credible technology-aided mechanisms"

1.12 "The principal aim of Environmental laws should be to ensure enhancement of environmental quality parameters and maintenance of ecological balance."

Global warming, environmental degradation, loss of biodiversity and potential for conflict growing out of competition over dwindling natural resources are the current focus of humanity and should occupy the centre stage in policy formulation"

"There is a need to review the situation and to evolve for the future a strategy of conservation including preservation, maintenance, sustainable utilization, restoration and enhancement of the natural environment"

## Flawed Process

The process adopted by the HLC while preparing the report was marred by controversy. To begin with there was no public consultation. Public comments were invited but with the rider that the comments should not exceed 1000 characters. This translates into roughly 120 -130 words of comments for the six statutes. Selective meetings based on specific invitation to select groups and individuals were held in a few urban locations (mostly capital cities) with very limited public interaction. The HLC did not visit any villages or any of the critically polluted areas. Other than visits made to one or two protected areas, it chose

to limit its interaction to the confines of the conference venues. The report of the HLC itself does not provide any details of the stakeholders consulted and the list of submissions received. Minutes of the meetings of the HLC have also not been annexed to the Report. The HLC report claims that it had a total of 35 to 40 meetings. This itself reveals that the HLC itself is not aware of the actual number of meetings conducted and reflects a casual approach.

### Is it really a High Level Committee?

As per directions issued by the Government of India, a High Level Committee can be constituted only after the approval of the Prime Minister through the Cabinet Secretary. With respect to the TSR Subramaniam committee, RTI replies from the Ministry of Environment and Forests has revealed that no such approval has been obtained. The Ministry of Environment of Forest is not even in possession of the CV's of the experts. It is surprising that such a detailed review of laws were entrusted by the MoEFCC without verifying the credentials. None of the members have any prior environmental experience and the sole member who was linked to environment, i.e. Vishwanath Anand, has the dubious distinction of dismissing every single appeal when he was the Vice Chairperson of the National Environment Appellate Authority.

There is no doubt that the framework of environmental laws needs reform. However, the reform should aim at strengthening the environmental law framework rather than weakening and diluting it. It should not be forgotten that India's environmental laws are many a times a result of people's struggle and have evolved over decades. It will be really tragic for India's sustainable future if the entire framework is dismantled based on the report of the HLC. The Report has the potential to do just that. The HLC report is not just about environmental laws: it is about the very foundation which sustains life and livelihood in the country. It is also about the existence of democratic values and practices that are central to constitutional democracy.

The High Level Committee is truly 'high level' - it has displayed a high level of ignorance about environmental laws, environmental issues and a high level of disdain for local democratic institutions, people's voices and the very values of the environment it says are "sacrosanct."

There can be no piecemeal acceptance of the report. It deserves to be rejected in totality.

# Forest Governance

The entire section in the HLC with respect to forest has been prepared with the sole focus of ensuring faster and higher rates of diversion of forestland. There is clear bias in favour of the project proponent/ user agencies.

One of the most damaging recommendations with respect to the procedure to be adopted for forest diversion is the requirement that no physical / field verification involving ground truthing needs to be done till stage I approval under Forest (Conservation) Act, 1980 is obtained. One is at a loss to understand as to how a proposal can be examined for diversion of forestland which involves felling of trees without first knowing/ assessing the total number of trees to be cut and the quality of the trees and the forest canopy.

Another destructive recommendation of the HLC is with respect to linear projects (roads, highways, power lines, canals, optic fibre cables, gas pipelines, conveyor belts, railway lines, etc.). The HLC has recommended that in the case of linear projects which benefit the community at large, including forest dwellers, the provisions of the Forest Rights Act, 2006 be amended to dispense with the obligation of approval of the Gram Sabha. One fails to understand that if the community is to benefit from linear projects, why is there a reluctance to place the proposal before the Gram Sabha?

The HLC recommends that only Protected Areas and forest areas with a canopy cover of over 70% (outside Protected Areas) should be treated as 'No Go' areas and therefore should not be disturbed except in exceptional circumstances and that too with the prior approval of the Union Cabinet. This recommendation, though it may seem impressive to the uninitiated, is actually an extreme dilution of existing forest protections.

The report presumes that the frame work of Indian Forest Act, 1927 has not been successful in proper settlement of newly delineated forest areas, bringing misery to many, as well as not contributing to sound forest management. The committee also comes to the conclusion that 'the procedure for approval for diversion of forests land has been seen as tardy and time consuming, delaying the development projects'.

While dealing with the question of "Forest Governance" it was imperative for the Committee to at least dwell on the issue as to how and when did the land under 'forest' increase from 40.48 million ha in 1951 to 77.18 million ha till date? Had the committee bothered to dig deep into such an important matter it would have found that the said claim of increase on the ground was fallacious to say the least. What actually made the land under 'forest' suddenly jump was merely the large scale transfer of privately held forests by the then Zamindars and Jagirdars and other categories of large land holder (not then on record with the Forest departments) into the possession of the Forest department, post the abolition of Zamindari. This needed consideration by any such committee to lay bare the claims if any of the departmental efforts having contributed to such a major increase of the forests in the country.

The committee also observes that the definition of a forest is an 'unresolved issue'. It states 'that the definition of forests as now applicable also includes the definition of forests as understood in the dictionary sense of the word leading often to 'varying interpretation'. The HLC instead of addressing this issue in a holistic manner has recommended that till 'forest' is defined by the Government, an explanatory note may be considered for insertion before section 2 sub-clause (ii) of the Indian Forest Act, 1927 – as per the recommendation, 'forests' means any forest notified under the Indian Forest Act, 1927 and any land recorded as forest and not used / broken before 25th October, 1980.

This recommendation, if accepted, would directly overrule the Supreme Court's land mark decision of 12th December 1996 in *T.N. Godavarman v. Union of India (1997) 1 SCC 267* wherein the Supreme Court, recognizing the fact that forest as understood in the Forest (Conservation) Act, 1980 is limited to government forest land and

does not address the issue of forests that exist on areas that are not owned by Government, held that 'forests must be understood in the dictionary sense of the term and must apply to all types of forests irrespective of ownership and classification'. The very limited legalistic definition proposed by the HLC would take us back to the pre 1996 situation where large scale deforestation has taken place simply on the ground that the forests were not legally notified under the Indian Forest Act, 1927 and similar laws at the state level. The HLC has, despite its avowed intention to protect our biodiversity and forests, has attempted to undermine the Supreme Court's landmark judgment by proposing a highly restrictive definition of 'forest'.

The entire section in the HLC with respect to forest has been prepared with the sole focus of ensuring faster and higher rates of diversion of forestland. There is clear bias in favour of the project proponent / user agencies. In addition there are clear instances of lack of understanding of the legal provisions with respect to the Forest (Conservation) Act, 1980 and the Rules framed therein in so far as procedures that are followed for appraising proposals for diversion of forest lands. The following are some of the instances of the HLC's lack of understanding of the same:

1. The procedure for forest clearance as provided by the HLC in its chart given in Table 4 of the Report is full of inaccuracies. It is stated that the proposal for diversion of forestland moves from the level of 'DFO to the PCCF through the Chief Conservator. From there papers are in many instances sent to MoEF&CC through the nodal officer while another file goes up to the state government for approval.' This is wrong. Under the provisions of the Forest (Conservation) Act, 1980 it is only after the State Government grants approvals for diversion of forestland that approval is sought from the Ministry of Environment and Forest. It is illegal for 'papers' to be sent to MoEF&CC without first obtaining the state government's approval.
2. One of the most damaging recommendations with respect to the procedure to be adopted for forest diversion is the requirement that no physical / field verification involving ground truthing needs to be done till stage I approval under Forest (Conservation) Act, 1980

is obtained. One is at a loss to understand as to how a proposal can be examined for diversion of forestland which involves felling of trees without first knowing/ assessing the total number of trees to be cut and the quality of the trees and the forest canopy.

3. The HLC has observed that multiple site visits by the Expert Appraisal Committee and the Forest Advisory Committees puts 'unnecessary stress' on both the user agency and the official at the field level. The committee therefore has suggested that consequent to the creation of the National Environment Management Authority such a situation need not occur. This implies that either no site visits will be undertaken once NEMA is operational or that NEMA will be the sole agency that will carry out these inspections. The recommendations are not clear on this.

4. Another destructive recommendation of the HLC is with respect to linear projects (roads, highways, power lines, canals, optic fibre cables, gas pipelines, conveyor belts, railway lines, etc.). The HLC has recommended that in the case of linear projects which benefit the community at large, including forest dwellers, the provisions of the Forest Rights Act, 2006 be amended to dispense with the obligation of approval of the Gram Sabha. One fails to understand that if the community is to benefit from linear projects, why is there a reluctance to place the proposal before the Gram Sabha? Is it because the HLC feels that Gram Sabhas do not possess the capacity to understand what is good and beneficial for them? It is not surprising that given the 'high level' composition of the committee there is a general disdain for grass root democratic institutions such as Gram Sabhas.

5. The generosity of the HLC to cater to the interests of project proponents/ industrialists/ builders/ miners/ power plant operators is clearly evident when one examines the recommendation with respect to compensatory afforestation. At present, the project proponent is responsible for compensatory afforestation (in accordance with the polluter pays principle). However, as per the recommendations of the HLC, the project proponent's 'primary focus will be on implementing the project on hand …… and that project proponent should be allowed to focus on his project, after meeting his obligation towards compensatory afforestation'. Thus,

as far as the HLC is concerned, the only obligation is the financial obligation and project proponents need not bother as to whether the trees have been planted or whether the trees have survived after being planted. The report of the committee repeatedly emphasizes that the project proponent should 'focus on his project'.

6. The HLC has specifically recommended that 'forest' should not include any plantation raised on private land by any individual or agency. In addition, plantations on side of roads, canals and other linear structures carried out on state government land that has been kept reserved for expansion should be denotified. This recommendation, if accepted, would lead to more deforestation. It is a fact that many of the roadside plantations and other plantations are repositories of bio-diversity including various endangered species of flora and fauna and also provide habitat continuity. This recommendation if accepted is bound to have a catastrophic impact on various species of fauna, which depends on these areas as well as their migration.

7. The farce of 'No Go Areas': The HLC recommends that only Protected Areas and forest areas with a canopy cover of over 70% (outside Protected Areas) should be treated as 'No Go' areas and therefore should not be disturbed except in exceptional circumstances and that too with the prior approval of the Union Cabinet. This recommendation, though it may seem impressive to the uninitiated, is actually a dilution of the existing requirement: Protected areas that include National Parks, Sanctuaries and Tiger Reserves are already no go zones and any non-forestry activity that will impact them needs the prior approval from the National Board for Wildlife and the Supreme Court of India. The HLC's recommendation in fact opens a window for exploitation by stating that the No Go Areas can also be 'disturbed in exceptional circumstances. The Committee does not state as to what constitutes 'exceptional circumstances'. Secondly, very few areas exist outside Protected Areas that have a canopy density of more than 70%. In fact, the Forest Survey of India regards areas with 40 % crown density as dense forest. Clearly the HLC has no objection for diversion of dense forests (between 40% to 70%) in the country.

## Where are the People?

As you continue reading through the lucid prose, you get that strange feeling of missing the elephant in the room. Where are the people? Where are the millions of people who live in forests or mountains or river valleys and islands or far-flung villages, who are most affected by shoddy environmental governance? Why is the report not even mentioning the hardships faced by thousands of such fishermen who lost their livelihoods due to pollution of Vashishthi creek while the MPCB sleeps, or the cracks on the homes of people in Uttarakhand due to hydel projects which received clearances from MoEF CC, or the remote hilly settlements in Himachal who lost their sources of water due to tunneling and blasting for hydropower, or millions of fisher folk who lost their rights to their rivers and coast, or millions of tribals and others who are still awaiting rehabilitation after being driven out of their homes and their livelihoods?

Why are they not a part of this discourse on environmental management? The report spouts Upanishads and Vedas but does not seem to acknowledge that coexistence with nature has been a part of our eco-region for millennia.

Parineeta Dandekar, SANDRP

# Wildlife Protection

There is hardly any mention of impacts of destructive projects on forests, communities and wildlife. The lines are clearly drawn at compensatory afforestation, raised NPV, monitored afforestation, web-based monitoring, priced databases, etc.

The HLC has wrongly stated that the Biodiversity Act and the NGT Act are legislations subordinate to the EPA.

We are not to question the rationale behind several large-scale destructive projects. To illustrate, in the case of Wild Life Protection Act, the report does not even talk about habitat destruction due to development projects as one of the major threats to wildlife.

The chapter on wildlife is sketchy, piecemeal and replete with factual inaccuracies.

1. The report states 'the committee understood that there has been no review of plants species under the Act since 1977' [6.2]. This is incorrect: plants were included in the Wildlife (Protection) Act, 1972 only in the year 1991, when Schedule VI was added to this Act.
2. The report further states that 'section 26(3) and section 35 (5) of the WLP Act requires the prior permission of the Central Government is needed (sic) for alteration of any boundary of the Sanctuary or National Park' [para 6.5]. This is incorrect: section 26 (3) and section 35 (5) requires approval of the National Board for Wildlife which is a Statutory Board

constituted under the provision of the Wildlife (Protection) Act, 1972 and is distinct from the Central Government.

3. It is factually incorrect for the Committee to mention (3.3.5 on page 17 and 18) "the network of protected areas is classified as wildlife sanctuary, national parks, **biosphere reserve and corridors**." The fact is that section 24-A of the WPA 1972 (as amended in 2002) defines "Protected Area" means a national park, a sanctuary, a conservation reserve or a community reserve notified under sections 18, 35, 36-A and 36-C of the Act. **Nowhere are biosphere reserve and corridors included in the category of Protected Areas.**
4. The HLC has wrongly stated that the Biodiversity Act and the NGT Act are legislations subordinate to the EPA. (Chapter 3, paragraph 3.3.6).
5. One of the most glaring examples of the unscientific approach of the committee is evident if one examines the sections with respect to cultural traditions. The committee notes that 'nature and animal worship has been part of the national culture.' The committee gives the example of the *Nagpanchami* in many states where snakes are worshipped during five days in *Shravan* month. The committee notes that 'the snakes are never harmed – indeed are worshipped during this period. A dispensation in various schedules should be permitted.' The committee does not cite any scientific studies in order to come to a conclusion that the snakes are 'never harmed', and seems blissfully ignorant about the manner in which snakes are cruelly mistreated and the number of snakes that are killed in the process of capture and in captivity. The HLC perhaps also thinks that force-feeding snakes in captivity is good for their health.

There is hardly any mention of impacts of destructive projects on forests, communities and wildlife. The lines are clearly drawn at compensatory afforestation, raised NPV, monitised afforestation, web-based monitoring, priced databases, etc. However, the rationale behind several large-scale destructive projects is not questioned even once. To illustrate, in the case of Wild Life Protection Act, the report does not

talk about habitat destruction due to development projects as one of the major threats to wildlife, but limits itself to hunting, poaching, man-animal conflicts and loss of corridors. Just to put things in perspective, in Arunachal Pradesh, Dibang Basin projects and Siang Basin projects can together submerge more than 23,000 hectares of prime wildlife habitat and affect several endangered and unique species of flora and fauna.

# Environmental Governance

The focus of the HLC is clearly not on environmental protection but on increasing the speed of approval. The way in which the procedure is planned, approval of development projects large and small will be a matter of right.

The report recommends Model TORs (Terms of Reference) for sections, which already exist. It also assigns just 10 days for the NEMA to work on a site specific TOR failing which the proponent will use the Model TOR. Laying down TORs for an Environment Impact Assessment Study is one of the crucial parts of the clearance process. Many stalemates we witness today have their roots in inadequate TORs.

Because nearly three months is too long a time to wait for projects which have the potential to change an entire eco region evolved over thousands of years, linear projects, projects of strategic importance and power and mining projects which are “engines of the nation’s growth” are put on a separate fast track. It is not clear how soon they will be appraised, or, approved, but imagination runs wild here.

As for Monitoring, the committee stresses an ironically named tool “Mandatory provision of voluntary disclosure”! Monitoring will be web-based, technologically assisted and with minimal need for site visits. This leaves absolutely no chance for any local affected community to be a part of monitoring, or be able to voice its concerns which may not show up on the high-tech monitoring devises.

The committee has laid emphasis on the concept of ‘utmost good faith’ wherein the project proponent will be held responsible for its statements.  It is surprising that the HLC relies on the project proponent for information despite concluding in the report itself that presently ‘there is an over dependence on the information provided by the project proponent.’

There is absolutely no justification for using principle of Utmost Good Faith in the environmental realm, because most EIAs are fraudulent and compliances do not exist. Even currently, any false information provided at the time of appraisal process is a violation of Environment Protection Act and invites punishment. But there are examples by the dozen about how the MoEFCC refuses to take action even when clear evidence is presented to them about false information presented by proponent.

Despite specific requirement of the Terms of Reference that the task of the HLC is to examine and take into account various court orders and judicial pronouncements relating to these Acts, the HLC failed to analyse any decisions of the NGT and the High Courts which specifically highlight the fact that the problem with the Ministry of Environment and Forest is not delay in granting approval but the haste with which approvals are granted.

Amongst the most damaging aspect of the report is its absolute contempt for people's voices in the environmental decision making process, including recommendations to dispense entirely with public hearings in projects of 'strategic' and 'national importance,' to dispense with public hearings in most areas that are already severely polluted on the theory that there is no need to hear the affected public since the situation cannot get worse, and to give power sector and coal mining projects undefined 'fast track treatment' through 'Special Procedure' that appe ar likely to short-circuit or eliminate public hearings and Gram Sabha approval.

It is in the chapter with respect to Environmental Governance that the real designs of the High Level Committee emerge. The focus of the HLC is clearly not on environmental protection but on increasing the speed of approval. The way in which the revised procedure is recommended, approval will be a matter of right. In the 113 page report, **the word "speed" in context of speedy clearances gets repeated thirteen times.** As we move from initial sagacious pages, the emphasis swiftly shifts from concern for environment to *"time consuming clearance processes"*.

## Process of Project "Approval"

**All in Three months:** The Report has also recommended how the clearance process should be. This is possibly one of the most problematic areas of the report where all the focus is centered on getting the file moved in full throttle. The report recommends Model TORs (Terms of Reference) for sectors, which already exist. It also **assigns just 10 days for the NEMA to work on a site specific TOR** failing which

the proponent will use the Model TOR. Laying down TORs for an Environment Impact Assessment Study is one of the crucial parts of the clearance process. Many stalemates we witness today have their roots in inadequate TORs. In fact in some developing countries, there is a Public Hearing at the TOR stage also so that affected communities and interested stakeholders can raise points to be included in the study. NEMA is supposed to recommend approval or rejection (with reasons) within two months of receiving the application. The basis of 2 months is not clear as the EIA study itself has to be at least a single season (one year) study!

**Fast track clearances:** On this Clearance express, there are some compartments which belong to the bullet train. Linear projects, projects of strategic importance and power and mining projects which are "*engines of the nation's growth*" are put on a separate fast track. It is not clear how soon they will be appraised, or, approved, but imagination runs wild here. The fact that such projects could potentially change the ecosystem of the region evolved over thousands of years is ignored altogether.

So what constitutes projects of national importance? The much debated Polavaram Dam which can submerge nearly 300 villages in three states or the Gosi Khurd dam which can submerge 100 villages, hundreds of hectares of forest land and are mired in deep corruption charges, can be fast tracked for being of National Importance as they already have the tag of being "National Projects"[1].

As for **Monitoring**, the committee stresses an ironically named tool *"Mandatory provision of voluntary disclosure"!* Monitoring will be web-based, technologically assisted and with minimal need for site visits. This leaves absolutely no chance for any local affected community to be a part of monitoring, or be able to voice its concerns which may not show up on the high-tech monitoring devices. The only place where committee mentions **accountability** is with reference to speed of clearance, failing which the Chairperson of NEMA will be held accountable. There is no accountability demanded about failing to address impacts on either ecology or people.

1 Shripad Dharmadhikari,

## Overreach of the Committee

**ELMA:** Hugely overstepping their mandate, the committee then proposes a new law for streamlining clearance and approval for projects at state and center by proposing Environment Laws (Management) Act, ELMA. As stated at the outset, this is no product of interactive discussions with civil society or general public, but is a part of a report by 4 individuals assisted by 2 secretaries in a period of 3 months.

## Utmost Good Faith towards Industry and utmost suspicion towards communities and concerned citizens

The committee has laid emphasis on the concept of 'utmost good faith' wherein the project proponent will be held responsible for its statement and if it is found that wrong information is given, serious consequence will follow. The Principle of utmost good faith requires some

The committee is under a mistaken notion that the concept is new to environmental law. The existing EIA Notification, 2006 clearly provides that if any information provided by the project proponent is found to be wrong or misleading at any stage the approval given will be rejected at the cost of the project proponent. The problem is that this provision has not been applied by the government in even a single instance since this Notification was enacted in 2006. Even in instances where project proponents were found guilty of submitting false data the liability has always shifted to agencies / lower level functionaries of the government who provided information to the project proponents. As per the model law (ELMA) drafted by the HLC, even if it is found that the project proponent has not acted in utmost good faith, revocation of approval is the last resort after other means have failed which includes spot fines, paying for the cost of restoration, warning, etc. and it is only on continued violation that revocation of environmental and forest clearance may take place. It is also surprising that the HLC continues to rely on the project proponent for information despite concluding in the report itself that presently 'there is an over dependence on the information provided by the project proponent' [para 7.6]

**(i)** **The analogy to insurance law is inaccurate and misleading**. In insurance law, the insured has a direct incentive to disclose all relevant information when seeking to purchase insurance because full disclosure will prevent a denial of coverage later based on failure to disclose. Likewise the insurer has an incentive to closely examine the completeness and accuracy of the insured's disclosure because the insurer wants to avoid claims it is not required to pay. This parity of economic incentives helps the system work, even though there are still extensive disputes over insurance coverage based on claims by the insurer of lack of disclosure or claims by the insured of improper denial of coverage. In other words, even in insurance law, an utmost good faith standard is not a cure all. It is unlikely to be a cure all – or a cure at all -- in the environmental field because the parity of economic incentives that helps in insurance law is missing in the environmental field. If an insured provides inaccurate information, the party that will be directly harmed by that -- the insurer – also has a direct and strong financial incentive to protect itself from the consequences of the inaccurate disclosure and a ready means to do so – in response to a claim based on incomplete or inaccurate information in an application for insurance, it can give notice and deny coverage. The burden then shifts to the insured to contest that decision. In the environmental field, if an applicant for a permit provides inaccurate information, there is no direct and immediate economic incentive for the government to act on that – in fact, there is no incentive at all because the harm from providing false information does not fall on the government agency but on the people who suffer the environmental consequences – illegal, unpermitted pollution for example. In the meantime, the company can profit from providing false information so it actually has a direct economic incentive **not** to make a full and complete disclosure and wait to see the government takes action.

Moreover, even if the government takes action, it cannot simply deny coverage as an insurer can and thereby shift the full economic burden to the other party. Instead, it must go through a series of enforcement steps that take time while the party providing the inaccurate information continues to profit and, indeed has an incentive to drag out the enforcement process for as long as

possible or resolve it through a settlement for minor costs. And the government has no economic incentive to insist on imposing major costs because doing so avoids no costs to it and the government derives no direct economic benefit from vigorous enforcement. In fact, it is a cost to the government to bring and prosecute an enforcement action so there are actual economic disincentives to active enforcement. As experience has shown, a theoretical sense of duty by government agents is completely insufficient to counterbalance these economic factors. Enforcement will simple be spotty and ineffective, achieving little or no accountability.

Because of this economic misalignment, adopting an utmost good faith standard from the insurance field, even with additional statements about enhanced enforcement by the government, will not bring any additional accountability to environmental compliance, let alone the kind of accountability the HLC acknowledges is needed to protect the environment and the people.

(ii) **The HLC has not done its homework.** Other than offering an inaccurate, misleading – and unexamined – analogy to insurance law as a basis for proposing its 'utmost good faith' standard, the HLC has not offered any substantive analysis to support its recommendation of this standard. It has not, for example, identified an environmental or other public regulatory system in India -- or anywhere else in the world -- that is recognized as effective at protecting the environment and people and that is based on an 'utmost good faith' standard backed only by good intentions of government agency oversight. At a minimum, simple rational caution should lead the government to insist on some clear and compelling evidence that the HLC's proposed 'utmost good faith' standard will work in the environmental field before implementing it wholesale and untested.

## Reasons why Utmost Good Faith will not be Effective

- **A new 'utmost good faith' standard will only be as effective as its enforcement – and there is no substantive recommendation in the HLC Report that would change current poor enforcement practices.** While the HLC recommends adopting an utmost good faith standard for information in permit applications, monitoring reports, and other measures by permit applicants and permittees, it pays scant attention to practical accountability and enforcement measures that have at least some demonstrated track record of success – indeed, it offers none. In the absence of such mechanisms, as a practical matter, a new standard of care will make almost no difference.
- **There are accountability and enforcement mechanisms that have demonstrated some effectiveness, including in the environmental areana, but the HLC does not even address, let alone recommend any of these.** At least two approaches for accountability for an utmost good faith standard come quickly to mind: (1) some version of a financial bounty system akin to the common law *qui tam* writ in which a private individual is awarded significant compensation for bringing to light a theft from, fraud on, or misrepresentation to the government; or (2) the kind of 'citizen suit' provision that has been extensively adopted in environmental laws in the U.S. in recent decades under which citizens can act as private attorneys general to compel environmental compliance and recover both significant fines (that can go to environmental mitigation) and substantial attorneys' fees.

## No Analysis of any Judgments of the NGT, High Court and Supreme Court with respect to the Environmental Clearance

Despite specific requirement of the Terms of Reference, that the task of the HLC is to *examine and take into account various court orders and judicial pronouncements relating to these Acts,* the HLC has failed

to analyse any decisions of the NGT and the High Courts. A close scrutiny of the decisions of the various Courts would clearly highlight the fact that the problem with the Ministry of Environment and Forest is not delay in granting approval but the haste with which approvals are granted. Some of the relevant portions from the judgments are worth quoting:

## Samata v. Union of India[2]

"*For a huge project as the one in the instant case, a thermal power plant with an estimated cost of Rs. 11,838 crore, covering a total area of 1675 acres of land, the consideration for approval has been done in such a cursory and arbitrary manner even without taking note of the implication and importance of environmental issues. On the same day the EAC took for appraisal not only the thermal power plant in question, but also other projects which would be indicative of the haste and speedy exercise of its function of appraisal of the project.*"

## Utkarsh Mandal v. Union of India[3]

"45. As regards the functioning of the EAC, from the response of the MoEF to the RTI application referred to hereinbefore, it appears that the EAC granted as many as 410 mining approvals in the first six months of 2009. This is indeed a very large number of approvals in a fairly short time. We were informed that the EAC usually takes up the applications seeking environmental clearance in bulk and several projects are given clearance in one day. This comes across as an unsatisfactory state of affairs. The unseemly rush to grant environmental clearances for several mining projects in a single day should not be at the cost of environment itself. The spirit of the EAC has to be respected. We do not see how more than five applications for EIA clearance can be taken up for consideration at a single meeting of the EAC. This is another matter which deserves serious consideration at the hands of MoEF… part of the EAC in performing its duty of proper consideration and evaluation of the project by making a detailed scrutiny before approving the

2 National Green Tribunal [Appeal No 9 of 2011]. Re: Alfa Infra Prop Thermal Power Plant in Andhra Pradesh.

3 Delhi High Court, 2009 http://www.indiankanoon.org/doc/188721650/Re: Mining in Goa

same… The EAC is constituted consisting of a Chairman and number of members who are experts from different fields only with the sole objective of national interest in order to ensure establishment of new projects or expansion of already existing activity without affecting the ecological and environmental conditions. Thus, a duty is cast upon the EAC or SEAC as the case may be to apply the cardinal Principle of Sustainable Development and Principle of Precaution while screening, scoping and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also disappointed the legal expectations from the same."

## Himparivesh Environment Protection Committee v. State of Himachal Pradesh[4]

"Sitting in the Green Bench, we have heard hundreds of matters and we are constrained to observe that in almost all, if not all, cases the word of the project proponent is accepted to be the gospel truth. Obviously, the project proponent and/or the consultants who prepare the project reports will paint a rosy picture about the project and will gloss over and in fact hide the ill effects of the project. This is where the role of the Pollution Control Board and the MoEF starts. Why should we wait for NGO's or local inhabitants to come to Court to question the validity of the project. They do not have the wherewithal, the finances, the capability or the knowledge to oppose the report. We are of the considered view that the duty of the Pollution Control Board and the Officers of the Board or the MoEF is to verify the facts stated by the Project Proponent. It is the duty of the Pollution Control Board, the EAC and the persons who conduct the public hearing to ensure that the pros and cons of the project are explained in simple language to the villagers. How will the poor villagers know that a project is going to affect their health or not? In fact no layman would know what is hazardous waste or pollution generated by a particular project. In our considered view it is the duty of the Pollution Control Board, the MoEF and EAC to examine each project report and thereafter bring forth even the negative aspects of the project to the knowledge of the

4 Himachal Pradesh High Court. [CWP No.586 of 2010 and CWPIL No. 15 of 2009]. Judgment dated 4-5-2012

people. There is no use of having a public hearing if the public is not aware of the effects of the project both positive and negative. We have not come across a single case in the last two years, during which we have been hearing environmental cases where the Pollution Control Board or the MoEF have actually brought such facts to the notice of the Public during public hearing. A public hearing without first informing the public is a total sham."

## Sreeranganathan K.P and Ors v. Union of India[5]

"*The Tribunal is able to notice a thorough failure on the part of the EAC in performing its duty of proper consideration and evaluation of the project by making a detailed scrutiny before approving the same... The EAC is constituted consisting of a Chairman and number of members who are experts from different fields only with the sole objective of national interest in order to ensure establishment of new projects or expansion of already existing activity without affecting the ecological and environmental conditions. Thus, a duty is cast upon the EAC or SEAC as the case may be to apply the cardinal and Principle of Sustainable Development and Principle of Precaution while screening, scoping and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also disappointed the legal expectations from the same.*"

## Prafulla Samantray v. Union of India[6]

"A close scrutiny of the entire scheme of the process of issuing final order in the light of the facts placed before us and material placed on record together with the observations made by the review committee though in two separate volumes; reveals that a project of this magnitude particularly in partnership with a foreign country has been dealt with casually, without there being any comprehensive scientific data regarding the possible environmental impacts. No meticulous scientific study was made on each and every aspect of the

5 Appeal No 172 -174 of 2013. Re: Aranmula Airport, Kerala

6 Appeal No 8 of 2011. Judgment dated 30-3-2012. Re: POSCO Steel Plant.

matter leaving lingering and threatening environmental and ecological doubts un-answered."

The above list is only illustrative and there are many other judgments reflecting the situation with respect to haste with which approvals are granted. The HLC clearly chose not to refer to any of the decisions of the Court which highlighted the fact of hasty decision-making process in the Ministry of Environment and Forest.

## Public participation

Reducing and eliminating public participation in environmental decision making – Amongst the most damaging aspects of the report is its absolute contempt for people's voices in the environmental decision making process. The following recommendations of the HLC are particularly problematic:

1. It has recommended for dispensing the need for public hearing in projects of 'strategic' and 'national importance' [para 7.14 (para vii)].
2. Public hearing may also be dispensed in areas where pollution load or cumulative pollution load is predetermined. To put it in simple terms, it means that for areas, which are already severely polluted, there is no need to hear the affected public since the situation cannot get any worse.
3. There is no necessity for public hearing where settlements are located away from project sites. Again one is unable to understand the meaning and implication of the word 'located away'. A village may be located many kilometers away from a thermal power plant and may yet be affected because of pollution and other impacts. Similarly, there may be downstream communities who may be 'located away' from the project site and yet may be affected due to flow fluctuations due to the construction of a hydropower project.
4. But given the fact that this recommendation is contained in the section which largely relates to public hearing and Gram Sabha approval it could imply the exemption from public hearing is also being sought for the power and coal mining sectors.

**The HLC has also recommended that projects in the power sector and coal-mining sector, which are "growth engines for national economy", may be given 'fast track treatment' through 'Special Procedure' ... It is not clear as to what is meant by 'Special Procedure'.**

In sum, in the largest democracy in the World, the TSR Subramanian Committee report severely recommends curtailing the democratic space existing in the environmental laws of India for the following categories of project:

i. Projects of 'national importance';
ii. Projects of 'strategic importance';
iii. Projects to be setup in industrial zone, manufacturing zone;
iv. Projects in areas of high pollution load;
v. Projects which are located away from settlements;
vi. Linear Projects including transmission lines, roads, irrigation canals, etc.;

In addition to exempting projects from the requirement of the public hearing, the committee has also recommended as to who can participate in the public hearing and what issues can be raised:

i. The committee has recommended that only environmental, rehabilitation and resettlement issues are captured in the public hearing. [Para 7.14 (vi)]
ii. Only 'genuine local participation' should be permitted [para 7.14 (vi)]. It is pertinent to point out that the present EIA Notification, 2006 allows all persons to participate in the public consultation process.

The committee, in fact, has fortunately been honest whilst stating that if the above recommendations are followed / accepted it could help 'doing business easier in the country' [para 7.14 (xvi)]. The inherent bias in the working of the committee and the presumed brief pre-given to it cannot be overstated.

# Access to Justice

The new procedure recommended by the HLC will seek to curtail not only the powers of the National Green Tribunal (NGT) but will adversely affect access to justice of communities across our country

The strength of the NGT is because of the fact that it is entitled to undertake a merit review and it is in recognition of this need that the Tribunal comprises of both judicial members and expert members. Environmental issues and problems do not always relate to illegality, impropriety or bias in the decision making process but rather relate to social and scientific considerations which requires a review both from the legal as well as social and scientific perspective. It is with this idea and keeping the limitation of judicial review in mind that the Law Commission of India in its 186th reports specifically recommended the setting up of environmental courts which would go beyond the narrow confines of judicial review and undertake merit review.

The HLC Report in fact does away with merit review completely since under the procedures it recommends, even the first Appeal before the Appellate Board will be heard by a bench comprising only of judicial and administrative members.

The HLC recommendation for setting up an Appellate Board take us back to the National Environment Appellate Authority (NEAA) days. The working of the NEAA, however, is widely recognized as a classic example of failure, a failure, in fact, that was a significant factor in the creation of the NGT.

Another illustrious recommendation among the long list of damaging recommendations of the HLC is the provision of setting up of an Appellate Board where the decision of the Ministry of Environment and Forest and SEMA could be challenged by way of an Appeal. The existing law allows an Appeal to be filed before the National Green Tribunal by any person aggrieved, if the same is filed within a period of 90 days from the date of communication of the order granting clearance. The National Green Tribunal that has been established under the National Green Tribunal Act, 2010 is entitled to undertake both the 'judicial review' as well as 'merit review' of the impugned decisions i.e. it can examine both the 'decision making process' as well as the 'merits of the decision'. The Tribunal has both Appellate and Original jurisdiction and has, over the last three years, emerged as a new hope for those struggling to protect our environment. The NGT, through its various decisions, has set aside environmental clearances as well as forest clearances for various projects on grounds of non-application of mind, lack of proper impact assessment studies, and faulty public hearings. Though the National Green Tribunal Act, 2010 was not in the list of laws which the HLC was mandated to review, it has chosen to go beyond its stated Terms of Reference and recommended amendments in the National Green Tribunal Act, 2010. The new procedure recommended by the HLC will not only curtail the powers of the National Green Tribunal but will also adversely affect access to justice of communities across our country.

The procedure of Appeal as recommended by the HLC involves:

1. A party aggrieved by a decision of MoEF or SEMA can file an Appeal before the Appellate Board constituted by the Government.
2. The Appellate Board will comprise of a retired High Court judge and two officers, either retired or serving, who are of the rank of Secretary to the Government of India.
3. An Appeal has to be filed within a period of maximum 30 days and a further period not exceeding 15 days from the receipt of the order.
4. The Board has the power to reject the Appeal summarily after providing one opportunity of hearing.

5. The Board may impose costs against persons found to be abusing the process.

6. An Application for Review against the decision of the Board can be filed before the National Green Tribunal. However, this has to be in the nature of only a judicial review of administrative action and subject to all the limitations that are applicable to High Court and Supreme Court with respect to judicial review.

In sum, the strength of the NGT is because of the fact that it is entitled to undertake a merit review in addition to judicial review. It is precisely in recognition of this need that the Tribunal comprises of both judicial members and expert members. Environmental issues and problems relate not only to illegality, impropriety or bias in the decision making process but rather relate to social and scientific considerations which requires a review both from the legal as well as social and scientific perspective. In fact, the Law Commission of India in its 186th reports specifically recommended the setting up of environmental courts, which would go beyond the narrow confines of judicial review and undertake merit review. The committee has in fact specifically recommended that all Appellate or revising authorities under the environmental laws shall cease to have power or jurisdiction under those laws (Section 14 of ELMA Act, 2014).

**The TSR Subramanian Committee report in fact does away with merit review of the NGT completely since even the first Appeal before the Appellate Board will be heard by a bench comprising only of judicial and administrative members.**

The HLC has recommended the setting up of special environmental courts at the district level. Though on first sight it may seem to be positive, a closer look reveals how access to justice will be curtailed - that the recommendation contains a condition that a member of the public may file a complaint only after providing 'credible evidence of his bona fides'. This puts an unnecessarily high burden of proof, not at the stage of adjudication, but at the stage of approaching the courts itself

The HLC recommendation for the constitution of the Appellate Board takes us back to the National Environment Appellate Authority days. The working of the National Environment Appellate Authority (NEAA) is a classic example of failure due to the fact that retired IAS and IFS officials were made vice chairman and member[7].

7

# HLC and Climate Change[8]

Any review of environmental governance would be considered grossly inadequate in 21st century if it fails to address climate change. Yet the HLC Report is climate blind. Scanning through the Report for the phrase "climate change," one finds that it appears just once in the report outside the name of the commissioning ministry (Ministry of Environment, Forests & Climate Change).

India's 12th Five Year Plan specifically gives importance to climate change when it says (para 1.42): "It is known that India will be one of the countries most severely affected id global warming proceeds unchecked and as such appropriate domestic action is necessary. A National Action plan for climate change has been evolved with eight component Missions. Implementation of these missions must be an integral part of the Twelfth Plan."

But HLC takes no cognizance of this Plan. Nor does it see the ecology, forests, rivers, bio-diversity from the climate change perspective and how vulnerable groups from climate change would be affected by projects that would adversely impact the ecology, forests, rivers, biodiversity & other natural resources. In fact HLC completely ignores the fact that millions of Indians directly depend on these natural resources.

The HLC was expected to consider populations that are vulnerable due to climate change and also affected by destruction of environment. But the entire HLC report has nothing to do with people or populations, let alone vulnerable populations or giving affected people any effective voice in environmental decision-making processes. The absence of such role for people is one of the key reasons for current environmental problems in India, as is apparent in any of the environmental and natural resources conflicts. The HLC analysis not only ignores this

8 Based on the analysis of Himanshu Thakkar, SANDRAP

fundamental problem, its recommendations are for further *reducing* the voice of the people by suggesting that public consultations can be done away with for most projects.

While the mandate of the HLC report was "to review various Acts administered by MoEF & CC", as the title page of the report says, the report rightly acknowledges that such a review would entail analysis of functioning of the environmental governance in India. And any review of environmental governance would be considered grossly inadequate in 21st century, when climate change is the biggest over arching environmental concern of our times that is also dictating the developmental priorities and options. As the world moves from deeply disappointing negotiations at Lima (Peru), symbolizing the continued let down of recent COPs (Conference of Parties) under United Nations Framework Convention on Climate Change, to the next (21st) COP at Paris in 2015, it would be useful to see the HLC report through the climate change lens.

**HLC is climate blind:** Scanning through the report for the phrase "climate change", one finds that it finds only a rare and occasional mention. Except the mention in the name of the commissioning ministry (Ministry of Environment, Forests & Climate Change), the phrase appears only twice in the whole report – once in the preamble chapter [where it says: "We need to take heed of the very recent Intergovernmental Panel on Climate Change (IPCC) call from Copenhagen that the earth is flirting with danger – the alarm flag has been hoisted"] (para 1.3), and once in the main report (para 7.10.4 (e)), which has nothing to do with climate change.

The other phrase generally used synonymously with climate change is global warming. This phrase appears in the report just once in preamble chapter, in para 1.7, which generates some hope: "Global warming, environmental degradation, loss of biodiversity and potential for conflict growing out of competition over dwindling natural resources are the current focus of humanity and should occupy the centre stage in policy formulation." Indeed, Climate Change is "current focus of humanity and should occupy the centre stage in policy formulation". But the HLC has nothing to do with that concern as the report does even care to mention that in any of its analysis or recommendations!

That shows that as far as direct reference to climate change is concerned, HLC has not referred to it in its analysis or recommendations. It would seem from this that the HLC report is blind to climate change concerns.

## But can it be blamed for inviting a climate disaster?

Indian government is proud of its National Action Plan on Climate Change, which is supposed to drive our developmental plans and priorities during the ongoing 12th Five-year plan and beyond. There are several national missions, including National Mission for a Green India, National Mission for Sustaining the Himalayan Ecosystem, National Solar Mission, National Water Mission, National Sustainable Agriculture, National Mission for Enhanced Energy Efficiency and National Mission for Sustainable Habitat, all of which have far reaching implications for environment governance and climate change. The prime minister himself chairs the PM Council on Climate Change, which is a policymaking and national monitoring body.

The 12th Five Year Plan specifically gives importance to climate change when it says (para 1.42): "It is known that India will be one of the countries most severely affected if global warming proceeds unchecked and as such appropriate domestic action is necessary. A National Action Plan for climate change has been evolved with eight component Missions. Implementation of these missions must be an integral part of the Twelfth Plan."

But HLC takes no cognizance of any of these. Nor does it view ecology, forests, rivers, biodiversity from climate change perspective and how vulnerable groups would be affected by projects that would adversely impact the ecology, forests, rivers, biodiversity & other natural resources. In fact HLC completely ignores the fact that millions of Indians directly depend on these natural resources. The HLC turns a completely blind eye to this.

Here it will be illuminating to quote what the HLC chairman said recently[9]:

> *"Villages in Gujarat could have got the water five years earlier had there been no andolan. Though some people lost their land in Madhya Pradesh (MP), the result is that half of MP and three-quarters of Gujarat today has access to water. So, there is some cost attached to everything. Some larger force will have to look at it. Ultimately, it is all about striking a balance."*

Mr. Subramanian here is clearly referring to Narmada Bachao Andolan agitation against the Sardar Sarovar Dam on Narmada River. This is not only grossly ill informed opinion, it shows his shocking bias against people's movements.

The HLC was expected to consider populations that are vulnerable due to climate change and also affected by destruction of environment. In fact the entire HLC report has nothing to do with people or affected populations, let alone identifying the vulnerable populations and giving affected people any effective say in environmental decision-making process. Absence of such role for people is one of the key reasons for current environmental problems in India, as is apparent in many of the environmental and natural resources conflicts. The HLC not only ignores this, in fact its recommendations are aimed at further reducing say for the people by suggesting that public consultations can be done away with in most projects.

Let us see some further direct implications of HLC recommendations with respect to climate change. HLC is essentially dealing with forests (chapter 5), wildlife (chapter 6), biodiversity (chapters 5, 6 & 7) and environmental governance (chapter 7). It makes a large number of recommendations on these issues and all of these have implications for climate change. However, the recommendations of the HLC would result in greater contribution to climate change and exposure to climate variability. For example, forests are a major storehouse of carbon and HLC recommendations such as the very limited definition of forest and denotification of plantations from the category of forest, among

9 http://sandrp.wordpress.com/2014/12/15/hlc-tsr-subramanian-report-climate-blind-or-a-climate-disaster/#_edn5

others, are going to lead to massive deforestations, thus increasing the release of stored carbon and reducing the carbon absorption, besides taking away the adaptation capacity of the forest dependent communities. Even in section 7.9.2 where HLC mentions the kind of expertise NEMA (National Environmental Management Authority), there is no mention of climate change.

It is in this context that we need to view the HLC recommendations including faster and single window clearances with advocacy for utmost good faith in the project developers; relaxing the environmental governance on several counts, for fast track clearances for mining, power, line projects and large number of other projects; recommending relaxation of public consultation process in most of the projects, for insulating the officials and the ministers (the executive) from environmental responsibility; delaying the legal challenge process to clearances and also for debarring the legal challenge on merit. These HLC recommendations are all going to help relax the environmental governance and hence invite greater environmental disaster and by implication, climate disaster for India.

**"We are suggesting that the government should not go after development blindly but also not let people of one village blackmail it (Sic) by shouting "my right, my right."**

**-T.S R. Subramanian in an interview to Down to Earth**

The claim of HLC chairman that HLC had tried "to optimize the efforts to balance developmental imperatives causing least possible damage to environment" is clearly unfounded. The remarks of the Union Environment Minister Prakash Javadekar, while receiving the report from HLC, stated, "the Report was a historic achievement that would strengthen processes to balance developmental commitments and environment protection. The recommendations of the Report would enhance Ministry's efforts to avoid undue delays and ensure transparency in clearances and implementation of projects" is again deeply disappointing and seems to herald an era where environmental conflicts will only increase and deepen.

It is thus clear that the HLC report will invite greater climate disaster for India, particularly for those who are poor and already vulnerable to climate change implications. The HLC report should be rejected for this reason alone, besides its other acts of omissions and commissions.

# Final Words

It is clear that the recommendation of the High Level Committee (HLC) is a concrete attempt to dismantle the basic structure of India's environmental law. The Report is against the Constitution: It violates Article 21, since interest of business and industry has been given paramount importance and overrides the right to clean air, water and balanced ecosystem. If the HLC recommendations are accepted, the State will abdicate its protective role mandated under Article 48 (A)10 of the Constitution and will rather rely on 'Utmost Good Faith' on the part of the industry. The fundamental duty of every citizen to protect environment, forest and wildlife as provided under Article 51 (a) g of the Constitution will be viewed with suspicion, since the HLC requires that the bona fide of those who intend to protect the environment be subjected to scrutiny with threat of exemplary punishment. The HLC report violates India's International commitment under the Rio Declaration of 1992 and other International Treaties. Public Participation and Public hearings: the essence of democracy is sought to be removed for a range of projects and would render people voiceless. The HLC report is out of tune with the current environmental realities: the report is totally blind to climate change concerns. There is no discussion or analysis on climate change at all. India's 12th Five Year Plan specifically gives importance to climate change when it acknowledges that India will be one of the countries most severely affected if global warming proceeds unchecked and as such appropriate domestic action is necessary11.

10 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 the forests and wild life of the country

11 (para 1.42) of the 12th Five Year Plan

Most disturbingly, the HLC aims to defang the National Green Tribunal: A quasi Judicial body that has emerged as the most effective grievance redressal mechanism on environmental issues. The HLC limits the role of the NGT to the narrow confines of 'judicial review' as opposed to a comprehensive 'merit review'. It is therefore a clear attempt to insulate the Government decision from judicial scrutiny. It has recommended that power to review the decisions should vest with a body comprising of serving and retired secretaries to the Government. The basis constitutional scheme of separation of powers is thus planned to be disturbed.

The provisions of the Forest Rights Act[12] is also recommended for dilution as the consent required for Gram Sabhas are proposed to be done away with.

In sum, the Report of the HLC is regressive, is aimed at dismantling the legal framework which exists for protection of environment. It recommends for new law, Rules and procedures which is solely aimed at ensuring that environmental quality as well as peoples voice is silenced.

There can be no piecemeal acceptance of the report. The report deserves to be rejected.

12 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006


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