

JURIST

Why India needs a better public participation framework for environmental governance?

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On 22nd April 2022, Earth Day, the Escazu Agreement enters into operation, marking a significant moment for transparent and participatory decision-making in environmental governance. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean 2018 (Escazu Agreement) was adopted in 2018 to “promote environmental democracy, cooperation, and capacity-building.”

This article is to examine how regional environmental law tools such as the Escazu Agreement and Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998) provide significant impetus to improve transparency in environmental governance. Based on this context, the article also examines how public participation in environmental governance in India needs to be improved.

Right of public participation and access to the environment is significant for society to engage and deliberate in the key decision-making process. Rather than viewing the bureaucratic process of decision-making on the environment as a top-down model, the emphasis is on the consultation of the societal members who would be affected by the decision, to have a say in reaching an inclusive informed decision. The right to have a say by community members in environmental issues such as infrastructure development and cutting down of a large number of trees in an urban neighborhood has been identified as part of the sustainable and inclusive environmental process.

Principle 10 of the Rio Declaration, 1992 has emphasized access to information and public participation as tools for sustainable development. The right to public participation is also highlighted as a necessary part of the concept of sustainable development through the New Delhi Declaration of Principles of International Law relating to Sustainable Development, 2012. This is significant for an effective environmental democracy to take shape. Moreover, in the world order determined by the market-oriented philosophy, the rooting to public participation and access to justice provides a glimpse of the linking environment and human rights as a holistic concept.

The Escazu Agreement brings forth the right to sustainable development in Article 1 as it states that “the right of every person of present and future generations to live in a healthy environment and to sustainable development.” Moreover, Article 7 of the Escazu Agreement provides that public participation should be accorded at the earliest instance to ensure that participation is a meaningful process. The Escazu Agreement has been evolved on the broad contours of the successful regional legal instrument of the Aarhus Convention. The Aarhus Convention has been a success in the European Union due to the compliance committee’s role in navigating towards environmental justice. Access to environmental information and public participation has also played significantly in ensuring a transparent and accountable regulatory process.

In the Indian context, the requirement of consultation of the project affected community found a place in the Environmental Impact Assessment Notification (EIA Notification) during the year 1994. Subsequent versions of the EIA Notification also had stipulations for public participation. Moreover, the requirement of participatory decision-making was quite rooted in the progressive legislation of the Forest Rights Act, 2006. But in practice, these legal instruments have rarely exhibited the spirit of being inclusive in the decision-making process.

The EIA Notification has made it mandatory to have public participation for significant projects having ramifications upon the environment. But in practice, participation is seen as a mere formality, which is also bypassed in many scenarios. The case laws such as Adivasi Kisan Ekta Sanghatan versus Ministry of Environment examine and highlight the significance of public participation when the EIA process failed to include the effective participation of the concerned persons. The Mumbai coastal road project had seen a lack of public participation leading to protest from the fishermen. The livelihood and environmental impact upon fishermen and coastal marine environment being not adequately considered necessitated the Bombay High Court to step in to mend the mistake.

The Forest Rights Act, 2006 provides for a right of participation in the decision-making process for instances where the proposed activity could lead to resettlement or adversely impact the forest-dwelling community. The forest-dwelling communities have cultural and livelihood ties to the forest and its fringe areas. Any infrastructural development or mineral extraction activities should be accorded by following the stipulation of the free prior informed consent principle. Section 4(2)(e) of the Forest Rights Act, 2006 states that “free informed consent of the Gram Sabhas in the areas concerned to the proposed resettlement and the package has been obtained in writing.”

The Gram Sabhas, which forms the constitutionally accepted unit at the village level, constituting of all the electorate members, helps to weigh in a greater level of participation. Forest bureaucracy could be one of the major problems for the effective implementation of the rights-based approach in the Forest Rights Act, 2006 is implemented. Forest officials attempt to curtail down the power of the gram sabhas and the participatory perspective of forest rights legislation.

In the Niyamagiri case, the Supreme Court had to intervene to ensure that the Dongria Kondh community could assert their free, prior informed consent right and negate the proposed mining extraction project which would impact their culture and livelihood. This was the first environmental referendum in India through which an indigenous community could assert their public participation right.

Hence in the Indian context, public participation as part of environmental governance needs to be strengthened in practice. Even accessibility to environmental decision-making remains elusive. Barring certain progressive moves such as a dedicated tribunal for the environment, the National Green Tribunal, India needs to step up on the regulatory capacity and transparency. The requirement of an independent decision-making body cannot be discounted in the Indian scenario. The ad-hoc nature of functioning of the environmental regulatory machinery such as EIA expert appraisal committees, including the state and central pollution control boards calls for revamping of the accessibility and transparency regarding environmental decision making.

From an environmental democracy point of view, India needs to adopt legislative rights for access and information and public participation in environmental decision-making. The stand which India could adopt would be important to steer leadership at the regional level association SAARC (South Asian Association for Regional Cooperation), for evolving legal instrument on the lines of Escazu Agreement and Aarhus Convention. The SAARC could be a significant regional mechanism to evaluate environmental governance. Promoting public participation in environmental governance through SAARC would also help India to push forward the sustainable development required under the Rio Declaration, 1992.