A National Law for Urban Trees

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Trees become the first victims of infrastructure expansion in urban areas. Laws and institutions for the protection of trees have not kept pace with the increasing developmental pressures. A fundamental reform in the law is needed, so that it is able to comprehensively protect trees in an urban landscape.

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In 1974, Christopher Stone in his essay "Should Trees Have Standing?" argued the need to recognise the legal rights of nature in general and of trees in particular. After more than four decades, legal rights of nature are being recognised in some jurisdictions. Rivers were recognised as legal entities by the courts in India (*Mohd Salim v State of Uttarakhand* 2017)[1] and through legislation in New Zealand (that is, through the Te Awa Tupua [Whanganui River Claims Settlement] Bill 2017).[2] In 2014, the Supreme Court of India recognised that even "animals have dignity, honour and their rights to privacy must be protected from unlawful assault" (*Animal Welfare Board v A Nagaraja* 2014).[3] Ecuador became the first country in the world to constitutionally recognise the rights of nature by stating in its Constitution that "nature has the right to exist, persist, maintain and regenerate its vital life cycles, structures and its processes in evolution." The recognition of "rights of nature" is particularly relevant in view of the increasing threats to nature across the world, including India. The last few years have seen increasing assault on nature across India, and trees in particular have been the victims of India's obsession with increasing its physical infrastructure. Even legally protected areas such as national parks and sanctuaries have been direct victims of this massive increase in infrastructure (Bindra 2018).

The recent controversy in New Delhi over the felling of a large number of trees for the redevelopment of government colonies is an epitome of the key concerns with tree preservation laws (Menon and Kohli 2018; Pillai 2018). The felling of thousands of trees, which formed an integral part of the city's identity and a repository of its biodiversity, was allowed to make way for commercial and real estate development (Sinha 2018). There was no objective consideration of the ecological impact of such felling of trees. Though the law contemplates an inquiry by the tree officer for every individual tree to be felled, permissions were given without any inquiry. One standard approach has been to stipulate that trees will not be felled but transplanted. However, a committee of the forest department of the Government of Delhi[4] clearly concluded that transplanting of fully grown trees in Delhi is not possible. The grown-up translocated/transplanted trees of most species are highly sensitive as the edaphic factors change, and due to the entailing extreme shock conditions for the root system of trees in a hot and dry climate like Delhi. Despite this reality, approvals continue to be granted based on the false notion that trees can be transplanted or that compensatory afforestation will be carried out.[5]

The importance of trees in the urban landscape cannot be overemphasised. At a time when 14 of the top 15 most polluted cities of the world are located in India, the need for trees as a means to control pollution has been recognised in the draft National Clean Air Programme (MoEFCC 2018).[6] There is a growing citizens' movement to save trees from felling in urban areas. The famous "Chipko" movement has taken rebirth in a way in many urban locations in India in the form of "urban chipko" (Sreevatsan 2018). Public protests, both in the form of street protests as well as social media campaigns, have been employed to express opposition to the felling of trees. However, unlike forest, wildlife, water, and air, there exists not even a single central legislation for the protection of trees in areas that are not a part of the forestland. Protection and preservation of trees is governed only through state-specific tree preservation laws of the respective states. This article examines the basic structure of the tree preservation laws, and appraises how effective these have been in protecting trees in certain instances where these were invoked. In addition, it focuses on the judicial response to the felling of trees in non-forest areas in the country. It also identifies key

areas for policy and legal reform so far as tree protection is concerned.

Trees in the Legal Framework

"Forest" is included in the Concurrent List (List III) under the Indian Constitution and, thus, both the central and state governments are empowered to legislate on the subject. There is, in fact, no specific mention of "trees" per se in the Constitution. The Fundamental Duties specifically mention that it is the fundamental duty of every citizen to protect and preserve forests, lakes and rivers and to have compassion for every living being, as per Article 51 A (g). The phrase "living being" may be interpreted to include trees as well. However, this expanded interpretation has not been followed.

Unlike in the case of forests, with a central legislation in the form of the Forest (Conservation) Act, 1980, there is no central legislation for the preservation of trees. Laws with respect to protection of trees have been enacted only by the various state legislatures. The data of the National Crime Records Bureau (NCRB), 2017 which has a comprehensive record of all environmental crimes, however does not include the various tree preservation laws (and the flouting thereof) in its record. The specific laws for the protection of trees outside forest areas include the Karnataka Preservation of Trees Act, 1976, the Delhi Preservation of Trees Act, 1994 and the Goa, Daman and Diu Preservation of Trees Act, 1984. It is interesting to note that though the laws were enacted by different states at different times, the contents are the same and they all broadly constitute the same pattern: tree officer, tree authority, procedure for seeking permission for felling of trees, and the situations wherein such permissions have to be granted.

One common feature of almost all the tree preservation laws is the constitution of a tree authority as well as the designation of a tree officer. The tree preservation laws follow the general structure of the criminal law and provide for exemplary powers to the tree officer, including the powers to arrest without a warrant. The most important power given to the tree officer is the power to decide on applications filed by individuals seeking permission for felling of trees. Though most of the state laws provide for a tree authority, the authority has no role in deciding whether trees should be felled or not. In a sense, it is the tree officer who exercises the real authority. It, therefore, becomes important to examine the role of the tree officer.

Need for Reasoned Orders

The functioning of the tree officer under the Goa, Daman and Diu Tree Preservation Act, 1984 was considered in detail by the Bombay High Court in the case concerning the construction of the second international airport in Goa (*Federation of Rainbow Warriors v State of Goa* 2018). The controversial project met with opposition from local communities as well as from social and environmental groups (Nielsen 2015). Although the judgment of the Bombay High Court delivered by Justice N M Jamdar is specific to the particular case of Mopa in Goa, the findings and observations are symptomatic of the manner in which the tree preservation acts are enforced in the country and the role played by tree officers. Elaborating on the purpose behind the tree preservation act, the high court observed:

> During the colonial era, trees were considered primarily as a source of timber. As the concern regarding the environmental degradation grew, the pivotal role trees play in maintaining a healthy ecosystem was recognised and various measures were adopted to protect and safeguard the tree cover by regulating the cutting of trees. The Goa, Daman and Diu Preservation of Trees Act, 1984, enacted by the State of Goa is one such measure.

One of the most important aspects dealt with by the Bombay High Court in the Federation of Rainbow Warriors case was the nature of inquiry undertaken by the tree officer when permission is sought for felling of trees. The court emphasised the fact that it is incumbent on the tree officer to pass a reasoned order since "in the cases where grant of permissions of such magnitude are in question, reasons bring transparency in the decision making." The tree officer has to take into consideration various aspects, including the number and kind of trees and the justification for cutting the required number of trees. In a way, the high court made it clear that basic principles of administrative law, that is, requirement from a decision-making body to make a speaking order, is applicable to the tree officer as well. A similar view was taken by the Karnataka High Court (*Paul D'Silva and Others v State of Karnataka and Others* 1999) with respect to the role of the tree officer:

> The Tree Officer is required to apply his mind and consider the question whether the permission sought to fell the trees must be granted is with reference to the nature of the trees, location of the trees and other relevant factors with reference to the trees, and it is not with reference to the status of the person who makes an application. The tree officer has to keep in mind the public interest and the consequences that are likely to flow on the environment or the preservation of the trees in an area while granting such permission.

The judgment in the Federation of Rainbow Warriors case has implications beyond the state of Goa. The standard approach of the tree officer remains that of granting a "no objection," that is, pass orders for felling of trees without any justification or reasons. Despite a plethora of judicial pronouncements on the "duty to give reasons," administrative authorities, including those performing quasi-judicial functions, fail to record reasons for their decisions. In addition, there is one more issue of serious concern that plagues the performance of statutory functions by the tree officer: the tendency to "act under dictation." Simply put, though the tree preservation acts confer absolute discretion to the tree officer to decide on whether to grant or refuse a permit for felling of trees, in reality, the tree officer merely acts based on the dictates of the higher authority. The higher authority may be the principal chief conservator, or the secretary, or the minister. Given the fact that many of the infrastructure-related projects, such as road widening or construction of airports, are policy decisions of the government, it is difficult to presume that a tree officer, most often a junior officer of the level of deputy conservator or conservator of forest, will be able to question such decisions.

Doctrine of Fait Accompli

India's environmental laws require prior approval from the competent authority before a regulated activity/project can

take place.[7] This is also true for all the laws for the preservation of trees, unless the situation is such that a prior permission is not possible.[8] However, applications for felling permissions are usually filed after project investments and contracts materialise and third-party rights get created. The option before the tree officer then remains to only negotiate the details of compensatory measures, rather than decide whether the trees should be felled or not. This issue was highlighted by the Delhi High Court in a case concerning the felling of trees on the Mahipalpur–Mehrauli Road in Delhi (*Bindu Kapurea v Government of NCT of Delhi* 2015).[9] Justice Rajiv Shakdher, who wrote the judgment, observed:

> What came to light, was that, more often than not, the difficulties which arose in the present matter, could have been avoided had the relevant authorities been brought on board at the appropriate stage. Experience has shown that governmental authorities, which are tasked with executing infrastructural projects, approach the forest department under the Trees Act only after tenders have been issued and plans have been approved.

What is significant here is the fact that this issue is not germane to only the tree felling issue, but to all matters relating to the environment, since permissions under environmental laws are sought after all other financial and other approvals, including for the land acquisition, are completed.[10] This renders the whole process of taking approval under the environmental law a mere formality.

Conclusions

The laws for the protection of trees are of comparatively recent origin. Despite significant developments in the field of environmental laws, the jurisprudence on tree preservation is yet to evolve in India.[11] Judicial intervention on the issues of trees has been limited. The National Green Tribunal, which is a specialised tribunal to adjudicate on environmental issues, has only recently held that it has jurisdiction to adjudicate on issues related to the preservation of trees outside forest areas (*Ksitij Aghihotri v Ministry of Environment, Forest and Climate Change and Others* 2018; Vashistha 2018). There are structural problems with the tree protection laws; the most fundamental one is that they are essentially framed to deal with tree felling permissions from individuals and households. The tree officer is equipped to deal with permissions for felling of a single tree or a few trees at the most. The purpose in such a case could be commercial (for instance, felling of a silviculturally mature tree is allowed) or it could be because the tree is posing a danger to the person or property.

Thus, the entire legal procedure is geared to deal with situations arising out of issuing permits for the felling of a few trees by private individuals or organisations. The law, unfortunately, is not designed to deal with permissions for the felling of a large number of trees. The tree officer neither has the technical capacity nor functional autonomy to deal with such applications for felling permits. Being usually a junior officer in the forest department, the tree officer rarely has the ability to say no to permissions sought by other government departments and big private agencies. The tree authority in reality lacks any authority and has only advisory powers. In such a situation, even without a basic inquiry, approvals are mechanically granted for felling of trees. The above analysis leads to one inevitable conclusion, and, that is, the vulnerability of trees to being cut, lopped, or transplanted in the urban landscape. Every single tree in an urban landscape is today in danger. The existing legal framework as well as judicial responses to issues of tree felling have largely failed to consider trees as a living and breathing entity. Their role in sustaining urban biodiversity and lending character to the urban landscape is undermined to facilitate the concretisation of cities.

A law can never be the only solution to a problem. Also, the law itself can be a problem. The tree preservation laws have been designed and implemented in a manner that facilitates infrastructural development in cities. Citizens' movements across India on saving trees must direct their focus on the enactment of a comprehensive national legislation for the protection of trees, a legislation which recognises the ecological, aesthetic, life sustaining and irreplaceable role of trees, both individually and collectively. Such a national legislation must recognise the uniqueness of each tree and the role it plays in shaping both the life and the identity of cities and making living in cities possible. The law should create institutions that have an ability to serve as a caregiver and guardian of trees and to ensure that the life of a tree must not be dependent on the whims and fancies of any single institution or officer. As cities the world over are judged in terms of how "liveable" they are, focusing on urban trees and developing a comprehensive legal edifice to protect each and every tree will make cities a better place to live.

NOTES

1 The judgment of the high court was subsequently stayed by the Supreme Court on a special leave petition filed by the state of Uttarakhand. However, only an interim stay has been granted and the judgment has not been overruled. The appeal is yet to be finally decided by the Supreme Court.

2 The Whanganui river became the first water system in the world to be recognised as a rights-bearing entity, holding legal "personhood" status. One implication of this legislation is that the Whanganui river is no longer property of the New Zealand's Crown government—the river now owns itself.

3 The Supreme Court in a series of judgments, introduced concepts such as "species best interest standard" and "ecocentric approach" as opposed to "anthropocentric approach" (*Centre for Environmental Law v Union of India* 2011).

4 The National Green Tribunal constituted a committee in the case of *Verhaen Khanna v Union of India* (2018).

5 As per the Indian Trade Promotion Organisation's (ITPO) own admission before the National Green Tribunal in the Verhaen Khanna case, in the redevelopment of Pragati Maidan, New Delhi by ITPO, out of the total of 1,750 trees, only 36 were selected for transplanting.

6 The National Clean Air Programme (NCAP) 2018 specifically recognises that, "Trees remove air pollution primarily by uptake of pollutants via stomata (pores on the outer 'skin' layers of the leaf). Some gaseous pollutants are also removed via the plant surface. Thus extensive plantation drive by identification and use of plant that have high pollutants absorbing

capacity is expected not only to purify air but also will help in improvement of health."

7 The Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 require "consent to operate" as well as "consent to establish." Similarly, the Environment (Protection) Act, 1986 requires a prior environmental clearance.

8 Section 8 of the Delhi Preservation of Trees Act, 1994 states that in such a case when the tree if not immediately felled, it could lead to grave danger to life or property or traffic, the owner of the land may take immediate action to fell such a tree and report the fact to the Tree Officer within 24 hours of the felling.

9 The case stands out as one of the rare instances where the high court considered in great detail the need and justification for felling of 810 trees. After detailed scrutiny, the high court was able to save 298 trees from being felled.

10 The Environment Impact Assessment Notification, 2006 requires prior environmental clearance before any activity, operation or process is carried out. However, though physical construction activities are not carried out prior to grant of environmental clearance (unless done illegally), there is no prohibition on acquisition of land or awarding of contracts or creating third party rights. As a result, the process of public hearing as well as Environment Impact Assessment (EIA) studies becomes a mere formality. With the contracts already being entered and the third party rights created, it becomes almost impossible for the EIA process to be fair and objective and for the decision-makers to refuse the grant of environmental clearance. This is true also for approvals under the Forest (Conservation) Act, 1980 and the Wildlife (Protection) Act, 1972. The judiciary in most instances has also refused to intervene citing the doctrine of fait accompli *(EAS Sarma v Union of India* 2018).

11 The public trust doctrine, species best interest standard, reversal of burden of proof, and ecocentric approach are some of the innovations in environmental law which have become part of the law of the land in view of Supreme Court pronouncements.

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