FAILURE OF ENVIRONMENTAL REGULATORY BODIES AND EIA FRAMEWORK: ANALYSIS OF EXISTING CHALLENGES

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ABSTRACT

The environment legal regime in India has many facets, however, none of them have been able to solve environmental concerns. The various regulatory authorities established by different statutes have proven to be inadequate in addressing the very purpose for which they were created. We have established environmental impact assessment framework which is diluted per amendment. The need to address the issues faced by these systems in order to make them effective is of paramount urgency. Both these systems are connected in many ways, some more latent than patent. The state needs to address the inherent, institutional and acquired problems that render these systems impotent. The creation of various regulatory bodies is a means to an end. 'Action' or 'inaction' of various regulatory authorities has made the end quite a distant dream.

I. INTRODUCTION

The Bhopal gas tragedy is considered the worst industrial disaster that occurred in the world. It was a man-made disaster. As much as we hold the Union Carbide Corporation responsible for the disaster, we 'will have' to hold both the Central and state governments of India responsible for this tragedy. Their responsibility was created at the point where they chose to construct a chemical fertilizer plant in a heavily populated area. In 1982, there was a request made to the State of Madhya Pradesh to shift this fertiliser plant to a more remote area by the city administrator. However, this did not happen and Union Carbide Corporation was also not keen on moving from their prime location. How the government becomes culpable in this tragedy is in the fact that they trusted Union Carbide's words instead of ensuring compliance by monitoring the various safety standards that

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they had to follow. The plant operator, T. P. Chouhan, says that the Bhopal gas tragedy *"is a case study on how the state can let you down."*[1] The Government of India and the State Government of Madhya Pradesh also contributed to the Bhopal gas tragedy.[2] However, they assumed the role of the plaintiff representing the victims after promulgating the Bhopal Gas Leak Disaster Processing of Claims Act of 1985.

The pertinent question at this point to whether we have learnt from our mistakes and prevented such similar incidents? The Vizag gas leak incident is the perfect answer to this question. The company was in operation since the 1960s, as such, they did not need Environmental Clearance as per the 2006 Environmental Impact Assessment (**"EIA"**) Notification unless they plan to expand production, change raw materials or modernize its units. However, they had been increasing production and changing raw materials since 2004 without Environmental Clearance. They were warned by the Andhra Pradesh Pollution Control Board (**"PCB"**) regarding the lack of Environmental Clearance in 2017. It took more than 10 years for the PCB to identify this violation and issue warning for non-compliance with the 2006 EIA notification. They applied to the Ministry of Environment Forest and Climate Change (**"MoEF&CC"**) for Environmental Clearance but withdrew the same in 2018. They submitted a proposal to the Andhra Pradesh PCB claiming that they were 'importing plastic granules to prepare extended plastic'[3] that does not require Environmental Clearance. The Board granted a consent to operate as well.

The environmental jurisprudence in India has been enriched by proactive decisions from the Supreme Court and various High Courts of the country. The Supreme Court expanded the scope of the Right to Life and personal liberty under Article 21[4] of the Constitution to include the right to enjoy a

[1] V. Krishnan, *Bhopal Gas Tragedy| 'This place was destined to be in ruins'*, Mint (02/12/2014), available at https://www.livemint.com/Politics/LMc6Ycm07hDsG7UJav2wjN/Bhopal-Gas-Tragedy--This-place-was-destined-to-be-in-ruins.html, last seen on 01/01/2021.
[2] I. Eckerman & T. Borsen, *Corporate and governmental responsibilities for preventing chemical disasters: lessons from Bhopal*, 24 HYLE-International Journal for philosophy of chemistry 29, 40(2018).
[3] S. Ramanathan, D. Singh & N. K. Yadav, *The Complete Story of the Vizag Gas Leak*, Down to Earth, available at https://www.downtoearth.org.in/dte-infographics/vizag_gas_leak/index.html, last seen on 02/01/2021.
[4] Art. 21, the Constitution of India.

healthy environment.[5] The need to the balance right to healthy environment and sustainable development was noted in *A. P. Pollution Control Board (II)* v. *M. V. Nayudu & Ors.*[6] It elaborated the polluter pays principle and the precautionary principle calling them essential features of sustainable development[7]. Compliance with sustainable development principles were declared to be *"sine qua non for the maintenance of the symbiotic balance between rights of environment and development"*[8]. Intergenerational Equity was also held to be part of life under Article 21.[9]

The legislative framework existing for the protection of the environment is also comprehensive. The point of discussion here is as to why the regulatory framework fails despite having the necessary support from both judiciary and legislature in terms of proactive environmental adjudication and delegation of power respectively.

Whenever there is an event with adverse consequences to the environment and the people living in and around the affected area, the discussion starts with insufficient and inefficient laws but ends with a conclusion that it is in the implementation that we suffer and not in the quality of laws. In matters of environmental concerns as well, we face the issue of poor implementation mechanism coupled with a reluctance to learn from our many, many mistakes. When issues that need to be addressed at an executive level get dragged to the judiciary, it is a waste of resource and time. When the leadership suffers in quality and qualification, environmental governance suffers. When scammers and plagiarizers are excused, the environmental cost is very high. The anthropocentric approach that leads our development strategy needs to change. Despite the call for a 'delicate balance' between ecological impact and the necessity for development by the judiciary, the executive is unable to find a balance because the laws that they implement are not reflective of the principles developed and expanded by the judiciary.

[5] Bandhua Mukti Morcha v. Union of India, (1984) 2 SCR 67.
[6] A. P. Pollution Control Board (II) v. M. V. Nayudu & Ors, (2001) 2 SCC 662.
[7] MC Mehta v. Kamal Nath, (1997) 1 SCC 388; See Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association & Ors., AIR 2010 SC 3645.
[8] N. D. Jayal & Ors. v. Union of India & Ors., (2004) 9 SCC 362.
[9] Court on its own motion v. Union of India & Ors., (2012) 12 SCC 497.

What is being attempted here is to understand the various issues plaguing statutory bodies in charge of implementing environmental laws and the EIA regulatory mechanism. Identification of these issues will enable us to understand where the fault lies. The next step is to assess the Draft EIA Notification, 2020 (**"DEIAN 2020"**) and understand whether this will serve to strengthen the existing regulatory systems. If the new draft regulation weakens the system, then we need to find a solution to this problem. No project survives on the EIA mechanism alone. It needs constant support and monitoring from other regulatory bodies in order to ensure that they are legally compliant and the environmental impact is minimal.

II. THE INSTITUTIONAL CHALLENGES

There are quite a few regulatory bodies in India with a focus on environmental protection and reduction of pollution. The Water (Prevention and Control of Pollution) Act of 1974 (**"Water Act"**), the Air (Prevention and Control of Pollution) Act of 1981 (**"Air Act"**), the Forest (Conservation) Act, 1980 and the Wild Life (Protection) Act, 1972 provide the regulatory framework for man's interaction with nature. All these statutes created regulatory bodies at the Centre and the States are vested with vast powers to discharge their duty to protect and prevent damage to the environment. In this paper, the focus is on the Central Pollution Control Board (**"CPCB"**) and the State Pollution Control Boards (**"SPCBs"**). This system has been in place since the inception of the Water Act and derives its powers from both the Water Act and Air Act. There is much that can be achieved in terms of controlling pollution if the various SPCBs do honest and sincere work.[10]

[10] P Mukherjee, *EIA Scams: Decaying the EIA Legal Regime in India*, 6 Journal of Environmental Research and Development 507, 510 (2012).

1. The lack of a recruitment policy leading to unqualified persons holding significant positions at PCBs affecting good governance

Madan Lokur J., rightly pointed out that not many SPCBs possess the attributes of a body capable of good governance. [11] For any authority/body to be capable of good governance they need to be led by qualified personnel who are capable of performing the duties vested in them. The qualification of the Chairman of the SPCB of Jharkhand was a matriculation and even more disappointing is the fact that he had no knowledge of pollution or the control of it. He had no 'practical or special knowledge' in this area. The High Court of Jharkhand considered this revelation before it to be one of "total horror, dismay, surprise and amazement."[12] The Court went on to hold the appointment of the Chairman to be illegal and invalid.

Despite multiple communications from the MoEF&CC, to the states regarding the need for professional appointments to the SPCBs, the states remained indifferent to it. Due to this and varying other circumstances, the National Green Tribunal (**"NGT"**) assessed the situation of all SPCBs and concluded that the members of the SPCBs in 10 States and 1 Union Territory lacked the necessary qualifications to hold their positions.[13] The NGT *inter alia* ordered all the state governments to notify rules on the qualification and experience (recruitment rules) needed for the Chairman/ Member Secretary of the SPCBs under the Water Act and Air Act.[14] This decision was subsequently challenged before the Supreme Court alleging that the NGT does not possess sufficient jurisdiction to adjudicate upon such matters in *Techi Tagi Tara* v. *Rajendra Singh Bhandari and Or*s.[15] The Supreme Court set aside the decision of the NGT but instructed the executive of all the states to frame recruitment guidelines within six months.[16] The rules are yet to be declared by the states. A contempt

[11] Techi Tagi Tara v. Rajendra Singh Bhandari and Ors., (2018) 11 SCC 734.
[12] Binoy Kumar Sinha v. State of Jharkhand, 2002 (50) BLJR 2223.
[13] Rajendra Singh Bhandari v. State of Uttarakhand & Ors., Application No. 318 of 2018 (National Green Tribunal, 24/08/2016).
[14] Ibid.
[15] Supra 11.
[16] Ibid.

petition has been filed with respect to this non-compliance of the decision in *Techi Tagi Tara* v. *Rajendra Singh Bhandari and Ors.*[17] before the Supreme Court.[18]

It is not possible for good environmental governance to materialise in the absence of qualified personnel to manage and monitor projects as per the mandate of the law. To have such leadership it is necessary to have clarity on the qualifications and experience required in an individual who is to be vested with such a significant duty as environmental protection.

2. The inaction of the PCBs

In more than one instance the callousness and lethargy of both CPCB and SPCBs have been brought to light by the judiciary. The Supreme Court has, on multiple occasions lamented their fruitless labor towards the prevention and control of pollution in Ganga for over 30 years. The major cause for the same is the inaction on the part of the statutory bodies, both the CPCB and SPCBs in implementing the various orders of the Supreme Court and the absence of effectively monitoring this by these bodies.[19] The NGT also stated that statutory authorities that fail to monitor pollution and take action against violators of anti-pollution laws, have to be noted.[20] However, this has not happened yet.

The inaction of the Bihar State PCB was made subject to the inquiry of the Chief Secretary of the state by the High Court of Patna in the matter of *New Era High School* v. *State of Bihar and Ors.*[21] The Chief Secretary was also instructed to propose an action plan for further proper functioning and discharge of duties by the Board. In this case, a printing press was opened near the New Era High School and a complaint was submitted to the board objecting to this. Their concern was noise pollution. No steps were taken

[17] Supra 11.
[18] N. Thapliyal, *Supreme Court Issues Notice in a Contempt Petition seeking Appropriate Guidelines in appointing Executives to SPCBs*, Live Law (18/12/2020), available at https://www.livelaw.in/top-stories/supreme-court-contempt-of-courts-act-recruitment-state-pollution-control-board-167408?infinitescroll=1, last seen on 19/12/2020.
[19] M. C. Mehta v. Union of India, (2015) 12 SCC 764.
[20] M. C. Mehta v. Union of India, Application No. 200 of 2014, (National Green Tribunal, 13/07/2017).
[21] New Era High School v. State of Bihar & Ors., AIR 2013 Pat 70.

by the Board in remedying this complaint as a result of which, they were forced to file a writ petition.

There is a situation in India where the statutory bodies await instructions from the Court to discharge their functions. Sections 19-27 of the Water Act and Sections 19-31A and 37- 42 of the Air Act provide the PCBs with enormous power and autonomy. Their inability to implement these powers vested in them is the biggest failure of all. It is a matter of concern when the officials of PCBs forget that they can take action against people who violate environmental laws without the direction from an external agency. The Courts have been brought to the point where they had to instruct officials to take appropriate action when they see a breach without awaiting instructions from the Court.[22] The Assistant Environment Engineer of the Gujarat PCB filed a note regarding dumping of waste near Ramol village and this prompted the High Court of Gujarat to take up this case *suo motu* and hold that *"no provision of this law or any other pollution law envisages any previous clearance from the High Court for taking action against defaulters."*[23] Again, the lethargy of SPCB was a matter of concern in *State of Madhya Pradesh* v. *Kedia Leather and Liquor*[24] and the court wondered at the SPCB's need for a direction from the Court to discharge their functions.

These are just some of the issues that need immediate resolution, before the State can hope to build more systems for effective management of environmental concerns. The creation of new systems will not do much good when the existing framework fails to perform their functions. Adding a new regulatory framework on an existing inefficient one is a plan that is destined to fail. It becomes a vicious circle which makes it nearly impossible to achieve the objects for which the new system is being made.

III. EIA CHALLENGES

Just as the regulatory framework has issues, the EIA Systems have many flaws that need immediate remedying given the unique circumstances prevailing in India. In India, we follow a discretionary model of EIA. The

[22] Suo Motu v. Vatva Industries Association & Ors., AIR 2000 Guj. 33.
[23] Ibid.
[24] State of Madhya Pradesh v. Kedia Leather & Liquor, (2001) 9 SCC 605.

Bhopal gas tragedy could be considered as the consequence of the discretionary model.[25] What the EIA notification does is identify what kind of projects require an EIA, and prescribe the procedure for obtaining Environmental Clearance for them.

1. EIA reports are made at the instance of the Project Proponent.

In India, it is the project proponent that conducts the EIA study.[26] This leads to issues like poor quality EIA reports, where actual facts are hidden (this was the case in the Goa airport matter) and the plagiarized EIA reports. The existing EIA framework in India is also plagued by the lack of efficient monitoring and verification process.[27] These issues together can make the EIA framework weak and inefficient.

2. Plagiarised EIA Reports

A hydroelectric project of the Murudeshwar Power Corporation Ltd. was to come up across the Kali River in Karnataka called the Dandeli mini hydel project. A rapid environmental impact assessment report was submitted by Ernst and Young. This report was found to be plagiarised by Environment Support Group and Parisara Samrakshana Kendra.[28] The report was plagiarised from the Tatihalla Dam project in the same district.[29] Tata Energy Research Institute drafted another EIA within a year. There were many issues with this report as well. However, the Karnataka government rejected this project in 2003.[30]

Shibani Ghosh cites the example of a pharmaceutical plant using the EIA report of a Sponge iron plant in her paper 'Demystifying Environmental

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[25] See P. Leela Krishnan, *Environmental law in India*, 259 (4th ed., 2016).
[26] Regulation 7(i) II, *Unified EIA Notification 2006 with amendments till September 2015*, MoEF&CC, S.O. 1533 (20/08/2015).
[27] S. Ghosh*, Demystifying environmental clearance in India*, 6 NUJS Law Review 433, 469 (2013), available at http://nujslawreview.org/wp-content/uploads/2016/12/03shibanighosh.pdf, last seen on 03/01/2021.
[28] M. Shankar, *Unsound power project thrown out,* Down To Earth (31/10/2003), available at https://www.downtoearth.org.in/news/unsound-power-project-plan-thrown-out-13619, last seen on 26/12/2020.
[29] P. Leelakrishnan, *Environmental Law Case Book*, 450 (2nd ed., 2006).
[30] Ibid.

Clearance in India'.[31] The Nauroji Nagar Project in Delhi is a great example of a plagiarised EIA report gone wrong in more ways than one. It claimed to have conducted a study on water quality a year before the project was commissioned. The report was also plagiarised from copyrighted materials including a book and the EIA report of the Tamil Nadu Mineral Ltd. without even changing names of the water quality monitoring locations.[32] The High Court of Madras scraped an EIA report in *P. V. Krishnamoorthy* v. *Government of India*[33]. The consultant M/s Feedback Infra Pvt. Ltd., that prepared the EIA report for the Salem- Chennai Eight Lane Highway Green Field Project as a part of the Bharatmala Pariyojana, made references to the Xi'an Province in China and HIV prevention steps taken. The Court did not consider this plagiarism but as "non-application of mind".[34]

3. Incomplete EIA

Quoting the Apex Court in the *Narmada case*[35] wherein it was observed that rehabilitation is much more than food, clothes and shelter, S. Rajendra Babu J., in *N. D. Jayal and Ors.* v. *Union of India and Ors.,*[36] held that *"prior rehabilitation will create a sense of confidence among the oustees and they will be in a better position to start their life by acclimatising themselves with the new environment."* For those who are displaced by developmental projects they are leaving behind their families, relations, livelihood, community etc. Rehabilitation schemes are vital to ensure that the displaced get a fair chance at restarting their lives. Yet we have had instances where rehabilitation policies were not in place when Environmental Clearances were given.

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[31] Supra 27.
[32] M Menon & V Viswanathan, *How not to do an environmental assessment,* The Hindu (30/08/2018), available at https://www.thehindu.com/opinion/op-ed/how-not-to-do-an-environmental-assessment/article24813642.ece last seen on 26/12/2020, last seen on 27/12/2020; See R. Banka, *EIA report on south Delhi govt colony revamp plagiarised, high court told,* The Hindustan Times (17/08/2018), available at https://www.hindustantimes.com/delhi-news/eia-report-on-south-delhi-govt-colony-revamp-plagiarised-high-court-told/story-GFR5EsM4pNXgN1aRZ88I3H.html, last seen on 27/12/2020.
[33] P. V. Krishnamoorthy v. Government of India, 2019 (3) CTC 113.
[34] Ibid.
[35] Narmada Bachao Andolan v. Union of India and Ors., (2000) 10 SCC 664.
[36] N. D. Jayal & Ors. v. Union of India & Ors., (2004) 9 SCC 362.

In *M.P. Patil* v. *Union of India and Ors.,*[37] the Environmental Appraisal Committee (**"EAC"**), after noting general nature of rehabilitation and resettlement policy recommended Environmental Clearance. The NTPC did not include the rehabilitation and resettlement policy in the Draft Environmental Impact Assessment Report, violating the Terms of Reference. The Environmental Clearance was granted under the condition that a detailed rehabilitation and resettlement policy will be developed within 4 months. But the court observed that the NTPC's rehabilitation and resettlement policy was limited to the paper. This was evidenced by the failure to identify and prepare a list of people affected by the project. NTPC also managed to hide the facts on the nature of the land. They claimed the land to be mostly rocky and barren, and partly agricultural when in fact the land in the project area was predominantly agricultural.

The EIA for the Aranmula Airport in Kerala did not explain how the multiple borewells that they would dig to meet their water requirements would impact the water table. The airport needed 500 acres of land (the land to be acquired were wetlands and paddy fields) and the EIA was silent about the materials and the quantity of the materials that would be needed to fill the land.[38] Moreover, the project proponent had altered the land without being granted the Environmental Clearance which was ignored by the MoEF&CC when the Environmental Clearance was granted.[39] The socio-economic impact of the land acquisition for the airport and the roads for accessing the airport finds no mention in the EIA. Aranmula is a heritage village. This village is famous for the Aranmula Kannadi (Aranmula metal mirror) made by local artisans. This metal mirror was certified Geographical Indication in the year 2005.[40] The artisans who make these mirrors use the mud and clay from the paddy fields of Aranmula as

[37] M.P. Patil v. Union of India and Ors., Appeal No. 12 of 2012, (National Green Tribunal, 13/03/2014).
[38] Shreeranganathan K.P. v. Union of India, 2014 ALL (I) NGT Reporter (1) (SZ) 1.
[39] Ibid.
[40] *Certificate Issued by the Geographical Indication Registry*, Intellectual Property India, available at http://ipindiaservices.gov.in/GIRPublic/Application/ViewDocument, last seen on 20/12/2020.

the main ingredient. These issues were not considered when the Environmental Clearance was given.[41]

4. EIA report excluding details of public hearing

Public hearing ensures participatory justice by giving voice to the voiceless.[42] The public hearing was adversely affected by not addressing key issues like the location of Ambient Air Quality monitoring stations and the absence of a rehabilitation and resettlement policy.[43]

The publication of public hearing with respect to the *Aranmula Airport case*[44] suffered from serious violations. The publication did not have all the details that were expected to be published. There were access issues to the public hearing. The NGT also observed that the 'tenor' of the protests was not reflected in the EIA.

In the *Hanuman Laxman Aroskar and Ors.* v. *Union of India and Ors.*[45] the project proponent concealed objections and environmental concerns raised during the public hearing and reduced it to a matter of employment concerns before the EAC. Among the concerns raised during the public consultation were the natural water recharge mechanism of the Mopa Plateau, Western Ghats protection, impact on local plantations, the lack of specificity as to the number of trees that would be cut down, loss of sacred groves, the effect on the 40 springs and the flora and fauna of these regions etc., which did not find mention in the report submitted to the EAC by the project proponent. What is concerning is that Environmental Clearance was given nevertheless. This begs the question as to the efficiency, integrity, quality and expertise of the EAC to take a decision in these matters.

[41] Supra 38.
[42] Samarth Trust v. Union of India & Ors., Writ Petition (Civil) No. 9317 of 2009 (High Court of Delhi, 28/05/2010)
[43] Supra 37.
[44] Supra 38.
[45] Hanuman Laxman Aroskar & Ors. v. Union of India & Ors., (2019)15 SCC 401.

5. Non-availability of Environmental Clearance in public domain

The non-availability of Environmental Clearance in the public domain, once the same is granted, was an issue in the *Save Mon Region Federation and Lobsang Choedar* v. *Union of India and Ors.*[46]. The project proponent did not publish the Environmental Clearance as required under Regulation 10(i)(a) of the 2006 EIA notification. Regulation 10(i)(a) requires the project proponent to publish the Environmental Clearance in 2 newspapers of the District or State where the project is located stating the conditions and safeguards in the same. In addition to this, the project proponent claimed that they had submitted the Environmental Clearance order to the heads of local bodies as per 10(i)(d) of the regulation, however, they failed to specify as to which local authority they submitted the same and also failed to mention the date of such submission.[47] Moreover, the MoEF&CC itself failed to upload the order at its website.

6. Non-application of mind by EAC

There is no application of mind by the EAC when the time for appraisal comes. The Supreme Court in *Hanuman Laxman Aroskar and Ors.* v. *Union of India and Ors*.[48] had called out the EAC for not analysing the EIA report, for not explaining the peculiar circumstances that lead to its recommendations, for its failure in addressing the environmental impact the project can cause and for considering extraneous circumstances. The Supreme Court went on to state the significance of the reasoning that the EAC has to provide thus: "The reasons which are furnished by the EAC constitute a live link between its processes and the outcome of its adjudicatory function. In the absence of cogent reasons, the process by its very nature, together with the outcome stands vitiated."

[46] Lobsang Choedar v. Union of India & Ors., 2013 (1) All India NGT Reporter 1.
[47] Ibid.
[48] Supra 45.

7. The soft approach of the Judiciary to Environmental Clearance violations.

Ex post facto Environmental Clearances were held to be *"completely alien to the environmental jurisprudence"*.[49] But the latest decision from the apex court takes a different approach. The court decided to take a route that best fits the doctrine of proportionality by reversing the revocation of the Environmental Clearance and closure of the units ordered by the NGT and imposed an additional fine of Rs. 10 Crores, on the violators who were operating without Environmental Clearance.[50] They continued this approach in the second Goa Airport case. In this case the suspension of the Environmental Clearance was removed after directing the National Environmental Engineering Research Institute to monitor compliance of the directions of the Court.[51]

IV. THE DRAFT ENVIRONMENTAL IMPACT ASSESSMENT NOTIFICATION 2020: ISSUES

The first stage of EIA under the DEIAN 2020 is scoping. In this stage, project proponent collects essential primary and secondary data before applying for the Terms of Reference (the detailed scope prescribed by the regulatory authority for the preparation of the EIA report in the project[52]). The next stage is the preparation of the draft EIA report as per the terms of reference and providing it to the concerned authorities for the conduct of public consultation. After the public consultation, the project proponent makes necessary changes to address the concerns raised by the public and submit the final EIA report for appraisal. It is at this juncture that the Appraisal Committee shall grant Prior-Environmental Clearance or reject the proposal.

[49] Common Cause & Ors. v. Union of India & Ors., (2007) 9 SCC 499.
[50] Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors., (2020) 4 MLJ 277.
[51] Hanuman Laxman Aroskar v. Union of India & Ors, (2020) 12 SCC 1.
[52] Draft Environmental Impact Assessment Notification-2020, MoEF&CC, (12/03/2020).

1. Self-regulation and Self- reporting in the case of violations.

The DEIAN 2020 hopes for self-regulation and monitoring in matters of reported violations, if any. That is not to say that none can bring violations to the attention of the authority. Regulation 22 of the DEIAN 2020 clearly states that any Government Authority, the Appraisal Committee and regulatory bodies can make a complaint against the project proponent. The Appraisal committee can make a complaint if any violation comes to light at the time of appraisal and the regulatory bodies can do so if any violation comes at the time of the application process. It is only in these instances that cognizance of any violations will be taken. For any subsequent violations the path is self-regulation and self- reporting.

2. Nominal penalty for violations.

There is a pecuniary liability attached to the violators. Unfortunately, the amount is nominal. Any form of punishment should serve the primary purpose of deterrence. The real object of the EIA understands the possible consequences for the environment and socio-economic fabric. It is a matter of common knowledge that recovery and rejuvenation of the environment, once damaged, is a long and expensive process. As such, pecuniary liability should be of greater value and proportional to environmental degradation caused due to the violation. The situation is similar in the matter of non-submission of compliance report under Regulation 20 of the DEIAN 2020.

3. Exclusion of public hearing

Regulation 14(8) of the DEIAN 2020 is couched in ambiguity. It states that the regulatory authority may decide to exclude public hearing if the local situation prevents the conduct of the same due to the impossibility of the local population to participate freely in the public hearing. It is the duty of the state to ensure that any such impossibility is remedied. It is also pertinent that the concerns of the people who stand to lose their homes, livelihoods, community etc., be heard. In a project requiring rehabilitation and resettlement, it is absolutely necessary that the community gets an

opportunity to respond to such a policy or be given the opportunity to claim for rehabilitation and resettlement in the absence of such schemes.

Regulation 14(2) of the DEIAN 2020, excludes a certain set of projects from the scope of public consultation of which exclusion of highway or expressway or multi-model corridors or ring roads chemical plants and building constructions and area developmental projects stand out. For these activities, there will be an acquisition of property, both public and private and as such, the impact on the environment, lives and livelihood of the people who live in these areas or nearby areas is significant. The rationale behind such an exclusion from the scope of public consultation or the object sought to be achieved by such exclusion is nowhere to be seen. Unfortunately, no justification can prove useful in creating such exclusions.

4. Reduction in the notice period

One might always say that the 20 days of notice of public hearing should enable the community to communicate the concern to the regulatory authority. One should understand that it is only one avenue of expressing one's concern to the concerned authorities. If we practice this mode of exclusion, we are operating under the assumption that all are literate. The reduction of 10 days from the notice period is a significant reduction in time for response.[53] No amount of technological advancement can be the justification for the reduction of the notice period.

The advantages of the public hearing were clearly stated in *Samarth Trust* v. *Union of India and Ors.*[54], as follows:

> The advantage of a public hearing is that it brings about transparency in a proposed project and thereby gives information to the community about the project; there is consultation with the affected parties and they are not only taken into confidence about the nature of the project but are given an opportunity to express their informed opinion for or against the project. This form of a social audit, as it were, provides wherever necessary, social

[53] Appendix IV of the EIA 2006 Notification Paragraph 3.1 holds that "…A minimum notice period of 30 (thirty) days shall be provided to the public for furnishing their responses". And the latest DEIA 2020 reduced the notice period to 20 days in Appendix I Paragraph 3.1.
[54] Supra 42.

> acceptability to a project and also gives an opportunity to the EAC to get information about a project that may not be disclosed to it or maybe concealed by the project proponent.[55]

5. Lack of clarity on what constitutes strategic considerations

The DEIAN 2020, in its objects and reasons clearly states that this notification is for the purpose of making the Environmental Clearance process more transparent. Despite the many benefits of a public hearing the conscious exclusion of public hearing in certain projects is a matter of concern.

While the exclusion of projects concerning national defence and security from public consultation seems valid, given that these are matters of state security, the power of the Central Government to determine what projects fall within the ambit of "other strategic consideration" needs clarity. This power is excessive and undefined. At least to the extent of understanding what falls under the scope of strategic consideration needs mentioning. It is not an exhaustive list that we are after (exhaustive lists are cumbersome, restrictive and nearly impossible to make in most cases). What we are after is to know the features and elements of projects that qualify it to be a project of strategic consideration. It is needed to avoid excessive government action and generally in resolving the vagueness of the phrase. It is pertinent that these lacunae be addressed for the preservation of a rule of law democracy. In *Hanuman Laxman Aroskar and Ors.* v. *Union of India and Ors.,*[56] the Court emphasised the importance of public access to information and environmental governance based on rule of law.

> Public access to information is, in similar terms, fundamental to the preservation of the rule of law. In a domestic context, environmental governance that is founded on the rule of law emerges from the values of our Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognized value under Article 21 of the Constitution. Proper structures for environmental decision making find expression in the guarantee against arbitrary action

[55] Ibid.
[56] Supra 45.

> and the affirmative duty of fair treatment under Article 14 of the Constitution.[57]

Jasanoff believes that the gaps in information about MIC and issues in the communication of information about it led to the Bhopal gas tragedy.[58] If the authorities had been receptive and appreciative of the information, then necessary steps could have been taken to prevent this disaster. Post Bhopal, the US saw a great shift towards the 'community- right-to-know'.[59] Despite us being the victims of this tragedy, reluctant to learn from our mistakes, we dilute public participation and involvement.

6. Exclusion of clearance from regulatory authorities

Regulation 17(5) of the DEIAN 2020, excludes the need for clearance from regulatory bodies and authorities for the grant of prior Environmental Clearances, except in the case of mining, diversion of forest land, projects in coastal regulatory zones and projects that require the acquisition of land. It is to be noted that under Regulation 22 (1) (d) of the DEIAN 2020, regulatory authorities can bring complaints of violations against the project proponent only during the processing of the application. If there is exclusion of clearances from regulatory bodies and authorities, the potential for environmental damage and degradation between the period of grant of prior Environmental Clearance and the application to various bodies cannot be / should not be ignored. The DEIAN 2020 is also silent as to the period within which applications are to be filed before other regulatory bodies and authorities once the Prior- Environmental Clearance is granted. When there is an exclusion from scrutiny by bodies that cater to curbing pollution, protecting environment and compliance with local laws or state laws, we are treading on a dangerous path. As already stated, recovery from environmental damage is a long-drawn process.

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[57] Ibid.
[58] I Jasanoff, *The Bhopal Disaster and the right to know*, 27 Social Sciences and Medicine 1113, 1113 (1988); See A. Rosencraz & S. Divan, *Environmental Law and Policy in India,* 547 (2nd ed., 2002).
[59] See A. Rosencraz & S. Divan, *Environmental Law and Policy in India,* 547 (2nd ed., 2002).

7. The limited scope of violation

The definition of the term violation in DEIAN 2020 seems to include only those cases where work has started on the site of the proposed project or an expansion work has started without prior Environmental Clearance. This means even the authorities do not have the power to take action against violations of law be it civil, criminal or environmental. This exclusion of potential violations and ability to take cognizance over such matters puts the entire framework in a dark spot. The role of the public in bringing such violations to the attention of concerned authorities cannot be overlooked. The expose of the MPCL dam project across the river Kali in Karnataka is one example among many to prove the significance of public participation. We have all benefitted from the proactiveness of M. C. Mehta and T. N. Godavarman Tirumalpadu.

In the land of EIA scammers, fraudsters and plagiarizers, one silver lining in the DEIAN 2020 is the inclusion of the provision for cancelling and rejecting prior Environmental Clearances or prior environmental permissions in the event of concealing information or data, submitting misleading, incorrect or false information by the project proponent or the consultant or EIA coordinator or functional area experts who prepared the EIA report.[60] In addition to this, the consultant or EIA coordinator or functional area experts may be blacklisted for such concealment and misleading information.

V. CONCLUSION

The regulatory framework existing in our country for the prevention of pollution itself has failed in achieving its goals. This fact was brought to our attention not only by media but also by the judiciary and even by our surroundings. The existing frameworks are unable to embrace their already existing powers and responsibilities and take proactive steps. There may be multiple reasons for their inability to meet these challenges that are posed to them. Lack of adequate manpower, both in terms of experience and qualification is a major hurdle that they have to overcome. Even then I

[60] Supra 52, Regulation 17.

believe it is their paramount duty to proactively engage with environmental concerns and find solutions and work towards creating solutions to remedy the lack of man power. Every city facing waste management problems, every river, every pond that is constantly fed human waste and effluents and ever-increasing air pollution is a testimony to the inaction and lethargy of statute based regulatory authorities that wield enormous powers to protect the environment.

The creation of additional framework like the EIA is essential and one that we cannot do away with. But the dilution of the existing norms is a dangerous path to tread on. We need the regulatory bodies strengthened, with more manpower not only in terms of number but also in qualification. They should be given training to meet the current challenges and they should be appraised with the recent developments in the field of pollution control and environmental protection. On-board training is also important to ensure that the officers are equipped to take decisions and request clarifications when it is needed.

As far as EIA systems are concerned, public participation should continue till project completion and at specific intervals. The State should allot consulting agencies to each project instead of the project proponent. The Environmental Clearance grant, suspension or rejection should include compliances with other environmental and state specific laws. The penalty should be increased for deterrence and the authorities should have the power to impose fines in addition to the penalty if there is breach of EIA promises and guidelines issued by the EAC.

There was an attempt made by the judiciary to create a national monitoring authority. The Central Government was directed to appoint a National Regulator under Section 3(3) of the Environmental (Protection) Act, 1986.[61] It was years after this decision that a concern came before the court as to whether the aforementioned was a suggestion or not.[62] The Court on 06/01/2014 ordered the Central Government to appoint a National Regulator and submit an affidavit with the notification of appointment of

[61] Lafarge Umiam Mining Pvt. Ltd. v. Union of India & Ors., (2011) 7 SCC 338.
[62] T. N. Godavarman Tirumalpadu v. Union of India & Ors., (2014) 4 SCC 61.

a regulator by the 31st of March 2014, after holding that the direction to appoint a National Regulator was Mandamus.[63] However this is yet to materialize.

As a first step in remedying the failure of environmental protection bodies, the legislature and executive must bear in mind the need to comply with the decisions and instructions of the judiciary. Delay creates challenges of increased economic liability and potential loss of ecosystems and species. The regulator at the national level with offices in all states would have the powers and functions of the Central Government under Environmental (Protection) Act, 1986 if the legislature decides to implement the decision of the Apex Court. However, this body aimed at remedying the shortcomings of the existing EIA mechanism- if it comes alive- will not solve the problems it is hoped to solve. What we need is the Central Government to create an umbrella organization that is autonomous and can function with minimal State interference to monitor and regulate these regulatory bodies and EIA systems. This organization should be formed using a separate law instead of a notification or rule, clearly stating the mandate of the organization, its structure, the qualifications of the head of the organization, minimum qualifications of other officers etc., without leaving them to be determined by rules to be formed later. Only then can we expect these authorities to do their work independently, fearlessly and honestly.

[63] Ibid.