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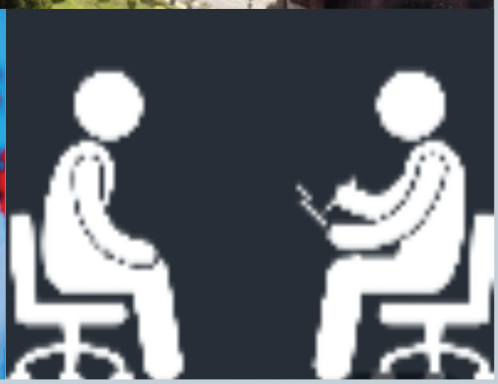

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EDITORIAL

CEERA, NLSIU is happy to publish Volume 6 of the IN LAW Magazine. In 2020, we have also published the Journal of Law and Public Policy and also the Journal on Environmental Law, Policy and Development. To continue and maintain such efforts in times when the world has moved online as a response to the coronavirus pandemic has been an immense learning experience to us.

This edition deals with various themes related to environment, Corporate Environmental Responsibility, NGT, non-compliance, issue of noise at airports, sand mining, animal law and pig farming, environmental justice and international relations law and also issues like migrant workers crisis during the COVID-19 pandemic, gig economy and labour welfare etc. It also gives me immense pleasure to present to you in this edition two interviews of prominent legal personalities followed by a book review and information about a few past and upcoming events and publications of the Centre.

The IN LAW magazine caters to contributions on emerging and contemporary areas of legal research. It provides a platform for practitioners and researchers to present their legal analysis, research and engage in pivotal exchange of ideas and discussions. We highly encourage contributions from advocates, law teachers, researchers, policy makers and others to contribute to the forthcoming issues.

We thank all the authors who have contributed to this edition of the magazine. We also thank our CEERA team members, especially Ms. Geethanjali K V and Ms. Lianne D'Souza, for their support, time and effort in working towards bringing out this edition. We profusely thank the support extended by the editorial review and advisory board members for their patronage towards this publication.

We hope that our readers will have an engaging experience reading this edition of the magazine and that it will live up to their ever-exalting expectations. As always, we welcome the feedback of our readers and look forward to hearing from them.

Prof. (Dr.) Sairam Bhat
Professor of Law & Coordinator, CEERA, NLSIU

SPOTLIGHT

Shyam Divan*
Senior Advocate, Supreme Court of India

Mr. Shyam Divan is a senior advocate practicing in the Supreme Court of India. His main areas of practice include civil litigation across banking, securities law, arbitration, administrative law, constitutional law and environmental law.

He is co-author of Environmental Law and Policy in India (2nd Edition, 2001, Oxford) and has authored chapters on Public Interest Litigation in the Oxford Handbook of the Indian Constitution (2016) and Contours of EIA In India in Water and the Laws in India (2009, Sage).

1. What would your advice be for a young advocate who aspires to embark on an expedition to reach the peak of a career in litigation?

To every young advocate embarking on her career, the challenges appear immense. Make no mistake: they are. So first, an encouraging word of advice I received from my father when I plunged into practice and the sea of lawyers in the Bombay High Court. His advice: "Don't worry, there is always room at the top".

In our system, a young lawyer's practice is shaped in the initial years by the practice fields of her senior. Should you have a preferred area of practice, select a chamber or office that works in that field. Your first client will likely engage you in work similar to your senior's practice areas.

While every court and tribunal in our country has a select band of top practitioners, to gain a reputation as a litigator it is important to work in our constitutional courts – the High Courts or the Supreme Court. Choose a chamber where a substantial part of the work is in the constitutional courts. Personally, I feel it is best to start in a High Court where young lawyers receive opportunities to argue. The organization of the Bar and the structure of Supreme Court practice leans in favour of senior advocates making it particularly challenging for young litigators keen on arguing cases.

Our system appears to favour generalists. While specialization is welcome, do not over specialize. Most of our top litigators are adept across several fields.

Dispute resolution is moving towards written arguments. The young advocates' ability to draft a persuasive brief in simple language is a skill that will take her far. The quality of our legal writing remains ordinary, lending an opportunity for young advocates to excel and surpass their seniors.

Finally, our system is generous enough to enable you to reach great heights as a litigator without compromising on your ethics. (This is an enormous complement to our system). Our system recognizes merit, though one may have to wait a while. Stay the course. Good luck.

2. It has been a virtual life ever since the COVID-19 pandemic, and this has been true in case of court hearings as well. How has your experience been in attending virtual hearings?

A court hearing is the culmination of lengthy preparation involving discussions with the client,

* Mr. Divan is on the CEERA JELPD Editorial Advisory Board and also recently spoke in our webinar titled "Future of Environmental Litigation in India" held on 7th - 8th August, 2020.

conferences amongst lawyers on the team and research for the case. The pandemic has severely curtailed physical meetings, access to libraries and discussions amongst colleagues – all of which help refine arguments that eventually assist the court to decide the case. The backend disruption is obviously impacting the quality of assistance a lawyer can provide during a virtual hearing.

Turning to the virtual hearing itself, my experience is patchy. Some hearings proceed smoothly because the case is simple, the parties are few and there are no technical glitches. On occasion, when the array of parties is large, or a bunch of similar cases is listed together my experience is not satisfactory. Moreover, at times one is unable to log in or address the court because the microphone is muted. This can be terribly stressful!

I am sure virtual hearing technologies will improve in the near term. Doubtless, given the importance of access to justice, virtual court hearings are better than no hearings.

3. Would you opine that virtual hearings are here to stay and save time and reduce cost of litigation, especially to citizens?

With improvements in virtual hearing technologies, I do see several advantages to the consumer. For routine procedural hearings both in court as well as before alternative dispute resolution fora, virtual hearings could be a great boon.

If we are to make a systemic change, we need to immediately scale up internet penetration and equip courts and tribunals across the spectrum with the necessary hardware and train the personnel to adopt and adapt to these technologies.

4. Alternative Dispute Resolution, especially arbitration, has been much in demand along with its shortcomings in India. What, in your view, can be improved to remedy the shortcomings of the ADR system, particularly arbitration, in India?

We must move away from ad-hoc arbitrations to institutional arbitrations. Once institutional arbitrations match up to and exceed in quality the results that we see from ad-hoc arbitrations, public confidence in the institutional mechanism will increase. This will encourage lawyers who draft arbitration clauses to recommend institutional arbitrations. Should this trend strengthen, a dedicated arbitration Bar will grow, and commercial disputes will resolve in much shorter periods. Further, the growth of institutional arbitrations will translate into less judicial interference, consistent with international practice.

5. What changes would you recommend in legal education in general, so as to make law students- practice ready?

Without hazarding any foolish suggestions with respect to legal education reform, (and in the hope that this pandemic will soon pass) – my suggestions for a more rounded education: Travel and more travel; Read, read and read.

Debesh Panda*
Advocate-on-Record, Supreme Court of India

Mr. Debesh Panda is an Advocate-on-Record at the Supreme Court of India. He is recognized as a leading practitioner of Commercial Arbitration and has handled several high stakes disputes in various industries of leading private sector entities and the Oil and Gas sector of Government of India

1. Having worked in the field of Alternative Dispute Resolution, would you say that the present situation of virtual hearing due to pandemic would have any kind of impact on domestic commercial arbitration? What would you say would be a positive and negative impact here?

Yes I do see an impact and it is considerable. The biggest impact appears to be that the appetite for instituting or continuing earlier arbitration proceedings has reduced. Instead of litigating, clients are happy to look for ways to settle, or to postpone the initiation of proceedings so long as their interests in the interim are safeguarded in some manner or the other. They are averse to taking steps which would lock up money in litigation/arbitration and want to do everything to maintain the cash flow in some manner or the other and ensure that liquidity is not affected. Clients are also far more sensitive to the cost of legal representation and high arbitral fee now, as compared to earlier. However, when I speak to my colleagues in Europe and South East Asia, it appears India is in a better position so far as Alternate Dispute Resolution is concerned. So I remain hopeful this conservatism will be temporary and short lived.

The other interesting take away is retired judges who were acting as arbitrators are suddenly making efforts to be self sufficient and want to avoid interaction with even their office staff, much less stenographers, and are ready to even type and send across orders pursuant to hearings via video conferencing. There is an increased demand for tech savvy arbitrators who are comfortable reading pleadings and documents online and typing their own orders. I think this is a positive impact, and is very welcome. I also see a lot of clients suddenly becoming open to appointing younger practicing counsels as arbitrators, as opposed to earlier when everyone wanted a "retired justice". So I guess the pandemic has created opportunities for many in our generation. That is yet another positive.

A big negative is witness examination. This is one area where I miss physical hearings. It is hard to get your flow as a counsel, unless the witness is in front of you. It also gets quite exhausting to argue for extensive periods of time, or to follow arguments at length on VC. In comparison to the amount of work that would get done in a single day's physical hearing with a well prepared tribunal, my experience is you would be lucky to get half the work done now. It is also much more taxing to keep staring continuously at a screen for hours in a virtual hearing, and to listen to long drawn arguments over headphones.

As a counsel, one way that I have significantly benefited from virtual hearings is that I no longer have to travel as much as I used to earlier. Especially when it comes to arbitrations, travelling can be quite an effort as you have to carry all your hearing volumes, check into a hotel and start working in a different atmosphere, stay there for weeks and then lug back all the papers. This is one reason why I feel that once the pandemic is over, not just parties, counsels and arbitrators but even arbitral institutions must continue to make a serious push to encourage virtual hearings, especially in respect of matters where hearings

* Mr. Debesh Panda, is an alumnus of NLSIU, Bangalore and the Graduate Institute, Geneva.

can be concluded with short arguments. It would be much more cost effective for clients and at the same time be less taxing for the counsel and the members of the tribunal.

2. In your experience of dealing with real estate laws would you say that the law as it presently favours the sustainable development in infrastructure?

I don't think it does. When it comes to the real estate sector, the legal framework appears to be more of a patchwork quilt that has been stitched over time. One of the casualties in the process is sustainable development.

When you look at the sector from the perspective of a developer, there are far too many legal changes that have occurred too fast in the last ten years, for there to be predictability and consistency, which would attract steady investment. For any commercial entity operating in this kind of an atmosphere, sustainable development would not be high on the priority list when they are busy jumping the hoops of legal and regulatory hurdles day after day. At the same time, you can't blame purchasers of real estate for going to court when projects are not being completed in time, or as per the approvals granted. They would naturally blame the developer for not being able to deliver as committed. I don't think sustainable development is on anybody's horizon in this kind of an atmosphere. If the policymakers are serious about fostering sustainable development, the first thing would be to create regulatory and legal certainty and make it clear, predictable and commercially lucrative for developers to walk the extra mile to turn environmentally conscious, and then adopt a carrot and stick approach to enforce compliance. What I see today is all stick and no carrots. If you are dodging sticks all the time, you would only want to keep costs low and sell as much as you can, as quickly as you can.

To foster sustainable development, one has to start from the bottom. It has however never started from the bottom in our country? Is it clear and predictable? I don't think so. Look at the law on environmental clearance where the goalposts have shifted from time to time. A few years back, use of fly ash bricks was made compulsory but fly ash bricks were not made easily available in the vicinity before introducing this change. It just led to increase in corruption that is all. Use of treated sewage water became the norm after the use of ground water in construction was banned. I am not for once advocating that ground water should have been permitted to be used in the first place, but before compelling every builder to shift to sewage water in Delhi NCR, were arrangements put in place to ensure availability for all? I was appearing in a series of matters before the NGT and I can tell you that when demand for sewage water treated in STP plants suddenly went up overnight because of the order, the Government did not even have sufficient sewage water to meet the needs of all the real estate developers. Of late, smog guns are being insisted upon at construction sites. Why was this not done earlier? Smog has been a problem for years now. If these guns are really the pancea for smog in the Delhi NCR, then why not have a clear policy in place for their use amongst all the authorities in the area? A quick survey will tell you that is hardly the case. So standards vary from one authority to the other. Yet another example that comes to mind is of *"dewatering"* - a few years back, developers were directed to build double floor basements for parking cars in their projects. In various projects that were in Noida close to the Yamuna, once the digging for the second basement was completed, it was discovered that water was collecting around the foundation, which had to be "dewatered" using water pumps all the time. If at all an approval was to be granted for double basements, should this not have been considered before granting the approval? What does a home buyer living in that project do now? The authorities should have refused approval for double basements, knowing the risk of water levels near the Yamuna. Who takes the blame?

So the basic point remains - knee jerk responses do not foster sustainable development. It would help that there was a complete policy overhaul and each and every aspect that needs approval was considered and made clear in advance. I am sure if you make it compulsory for all real estate developers to install rainwater harvesting, or solar panels for power generation, or smog guns, they will happily factor it into their cost, and pass it on the customers. I don't think customers would refuse to pay, if they know that it is compulsory and necessary for sustainable development. However, if you keep introducing such measures

piece meal, there are bound to be problems. What is necessary is to make it compendious and transparent from the outset and then rigorously enforce it, applying even principles of strict liability if necessary, wherever permissible.

RERA is a fantastic game changer that way, but it has a long way to go and is still piecemeal in many ways. It would help if Parliament were to trust an umbrella regulatory body and vest it with jurisdiction to dovetail all the environmental issues such as Environmental Clearance, shift to usage of fly ash bricks, ban on use of groundwater, use of smog guns etc. with the day to day issues that confront the real estate sector, and create a single window for developers to obtain all approvals in one go, before commencing a project. Enforcement can then be left to the machinery under that statute.

One area, which is close to my heart, is noise pollution. I find that this area is significantly overlooked by all concerned. If you see the conditions in which workers operate at construction sites, operating high noise machinery, with their children running around, it makes you wonder why it is not being properly regulated. My father in law is a doctor specializing in hearing disorders and I have often heard from him stories of people becoming deaf or developing psychological problems later because of constant exposure to very high noise levels. As on date, this is not even adequately documented. I am sure if you made it compulsory for a real estate project to get a sophisticated noise meter installed that is expensive and designed to be less susceptible to tampering and can be managed online at all times from a central server, most customers who are purchasing units would want the developer to install the same and would not shy away from defraying the cost pro rata.

So in a nutshell, I would say the law at present does not do much to foster sustainable development. However, if it is made lucrative and easy to adopt, I doubt there would be much resistance to change.

3. What would you suggest a young lawyer in dealing with matters in multiple locations? What strategies had you adopted to deal with the situation yourself?

That's a very interesting question! Frankly I don't think I had any clear and fixed approach. I just took things as they came. During my initial years in the profession, most of the briefs came on a reference of colleagues whom I had practiced with in Supreme Court, or from briefing counsels from outside Delhi whom I had a chance to work with while working with various senior counsels. So I ended up with a practice where an overwhelming majority of my briefs were before forums outside Delhi. As and when I took up matters, it was on the understanding that the local counsel would hold fort on the days I could not leave Delhi.

The best "strategy" I would say I adopted was to get married to Amrita who has been my pillar of support. In the initial years, she held fort before Courts in Delhi and also travelled outside when needed. It also helped us build our practices over time and I am glad that we both have managed to keep things afloat for each other till date. I cannot imagine having come this far without her.

The only advice I would give to young lawyers is to always go out of your way to help your colleagues and your juniors in the profession. They are the ones who have always looked out for me and helped me. Not only will they refer you new matters, they will also give you useful advice and tips to deal with local courts and the mindset of judges. It has happened on more than one occasion that the judge concerned whom I had appeared before in the high court, later got elevated to the Supreme Court. When you get a brief to appear before that judge in the Supreme Court, your past experience before him is a big advantage.

4. Where should the focus of a young advocate be in terms of litigation practice, the trial courts or the High Courts or the Supreme Court? Why?

The answer to this question depends upon a multitude of factors. As they say, one size does not fit all. It depends upon the area of law you have an aptitude for, and the kind of practice you want to build. Obviously if your forte is criminal law or intellectual property, specialisation is a must. The Supreme Court would not make sense as a place to begin with.

My advice is to first spend a year or so in the chamber of a leading practitioner in the Supreme

Court or the local High Court with a very wide practice that is not too specialised, as this would expose you to a multitude of laws and proceedings and broaden your horizons after graduation. It would give you a sense of how the law works in practice and help you to decide how to take your career forward, and more importantly, to find out what you do not want to do in practice. A stint like this would also give you a fair idea of which chamber you should move to a few months down the line. Depending on whether you discover a penchant for civil or criminal law, you should then pick a chamber with plenty of trial and appellate work in that domain, and where you will also get opportunities to appear on your own. Most progressive young chambers also allow junior counsels to take up their own independent briefs. Stay in this chamber till you have enough work of your own so as to go independent, and by that time you would have also become comfortable with advocacy in trial courts as well as other high courts that you hope to build your practice around. My experience in Delhi has been that unless you want to focus on criminal law, it helps to pick a chamber in the Delhi High Court which has a broad practice comprising of writs and civil trial. This is one court where you will find very high standards of advocacy and tremendous exposure to every possible area of practice. More importantly, most of the judges are kind enough to encourage all junior counsels appearing before them.

That said, let me however add a caveat to what I have said above. There is no one fixed formula. In my career, I started in trial court, and a year later was called to join the chamber of a senior counsel in Supreme Court. So the only high court exposure I got in my first few years was when my senior got briefed to appear in high court. I started going to the Delhi High Court regularly only after a few years of practicing independently. All in all, I would say, junior counsels should not be choosy about where they are getting briefs from. Keep appearing and keep polishing your skills as you move forward. A time will come when you look back and find that a point of law you had researched on for a matter before a munsif court or a statutory authority years back, will be the clincher in a matter before the High Court or Supreme Court, or in an arbitration hearing. As you go along in your journey, you will find that you are getting more comfortable with a particular area of law or a particular forum and are getting more appearances there. Allow your practice to grow organically

Corporate Environmental Responsibility in EIA: Not a Mandate?

*- Prof. (Dr.) Sairam Bhat, Ms. Madhubanti Sadhya & Mr. Saumya Singh**



Key Words: Environment Responsibility, Corporate Social Responsibility, Environment Impact Assessment, Office Memorandum, EIA Notification 2006

Introduction

On September 30 2020, the Ministry of Environment, Forest and Climate Change (MoEF&CC) issued an Office Memorandum (OM) that has superseded another Memorandum dated May 1 2018.[1] The 2018 OM had mandated that for gaining Environment Clearance (EC) for projects under the 2006 EIA Notification, specified funds under the label of Corporate Environment Responsibility (CER) be allotted to specified purposes by the project proponent.[2] The recent Memorandum has removed this requirement. Instead, the Expert Appraisal Committees (EACs) deliberating on the project have been mandated to prescribe "*specific condition(s) in physical terms*" for the project proponent to follow, these conditions forming part of the Environment Management Plan (EMP) prepared under the clearance process.[3] Given that EMPs and requirements under the same were part of the process even earlier, the recent Memorandum has effectively served only to remove the additional requirement of CER imposed through the 2018 OM.

However, the recent Memorandum does not provide any concrete reasons that necessitated this removal. It merely mentions that the Ministry had received "*several representations*" against the 2018 OM, and the same had also been challenged in the Delhi High Court. Consequently, the Ministry examined the matter and settled on this course of action. This removal signifies a diametrical shift in the approach towards the CER requirement as compared to the Draft EIA Notification 2020 released earlier this year. In the draft 2020 EIA Notification, the requirement of CER had been mentioned and hence upheld, and the MoEF&CC had been tasked with releasing guidelines regarding the same from time to time.[4] This change in stance should have been cogently justified. Further, the impact of such a dilution on the environment should have been assessed and explained. In the absence of such an explanation or assessment by the MoEF&CC, the 2020 OM, and the place and importance of CER in the EC process, need to be examined to gauge the justifiability of the repeal.

The aim of this piece is to first examine the place and contours of the requirement of CER in the EIA process. It then analyses some criticisms of the CER requirement as expressed by some stakeholders, both regarding the provisions and the implementation of the same. The article also analyses some of the ECs granted, and Compliance Reports for, some projects. Finally, it assesses whether the removal of the requirement, and the manner in which it was undertaken, was justified, and some alternative approaches towards CER that could have been adopted.

• Prof. (Dr.) Sairam Bhar, Professor of Law and Coodinator, CEERA-NLSIU, Ms. Madhubanti Sadhya, Teaching Associate, and Mr. Saumya Singh, 2nd year law student, NLSIU, Bengaluru.

1 Office Memorandum by the Ministry of Environment, Forest and Climate Change on "Deliberations on the commitments made by project proponent and requirements to address the concerned raised during the public consultation and prescribe as specific condition(s) while recommending the proposal, for prior environment clearance, in physical terms in lieu of Corporate Environment Responsibility (CER)- regarding." (September 30, 2020).

2 Office Memorandum by the Ministry of Environment, Forest and Climate Change on "Corporate Environment Responsibility (CER) – reg." (last accessed, May 1, 2018).

3 *Supra* note 1.

4 Draft EIA NOTIFICATION 2020, Ministry of Environment, Forest and Climate Change , http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf, § 15(9).

About the Corporate Environment Responsibility (CER) Requirement

Theoretically, CER is defined as "*the duty of the corporation to mitigate its impact on the natural environment*". This responsibility is considered part and parcel of Corporate Social Responsibility (CSR),[5] a concept which encompasses the duties of the corporation towards society.

However, in the 2018 and 2020 Memoranda, CER has been used to denote a particular mandatory condition to be fulfilled by companies for gaining ECs under the EIA framework provided under the EIA Notification 2006. This is not the only requirement that has been imported into the EIA process under the label of CER. Another such requirement was imposed through a set of OMs issued in 2011 and 2012. Under that requirement, some specified types of project proponents were required to formulate 'Corporate Environmental Policies' for the protection of the environment, and to set up mechanisms to ensure adherence to this policy and the conditions mentioned in the EC.[6]However, for the purposes of the recent Memorandum, it is the requirement imposed through the 2018 OM, and reaffirmed in subsequent OMs, that is pertinent.

The grant of ECs to projects is governed by the EIA Notification of 2006. Under this Notification, prior ECs are required by the projects specified under Section 2.[7] Such ECs are granted by the MoEF&CC (at the union level) or the State Environment Impact Assessment Authorities (SEIAAs) (at the State level), depending on the category of the project.[8] These clearances are granted only after the recommendation of the Union/State Expert Appraisal Committees (EACs/ SEACs). The body concerned conducts a four-stage process to assess the environmental feasibility of the project: the stages being screening, scoping, public consultation, and appraisal.[9]

It is at the stage of appraisal that the requirement of CER comes into the picture. At this stage, the body concerned conducts a detailed scrutiny of the project proponents' application, as well as other relevant documents such as the final EIA report (prepared by the proponent in the first three stages).[10] The recommendation for the grant of EC is advanced after such scrutiny. Section 7(IV)(i) of the EIA Notification 2006 mandates that if such a recommendation is made, the *stipulated terms and conditions* must also be specified with the same. Further, the minutes of the EAC meeting shall list out the *specific environmental safeguards and conditions* prescribed by the EAC.[11]

The 2018 Memorandum incorporated CER as a mandatory requirement for every project proponent to be granted EC. Under this condition, a specified percentage of the total capital investment undertaken in a project was to be channelled into specified activities such as sanitation, health, and education, in the "*affected area*" around the project.[12] This investment was to be independent of the capital spent in compliance with any other requirement under the EIA/ any other statute.[13] The exact quantum of the CER investment was to be decided by the EAC on a case to case basis, based on "*due diligence*": the Memorandum only specified the maximum permissible levy, the upper limits varying based on (a) the total capital investment in the project (b) whether the project was greenfield or brownfield.[14] Further, in case any modification was sought in an existing EC, CER was to be levied only if any additional capital investment was being undertaken by the project proponent, as a percentage of the additional expenditure.[15] On the level of enforcement, the activities to be undertaken by the proponent were to be treated as a 'project', and the allocated funds were to be utilised in the same directly. The status of the CER activities was to be reported as part

5 Shishir Tiwari & Gitanjali Ghosh, *Governance of Corporate Environmental and Social Responsibilities in India: Sketching the Contour of Legislative Evolution and Reforms*, 6(1) IMJ 35, 37 (2014).

6 Office Memorandum by the Ministry of Environment, Forest, and Climate Change on "Corporate Environment Responsibility." (April 26, 2011).

7 Notification number S.O. 1533 2006 § 2.

8 *Id.*

9 *Id* § 7.

10 *Id.* § 7(IV).

11 *Id* § 7(IV)(i), Appendix 5.

12 *Supra* note 2, at § 6.

13 *Id* § 6(I).

14 *Id* § 6(II).

15 *Id* § 6(IX).

of the half-yearly Compliance Reports that need to be submitted by project proponents to show the level of compliance with the requirements imposed by the EAC.[16]

As apparent above, the legal requirement of CER is different, and separate, from the *Corporate Social Responsibility (CSR)* requirement that companies must comply with under Section 135 of the Companies Act. There are indeed certain similarities between these requirements, especially in terms of the activities that can be invested in, in discharge of the CER and CSR obligations. Both include areas such as education, health, sanitation etc.[17] Secondly, while making CER investments in the project affected area is mandatory, CSR expenditures should also preferentially be made in *"local area and areas around where it operates"*.[18]However, despite this overlap, they remain different statutory requirements, and as discussed earlier, the CER requirement operates independently of all other statutory requirements. Hence, both have to be complied with independently. Further, while only companies crossing certain thresholds in terms of net worth or turnover or net profit are required to undertake CSR activities, no such eligibility conditions have been prescribed for CER. The 2018 OM only mentions that some project proponents might not be eligible for CSR because of these eligibility thresholds; it does not prescribe any such threshold for CER itself.[19]

As mentioned in the 2018 OM, the CER framework has been the subject to much criticism, regarding both the content of its provisions and the implementation of the same. These issues need to be examined, to analyse whether the elimination of the CER requirement was justified.

Criticisms of the CER Requirement and Critical Analysis of the 2020 OM

The first criticism regarding the CER focuses on the form of executive action through which the same was implemented: an Office Memorandum (essentially a piece of communication between a MoEF&CC officer and the authorities concerned).

16 *Id* § 6 (VI).

17 Companies Act 2013 sch VII; *Supra* note 2 § 6(V).

18 Companies Act 2013§ 135.

19 *Supra* note 2, § 3.

The EIA Notification does not specifically mention CER. As discussed earlier, the only EIA provisions to which CER can be traced are the general provisions that mandate certain environmental safeguards for EC to be granted. Hence, it has been argued that the MoEF&CC's approach of introducing an entirely new (and significantly onerous) financial responsibility, without any statutory backing, was untenable.[20]This lacuna was recognised and remedied in the Draft EIA Notification 2020, which specifically makes provisions with respect to CER. However, as the law stood before the repeal, CER had no statutory backing.

The second criticism relates to the scope of the activities for which CER expenditure can be made, as mentioned under Guideline 5 of the 2018 OM. These activities cover a broad range, including drinking water supply, health, sanitation etc.[21] However, one common thread that runs through them is that they focus mainly on social and economic development, instead of focusing on the environment *per se*. The inclusion of more, environment-centric activities, such as technological innovation for finding a viable alternative to plastic bags, was one of the improvements sought by Anup Kumar through a 2018 writ petition filed in the Delhi High Court.[22] Even though the list of activities prescribed under Guideline 5 is an inclusive list, some EACs have restricted themselves to prescribing the activities under the same as part of the CER requirement. This was the case for the EC granted to Ultratech for its Integrated Cement Plant in Kurnool in 2019, where the activities prescribed included only those related to social development (such as education and social causes),[23] and did not

20 Chandra Bhushan, *Green Responsibility order achieves little*, Financial Express, (May 23, 2018, 3:13 AM), https://www.financialexpress.com/opinion/green-responsibility-order-achieves-little/1177517/.

21 *Supra* note 2,§ 6(V).

22 *PIL seeking modification of guidelines issued by MoEF on Corporate Social Responsibility: Delhi HC issued notice*, India Legal, (May 30, 2019), https://www.indialegallive.com/delhi-high-court/pil-seeking-protection-natural-environment-including-forest-lakes-rivers-wild-life-delhi-hc-issued-notice/.

23 *Integrated cement plant (clinker 4.0 MTPA, cement 6.0 MTPA, CPP 60 MW and WHRB 15 MW) of M/s UltraTech Cement Limited located at Village*

include any activities benefitting the environment. Hence, the scope of activities under Guideline 5 is problematic.

The first criticism gains further credence in the light of the second. As the 2018 Memorandumstood, the MoEF&CC had essentially prescribed socio-economic safeguards through CER, putting the same outside the purview of the *environmental safeguards* prescribed under the EIA Notification.

The third criticism stems from the second. The focus of Guideline 5 on activities relating to social and economic development has led to a significant overlap with CSR. This has led to two criticisms of the 2018 Guidelines. Firstly, it has been argued that through the CER requirement, the MoEF&CC is indirectly controlling the company's CSR expenditure. There is hence a overstep of jurisdiction, since CSR is governed by the Companies Act.[24]This criticism is not strictly tenable, given that the CER requirement exists independent of the CSR one (and hence the MoEF&CC is not controlling the company's CSR expenditure in the strict sense). However, the point regarding the overstep of jurisdiction is relevant more broadly as CER is indeed highly similar to CSR in terms of the activities to be undertaken. Secondly, it has been argued that in the current system, a company undertaking a project has to make overlapping investments, hence duplicating expenditure and complicating the situation on the ground. For a company carrying out a project, the Land Acquisition Act, 2013 imposes a requirement to carry out a social impact assessment and rehabilitation and resettlement. Hence, there is a necessary investment in social and economic infrastructure, with many of the heads of expenditure overlapping with the CER.[25] If a company fulfils the eligibility conditions for CSR under Section 135 of the Companies Act, it will have to undertake CSR expenditure as well, on mostly the same activities as CER. Some companies are also required to allocate funds for compensatory afforestation (under the Compensatory Afforestation Fund Management and Planning Authority (CAMPA)), independently of the CER framework.[26]Hence, the extant framework necessitates overlapping investment on similar activities which, according to the critics, prejudices the companies concerned.[27]

The fourth criticism relates to the lackadaisical implementation of the CER requirement, both at the stage of prescribing the activities to be undertaken, as well as enforcement. For analysing these aspects, the ECs granted to, and compliance reports filed for, four projects have been analysed:

1. Ultratech's Integrated Cement Plant in Kurnool (EC granted on May 24 2019);[28]
2. Shree Cement's Integrated Cement Plant in Guntur (EC granted on May 20 2019);[29]
3. Sree Rayalaseema Hypo Limited's Organic Chemicals plant (EC granted on February 4 2019);[30]

Petnikote, Mandal Kolimigundia, Dist.Kurnool, Andhra Pradesh. – Environmental Clearance regarding., Ministry of Environment, Forest and Climate Change, (October 6, 2020, 11:50 PM),http://environmentclearance.nic.in/writereaddata/Form-1A/EC/052720191Ultratech404-2011ECLr.pdf, para 18.

24 Nidhi Sharma, *Pay 2% of capital investment for green clearance: Environment Ministry to Corporates*, Economic Times, (May 03, 2018, 7:50 AM), https://economictimes.indiatimes.com/news/economy/policy/pay-2-of-capital-investment-for-green-clearance-environment-ministry-to-corporates/articleshow/64008830.cms.

25 *Supra* note 20.

26 *Green Blunder: The environment ministry's proposed Corporate Environment Responsibility spend for firms is a bad idea*, Financial Express, (May 4, 2018, 3:33 AM), https://www.financialexpress.com/opinion/green-blunder-the-environment-ministrys-proposed-corporate-environment-responsibility-spend-for-firms-is-a-bad-idea/1155204/.

27 *Supra* note 20; *Id.*

28 *Supra* note 23.

29 *Greenfield integrated cement project consisting of clinker (2.4 MTPA), cement (4 MTPA), captive power plant (25 MW) and waste heat recovery power generation (15 MW) of M/s Shree Cement Ltd located at Village Pedagarlapadu, MamdalKarempudi, District Guntur, Andhra Pradesh- Environmental Clearance regarding.*, Ministry of Environment, Forest and Climate Change, (October 6, 2020, 11:40 PM), http://environmentclearance.nic.in/writereaddata/Form-1A/EC/052320191ShreeCement165-2014ECLr.pdf.

30 *Expansion of Synthetic organic chemicals and co-generation power plant by M/s Sree Rayalaseema Hi-Strength Hypo Limited at Village Gondiparla, Mandal & District Kurnool (Andhra Pradesh) – Environmental Clearance – reg.*, Ministry of Environment, Forest and

4. ONGC's Onshore Oil Production Facility in Assam (EC granted on May 1 2019).[31]

A total of 6 Compliance Reports have been analysed, one from Ultratech for its Kurnool project and two each from the other project proponents for their respective projects.

A perusal of the ECs reveals that only in the case of project 1 were the activities to be undertaken specified, and the expenditure to be made under each head earmarked.[32]With respect to projects 2, 3, and 4, no such guidance was given by the EAC, leaving the expenditure completely on the project proponents' discretion. The ECs for projects 3 and 4 mention that the project proponents concerned had been directed to submit "*item wise details along with time bound action plan*" regarding the CER expenditure, to the MoEF&CC's Regional Office.[33] However, these plans appear not to have been formulated, given that they have not been mentioned in any of the compliance reports filed by these proponents. This lack of specification of activities is a breach of the EAC's mandate under the 2018 OM, which requires that the EAC concerned "*should clearly suggest the activities to be carried out under CER*".[34] Further, with respect to the latter projects, the exact amount to be spent under CER was mentioned only in the EC granted to project 2.[35] The ECs for projects 3 and 4 only mention that *at least* 2% (and 1.5% respectively) of the total project cost had to be allocated for CER.[36] The use of 'at least' leaves the exact amount indeterminate, making compliance difficult; and the lack of the specification of the amount and the activities to be undertaken suggests that the delineation of the CER requirement was not given due consideration in these cases. Besides, the prescription of at least 2% of the project cost was impermissible under the 2018 OM, given that 2% was the maximum amount that could be prescribed.

A perusal of the Compliance Reports filed by the various project proponents presents an even bleaker picture with respect to implementation. In 5 of the 6 compliance reports analysed, some of them filed a year after the grant of EC, there exists only an assurance that the CER requirements *will be complied with*.[37] Only in the Compliance Report filed by ONGC in December 2019 is there an acknowledgement that "*all relevant measure(s)*" have been undertaken with the involvement of the local villagers and the administration. However, no details of these activities have been provided, and the only activity that has even been mentioned is plantation.

This complete lack of implementation of the CER requirement stands in stark contrast with other measures being specified in the EC being implemented, and comprehensive details of the same being provided in the compliance reports concerned. Overall, there existed issues with the CER requirement on multiple levels: in the provisions of the 2018 OM, and especially at the level of enforcement.

Lack of enforcement, by itself, cannot be a justified ground for the repeal of the requirement. The only legitimate response to this issue is stricter implementation. However, keeping the various lacunae in the CER provisions in mind, the requirement was admittedly unsustainable, and its repeal was justified. It led to a significant rise in the costs of business, with the expenditure being routed towards the same activities as the project proponents had already undertaken under other statutory requirements (such as CSR). Further, this significant additional burden had no statutory backing.

An alternative approach on part of the Government could have been to address the various concerns raised by stakeholders via amendments in the framework. The first concern

Climate Change, (October 6, 2020, 11:20 PM), http://environmentclearance.nic.in/writereaddata/Form-1A/EC/02222019182_2016_SreeRayalaseema_Letter.PDF.

31 *Onshore development and production of oil and gas from six wells in 5 Mine Lease Blocks in Districts Jorhat and Golaghat (Assam) by M/s Oil and Natural gas Corporation Ltd- Environmental Clearance – reg.*, Ministry of Environment, Forest and Climate Change, (October 6, 2020, 11:30 PM), http://environmentclearance.nic.in/writereaddata/Form-1A/EC/05022019149_2014_ONGC_Letter.PDF.

32 *Supra* note 23.

33 *Supra* note 30 para 9(p); *Supra* note 31 para 10(xxi).

34 *Supra* note 2, § 6(VIII).

35 *Supra* note 29 para J(i).

36 *Supra* note 33.

37 All the compliance reports are available on http://environmentclearance.nic.in/Online_EC_Complience_Report.aspx.

could have been addressed by amending the EIA Notification to provide CER with statutory backing. The concern related to the scope of the activities to be undertaken under CER could have been addressed by shifting the focus from activities related to socio-economic development to environment-centric activities, such as the creation of recycling facilities in the areas concerned. This shift would also have addressed the third concern to a large extent, as the extant overlap between the CER and CSR obligations would then be addressed.

However, any such amendments would have had to balance the interests of the project proponents with environmental concerns. The additional burden imposed by CER cannot be so onerous as to make developmental projects unfeasible for proponents. Hence, if the CER levy under the 2018 OM were to be sustained, the same would have required significant amendments taking these factors in account.

Another alternative approach to making the CER requirement sustainable could have been to change the scope and nature of the same. For example, CER could be remodeled to mandate a Bank Guarantee on part of the project proponents, to ensure compliance with the conditions mentioned in the EC. Since bank guarantees are security deposits payable only if certain conditions (in this case, conditions mentioned in the EC) are not fulfilled, this requirement would be much less onerous for proponents. Further, CER in this form would have a much more tenable connection to the environment than the socio-economic activities that were mandated under the 2018 OM.

Conclusion

On analysing the requirement for CER as mandated under the EIA process through a 2018 Office Memorandum issued by the MoEF&CC and the different concerns raised by various stakeholders regarding the same, including the recent repeal of the CER requirement as mandated by the Office Memorandum issued by the MoEF&CC dated 30 September, 2020 the following observations are made:

- The CER requirement had been introduced as part of the EIA process. It mandated the companies concerned to set aside a specified percentage of the project costs for specified activities. The exact percentage and activities were to be decided by the EAC concerned, during the appraisal stage of the four-stage EIA process. The activities were to be undertaken by the project proponents directly as projects. Hence, there was no fund set up to collect CER contributions, and CER expenditures were made by the companies directly.
- There were various legitimate concerns raised by various stakeholders regarding the requirement. The same were:
    - The CER requirement had been introduced without statutory backing, under an OM, despite finding no mention in the EIA Notification;
    - The CER activities prescribed under the 2018 OM aimed mostly at socio-economic development of the areas concerned, and not environment conservation;
    - Because of the above there was a significant overlap and similarity between CER and CSR obligations (under the Companies Act). There exists no formal clarification regarding whether CSR expenditures could be offset using CER payments on similar activities, or vice versa. However, given that CER under the 2018 OM was conceived as independent of other statutory requirements under the EIA process/ any other statutes, the most tenable interpretation is that both these expenditures had to be undertaken independently. Hence, project proponents meeting the eligibility conditions for CSR had to undertake multiple expenditures for similar activities. Further, expenditures on similar activities had to be undertaken under the Land Acquisition Act, 2013 as well. Some project proponents were also required to contribute funds towards compensatory afforestation.
    - There was a lackadaisical implementation of the CER requirement by the Government, at the level of first, the EAC's prescription of the total expenditure to be undertaken under CER, and the activities to be undertaken; and second, the enforcement of CER obligations on part the project proponents.

- While implementation issues cannot be grounds for the repeal of the requirement itself, the concerns mentioned in the aforementioned points justify the elimination of the requirement. The same led to a significant rise in costs of business, with the expenditure being routed towards the same activities as the project proponents had already undertaken under other statutory requirements (such as CSR). Further, this significant additional burden had no statutory backing.
- Other alternative approaches towards CER could have been first, through the prescription of more environment-centric activities, while ensuring that the requirement did not prove excessively onerous for project proponents; and second remodelling CER as a bank guarantee to be undertaken by the project proponent to ensure compliance with the conditions mentioned in the EC.

NOISY AIRPORTS!

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Key Words: Noise Pollution, Airports, Air Act, 1981.

Sound can be described as a vibration or a series of vibrations which travel through a medium, mostly air, and which can be heard once they reach an individual or a living entity ears. For a sound to become 'noise' it has to be loud or unpleasant or a tendency to cause disturbance to the said individual of a living entity. Noise however is subjective and people are said to have different thresholds when it comes to what sounds they are able to withstand. One can say that people are irritated by sounds and noise that origin from unpredictable sources than a predictable impersonal sound or noise. The Noise produced by an aircraft however can be categorized as unpredictable impersonal noise due to its intensity and uncertainty. This noise from an aircraft can originate as follows-

- Mechanical and engine noise – caused by the engine parts like the fan blades attaining supersonic speed;
- The aerodynamic noise – caused by the surface airflow on the aircraft, this is especially high intensity when the aircraft is flying low at a very high speed;
- Noise caused from the aircraft systems – caused by the cockpit and cabin pressure.

Taking the issue of noise and the control and mitigation of noise pollution various countries have come up with several legislations. In India in case of a noise nuisance, one can easily complain to the local police station and legally the offence can be charged under Chapter 14 of the Indian Penal Code, 1860, more specifically under Sections 268 for causing public nuisance and under Section 133 and 144 of the Criminal Procedure Code, 1973.

Noise has been aptly included as an 'air pollutant' under the Air (Prevention and Control of Pollution) Act, 1981.[1] As the definition suggests, the concentration level of this pollution needs to be kept in check to reduce the injurious effects to an individual or a living entity. To keep this in check there exists an Ambient Air Quality Standard that a country has set for itself. Ambient air quality standards specifies the limit of harmful pollutant allowed to be present in the environment and this limit is set by the Environment Ministry of each country through their specific Acts, Rules and Regulations. It is common for the Airports or Aerodromes and the areas around it to experience and also have maximum impact of the noise produced by the aircrafts making it prime location for harboring harmful effects of noise pollution; and a prime necessity to mitigate and control the same. India has several legislations related to Airports and Aircrafts. Section 9A of the Aircraft Act, 1934, is where the Central Government has power to prohibit or regulate the construction of buildings and planting of trees etc. within 20 kilometers from an 'aerodrome reference point' in consideration of the safety of the flights. Further, Part 11 of the Aircraft Rules, 1937, deals with licensing and management of Aerodromes and of its establishment. The aerodrome manual under Rule 81 of the said Aircraft Rules states, among other things, that particulars of the aerodrome site must contain plan of the aerodrome with the main facilities for its operation, its boundaries and its distance from the nearest city; and Rule 91 prohibits, around an aerodrome, slaughtering and flying of animals and depositing rubbish likely to attract birds which would hinder safe passage of flights. What is interesting to note here is that

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1 Section 2(a) of The Air (prevention and Control of Pollution) Act, 1981: "air pollutant" means any solid, liquid or gaseous substance 2[(including noise)] present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

although the safety of the aerodrome, and safety of the airplanes and its passengers, by maintaining an acceptable and safe environment in and around the aerodrome is of prime importance, the absence of consideration of noise pollution and its effects and regulations related to the same in both the Aircraft Act, 1934 and the Aircraft Rules, 1937 is apparent.

Moving further in India the maintenance of ambient air quality standards are specified under the Noise Pollution (Regulation and Control) Rules, 2000. The Rules came into existence under the Environment (Protection) Act, 1986[2] and Environment (Protection) Rules, 1986[3] with an objective of regulating and controlling noise generating and producing sources so as to maintain the ambient air quality standards in respect of noise. The Rules however, is only indicative of 'zones' with decided limits of noise level[4] and specifies the contravention of which would be liable for penalty under the provisions of the Environment (Protection) Act, 1986.[5] Accordingly the Ministry of Environment, Forest and Climate Change had fixed the noise standards within an airports boundary to be covered under the 'industrial area' with a day time limit of noise pollution to not exceed 75 dB(A) and night time limit to be 70 dB(A) respectively. As per the Noise Pollution (Regulation and Control) Rules, 2000 day time would mean between 6AM and 10 PM and night time would be 10 PM to 6 AM.[6] However, this limit excluded one crucial aspect of noise pollution in an airport and that was the noise during the landing and takeoff of an aircraft. This brings us to the present discussion of the airport noise standards that had not found an independent footing for itself in any of the regulations until 2018.[7]

The Government of India, under the Ministry of Environment, Forest and Climate Change (MoEFCC), on 18th June 2018 come up with a notification by exercising its power under Section 6 & 25 of the Environment (Protection) Act, 1986 to bring an amendment to include serial number 111 to the Schedule-I of the Environment (Protection) Rules, 1986. This notification indicated the ambient air quality standards with respect to noise in airport noise zone. The requirement for noise standards for aircrafts has been on the cards for the Government of India for quite some time and the tipping point for this amendment came in the form of a National Green Tribunal (NGT) order of 2017. It all started in 2009 when the residents of Vasant Kunj and Bijwasan in South Delhi had approached the Delhi High Court seeking a ban on flying of aircrafts to and from the Delhi airport (Indira Gandhi International Airport) over said areas, along with Masudpur and Rangpuri, as there was violation of Noise Pollution (Regulation and Control) Rules, 2000 as the noise level reached 74 – 84 dB[8]. This case was transferred to the National Green Tribunal in 2013 followed by which Indian Institute of Technology, Delhi, was to submit a report relating to construction of sound barriers around the airport. The Director General of Civil Aviation (DGCA), however, had submitted that all aircrafts which were operating from India were complying to the noise standards laid down by the International Civil Aviation Organisation (ICAO) so as to operate globally; it was also submitted that in December 2014 there has been a Civil Aviation Requirement (CAR) issued by them on 'noise management of aircraft operations at airports.' Following this the Ministry of Environment, Forest and Climate Change, Indian Institute of Technology, Delhi, and the Ministry of Civil Aviation filed their respective statements and reports by 2017 and mitigation measures had been taken to reduce noise levels; in the same year the National Green Tribunal applied the principle of sustainable development, precautionary principle and polluter pays

2 Clause (ii) of sub-section (2) of section 3, sub-section (1) and clause (b) of sub-section (2) of section 6 and section 25.

3 Rule 5 Environment (Protection) Rules, 1986.

4 Rule 3(1) and 4(1) of the Noise Pollution (Regulation and Control) Rules, 2000.

5 Rule 6 of the Noise Pollution (Regulation and Control) Rules, 2000.

6 Schedule under Noise Pollution (Regulation and Control) Rules, 2000.

7 Ministry of Environment, Forest and Climate Change Notification on 18th June 2018, accessed on 23 March 2020 and available at http://www.indiaenvironmentportal.org.in/files/file/Airport%20Noise%20Standards-final.pdf.

8 Decibel – a logarithmic unit used to measure sound level. Sounds at or below 70 dB are considered safe and a prolonged exposure of noise level at 85dBA or above is considered harmful.

principle and ordered the officials to comply with the Indian Institute of Technology, Delhi, report; to provide green belt around the airport; aircrafts to use reverse thrust to reduce noise while landing an aircraft.[9]

In the meantime in May 2017, the National Physical Laboratory (NPL) of the Council of Scientific and Industrial Research (CSIR) and Delhi International Airport Ltd (DIAL) and the Airport Authority of India (AAI) started 'noise mapping'[10] of all airports across India to suggest suitable mitigation measures to minimize noise pollution. This included multiple rounds of discussions between the officials of Ministry of Environment, Forest and Climate Change (MoEFCC), the Directorate General of Civil Aviation (DGCA) and Central Pollution Control Board (CPCB). Following this, in 2018, the present Notification[11] came into being.

The present notification has set noise standards and limits for all airports across India however, defence aircrafts and noise during landing and taking off of aircrafts are exempted from complying with these limits and standards. The notification classifies the airports into-

- 'busy airports', where more than 50,000 aircrafts are said to be taking off and landing (movement) per year; and
- Other airports, where more than 15,000 to 50,000 aircrafts move per year.

The notification however, retains standards set regarding the classification of 'daytime' and 'night-time', 6 AM to 10 PM and 10 PM to 6 AM respectively, in the Noise Pollution (Regulation and Control) Rules, 2000; going further to specify that the noise levels during daytime to not exceed the limit of 70 and 65 dB(A) and during night-time to not exceed the limit of 65 and 60 dB(A).Interestingly this notification would not be applicable to established civil airports where less than 15,000 aircrafts move annually.

To put the limit setting for noise into perspective let us consider an experiment conducted in 1980 of the schoolchildren around Los Angeles airport which found that the kids were deficient in proofreading and had issues with challenging puzzles.[12] The damage was said to be based mostly on the uncontrollability of noise rather on the intensity of it. The adaption strategies such as tuning out or ignoring noise and putting extra effort to focus and perform during noise is said to heighten sympathetic arousal, an indication of increased levels of stress hormone and an elevation in resting blood pressure. Chronic exposure to aircraft noise during early childhood is said to impair reading acquisition and reduced motivational capabilities. One can conclude from this that it isn't suitable for day-care centres and schools to be opened and operational around airports.[13] A comment in one of the reports of the World Health Organisations (WHO) 2018 bulletin on 'Improving the health impacts of Airports' states that there hasn't been a comprehensive or a systematic effort to design a model for a "healthy airport" which is inclusive of wider environmental and community footprint.[14] In the same year, on 10th October WHO Europe came up with an updated guideline for environmental noise. This report highlights growing evidence which links significant aircraft noise exposure to serious health conditions like heart attacks and strokes and further recommends stringent noise limits for aviation industry. It recommends reducing noise levels produced by aircraft below 45 dB Lden and identifies that aircraft noise above this level will

9 Society for Protection of Cultural Heritage, Environment, Traditions and Promotions of National Awareness (CHETNA) v. Union of India and Others, accessed on 23 March 2020 available at http://www.indiaenvironmentportal.org.in/files/noise%20pollution%20IGI%20Airport%20NGT%20Judgement.pdf.

10 It is a scientific method to perceive existing and projected noise levels in a given area. It is done by calculating noise levels in various scenario leading to helping to make an action plan to suggest mitigation measures.

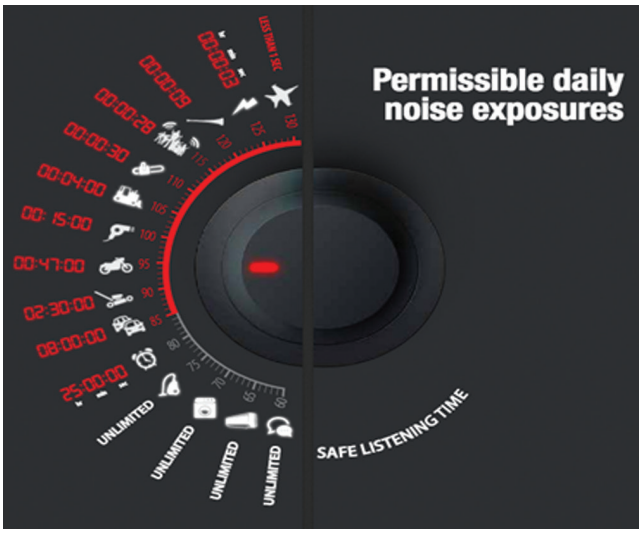
11 *Supra* note 7.

12 "Physiological, Motivational, and Cognitive Effects of Aircraft Noise on Children – Moving from the Laboratory to the Field" by Sheldon Cohen, Gary W Evans, David S Krantz, Daniel Stokols, American Psychologist, Vol 35, No. 3, 231-243 (March 1980).

13 Guidelines for community noise – chapter 3 - Adverse Health Effects of Noise; Accessed on 23 March 2020 and Available at https://www.who.int/docstore/peh/noise/Comnoise3.htm.

14 "Improving the health impacts of airports" Bulletin of the World Health Organization; Volume 96, Number 8, August 2018, 513-588.

have adverse health effects. The communities around the airport would, additionally, face noise-induced awakenings during sleep causing night-time annoyance and further impacting performance the following day leading to not just physiological but also psychological reactions and a drop in work efficiency of those affected. It was also identified by the WHO that children living in areas with higher aircraft noise levels have delayed reading ages, have poor attention levels and a high stress level.[15] Acute noise exposures are said to activate autonomic and hormonal systems, leading to temporary changes like increased blood pressure, increased heart rate and vasoconstriction; on prolonged exposure some individuals may develop permanent effects like hypertension and ischemic heart conditions. Prolonged exposure by WHO standards are noise with 65-70 dB or more and it is significant, at this point, to note here that the notification in discussion has set the noise limit to not exceed beyond 70 dB and above 65 dB during day and night time respectively. Below is an illustration from one of the WHO brochures related to the discussion on safe hearing of sounds:



Source Credit: Make Listening Safe, World Health Organisation[16]

In Western European countries the WHO has estimated that a minimum of 1 million healthy life years are lost each year due to environmental noise where cardiovascular disease, particularly high blood pressure, heart attacks and coronary heart disease, were the major cause for such deaths. Taking this into consideration the European wing of the World Health Organization has certain recommendations in this regard:

- For average noise exposure, it is strongly recommends reducing noise levels produced by aircraft below 45 dB Lden, as aircraft noise above this level is associated with adverse health effects.
- For night noise exposure, it strongly recommends reducing noise levels produced by aircraft during night time below 40 dB Lden, as aircraft noise above this level is associated with adverse effects on sleep.
- To reduce health effects, it recommends that policy-makers implement suitable measures to reduce noise exposure from aircraft in the population exposed to levels above the guideline values for average and night noise exposure. For specific interventions it recommends implementing suitable changes in infrastructure.[17]

Moving further the notification in discussion also categorises airports that are 'proposed' but not yet constructed and specifies that the operators of such proposed airports would be accountable to:

- MoEFCC – to obtain Environmental Impact Assessment (EIA) and to submit report after conducting noise modelling;
- Ministry of Housing and Urban Affairs, Government of India (MHUA) and State Development Authority for noise zoning.

The notification also mentions that the State development authorities are to allow residential, commercial and commercial facilities around the airport if and only if they comply with noise reduction measures. The notification further specifies that the airport operators of

15 Health and Sustainable development – Noise, World Health Organization, accessed on 23 March 2020, available at - https://www.who.int/sustainable-development/transport/health-risks/noise/en/

16 https://www.who.int/pbd/deafness/activities/MLS_Brochure_English_lowres_for_web.pdf.

17 Environmental Noise Guidelines for the European region, accessed on 23 March 2020 Available at http://www.euro.who.int/__data/assets/pdf_file/0008/383921/noise-guidelines-eng.pdf?ua=1.

both established and proposed airports are also accountable for the following:

- To prepare noise management plan in compliance with airport noise standards;
- Airport noise zone area are to be defined in consultation with Air Navigation Service Provider as per Master Plan of Airport and based on Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015;
    - These noise zones areas are to be approved by the Director General of Civil Aviation (DGCA) and displayed on the website of airport operator;
    - This activity is to be completed by June, 2020. (time limit set under the said notification).
- Carry out 'noise mapping' considering present and future aircraft movement and are to be displayed at the airport and its website as well as the webpage of the State/Union Territory Development Authority.

In the wake of introduction of this amendment, it is interesting to observe that Chatrapati Shivaji Maharaj Internatonal Airport (CSMIA), Mumbai, which is managed by the Mumbai International Airport Ltd (MIAL), has proactively undertaken noise management as early as 2013. MIAL also has a robust noise monitoring system in compliance with the DGCA and the International Civil Aviation Organization (ICAO) specifications where they have two stationary noise monitoring terminals installed under take-off and landing flight paths and a mobile unit on airfield to respond to noise pollution issues.[18]

The International Civil Aviation Organization (ICAO) has a policy on aircraft noise called the Balanced Approach to Aircraft Noise Management[19] and it was adopted by the ICAO Assembly in 2011 during its 33rd Session and this policy has subsequently been reaffirmed in all future Assembly Sessions of the ICAO.[20] This policy comprises of spotting the exact noise issue at a particular airport, analysing various measures therein to reduce the noise by exploring different measures it has classified as four principles namely:

1. Reduction of noise at source;
2. Land-use planning and management;
3. Noise abatement operational procedures;
4. Operating restrictions.

The primary focus of the ICAO policy is to tackle the noise issues categorically and on subjective basis for an airport to indicate measures to achieve maximum environmental benefit, to be cost-effective and on an objective and measurable basis.

The ICAO also specifies measures and management strategies on the lines of precautionary and polluter pay principle in terms of providing directions as to the planning and development of an airport and imposing 'charges' for mitigation of noise pollution of the airport. The ICAO on provides for general guidelines to airports regarding the land use planning and management[21] and as per the Assembly Resolution A39-1, Appendix F, the States can follow the following guidelines:

a) locate new airports at an appropriate place, such as away from noise-sensitive areas;

b) take the appropriate measures so that land-use planning is taken fully into account at the initial stage of any new airport or of development at an existing airport;

c) define zones around airports associated with different noise levels taking into account population levels and growth as well as forecasts of traffic growth and establish criteria for the appropriate use of such land, taking account of ICAO guidance;

d) enact legislation, establish guidance or other appropriate means to achieve compliance with those criteria for land use; and

18 The Sustainability Report, CSIAM, Accessed on 23 March 2020 and available at https://www.csmia.aero/pressrelease/SR_2016.pdf.

19 The Balanced Approach to Aircraft Noise Management, ICAO, accessed on 23 March 2020, Available at https://www.icao.int/environmental-protection/Documents/Publications/Guidance_BalancedApproach_Noise.pdf

20 Aircraft noise – Balanced Approach to Aircraft Noise Management, ICAO Environment, accessed on 23 March 2020, available at https://www.icao.int/environmental-protection/Pages/noise.aspx.

21 Land-use Planning and Management, ICAO-Environment, Accessed on 23 March 2020, Available at https://www.icao.int/environmental-protection/pages/Land-use-Planning-and-Management-.aspx.

e) ensure that reader-friendly information on aircraft operations and their environmental effects is available to communities near airports;

The ICAO had something called as the 'Noise Charges' which first came into being in 1981 and is part of the ICAO Policies on Charges for Airports and Air Navigation Services.[22] However, the charges are to be levied at the discretion of the States and only at airports experiencing noise problems where alleviation or prevention measures have been carried out. The notification in discussion however, does not contain any specification related to the prosecution or liability of damages caused by noise pollution and who has to be responsible for the same.

Some airports in London, UK and Germany have applied the night flying restrictions to reduce noise exposure of its citizens at night.[23] Netherlands is working towards green aircrafts to reduce not just noise pollution but air pollution and carbon footprint as well.[24] There have also been several technological advances in engine design and engine location as well to reduce noise pollution. NASA had found that over-wing and mid-fuselage nacelle would be effective in reducing noise by 30-40 dB and 40-50 dB for a hybrid wing body essential for open rotors.[25]

In this regard the Federal Aviation Administration (FAA) of the United States Department of Transportation has continuously been coming out with circulars as early as 1997 regarding the noise levels for United States certified and foreign aircrafts. These circulars quantifies the aircraft noise levels and also notes progress in control and abatement of aircraft noise and mentions ICAOs standards for the sake of comparison; this provides common noise level reference for potential future reductions.[26] What is interesting to note here is that in the US the regulation is imposed on the aircrafts itself and not on the airports per se to reduce noise levels. The United States categorises its aircrafts based on Stages where Stage 1 is the loudest and Stage 4 is the quieter aircraft. The FAA in the US also specifies the flight standards district office and the FAA ombudsman as the points for affected persons to register complaints regarding the aircraft noise levels.

The courts in the United States of America have time and again, through numerous judicial opinions and statements of legislative intent, have made it clear that an airport proprietor would be liable for the aircraft noise related damages claimed by the landowners around the aerodrome affected by it.[27] The courts have supported the federal government's claim of not being liable for the damages caused by noise, above the set standards, caused by the aircraft and similar immunity has been granted to the airplane manufactures.[28]This makes it clear that the government per se is only responsible to set standards to be complied with by the airport proprietors and operators and the proprietors will be liable to remedy and compensate in case of violation of the said standards. Taking inspiration from this the judiciary in India has currently not taken a stand in this regarding probably because the proprietorship and management of airports or aerodromes in India are done through either a public enterprise or as a public-private partnership; one can only wait to observe in the future the stand of India in terms of who should be made liable in case contravention of this provision.

22 DOC 9082.

23 Night flying restrictions at Heathrow, Gatwick and Stansted Airports, Department for Transport, The National Archives, accessed on 23 March 2020, available at https://webarchive.nationalarchives.gov.uk/20090607023527/http://www.dft.gov.uk/press/speechesstatements/statements/nightflyingrestrictionsathea5940.

24 Dutch airports to go green with new wind farm deal, International Airport Review, accessed on 23 March 2020, available at https://www.internationalairportreview.com/news/37802/dutch-airports-go-green-new-wind-farm-deal/

25 "Problems Aerospace Still Has To Solve". *Aviation Week & Space Technology* (2016).

26 https://www.faa.gov/about/office_org/headquarters_offices/apl/noise_emissions/airport_aircraft_noise_issues/

27 Griggs v. Allegheny County, 369 U.S. 84 (1962); City of Burbank v. Lockheed Air Terminal, Inc, 411 U.S. 624 (1973).

28 Airport Noise Pollution Damages: The Case for Local Liability by Leland C. Dolley and Douglas G. Carroll, The Urban Lawyer, Vol. 15, No. 3 (Summer, 1983), pp. 621-636.

India as on March 2019 through the Ministry of Civil Aviation, Government of India, had came up with a 'White Paper on National Green Aviation Policy.' Two of the significant points mentioned under the noise management section in the white paper on aviation are as follows:

- All the requirements set out by DGCA shall be complied with for Aircraft noise management. Airlines shall strive to use of modern aircraft to promote less noisy and more fuel-efficient operations.
- Airlines will explore possibilities to avoid or minimize use of reverse thrust to reduce noise while landing.

One can hope that these standards are adhered to and complied with and is instrumental in mitigating and addressing the noise pollution in and around the airports in the country.

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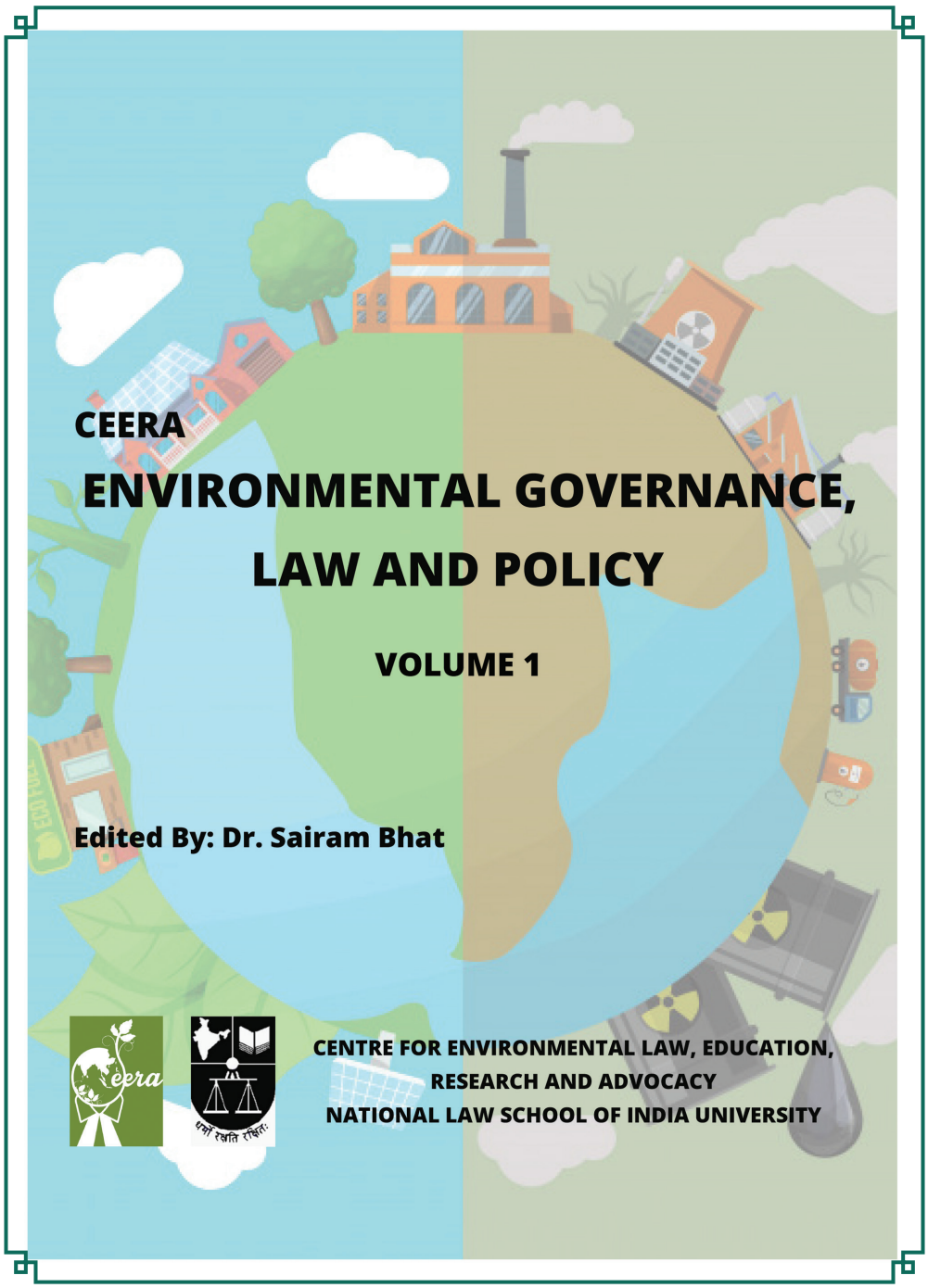

'GIG ECONOMY': LEGAL STATUS OF MIGRANT WORKERS IN INDIA DURING COVID-19


- Ms. Shaguftha Anjum Allaudin Eksambi & Mr. Madhu Dev MD***

Key Words: Gig Economy, Migrant Workers, Labour Laws, Constitution of India, Supreme Court, International Conventions.

Introduction

In the 20th Century, urbanization triggered the mobility of human beings for a better life from one nation to another nation, one-state to another state. Asia contributes the largest migrant workforce to the World and in turn, the workforce contributes to their country's economy. Crores of people undergo inter-state migration in a developing country like India due to various reasons. Nearly 56% of the workforce comes under the umbrella of the 'Unorganised Sector' or 'Informal Sector' called a 'Gig Economy'. The term 'Informal Sector' was coined by the British Economist Mr. Keith Hart in 1971[1].

Gig Economy known as Freelancer economy/ Platform economy/ the sharing economy is a new concept in the world of work that operates through a web-based platform or location-based platform. This type of temporary employment runs on the motto of *providing service on demand for hire*. Some of the key players in this market are Non-State Actors such as Ola, Uber, Airbnb, OneFineStay, HopSkipDrive, ParkingPanda, AmazonFlex, etc.

Due to the unregulated market and short-term engagement with the hiring organisation, this informal sector gets deprived of social security benefits and fundamental rights under the Constitution of India. Internal migrant workers who are an integral part of the Gig workforce suffer from dislocation, the taint of being illegal occupants, human rights violations, and lack of government support. Since hiring is done as a *quick-fix* mode to suit elastic lifestyles of clients, these workers get underpaid with less job security, long working hours, inhumane work conditions, abuse, unreasonable target to achieve, lack of health benefits and formal contracts, and absence of legal recourse in case of adversities.

Lack of credible data on seasonal or circular migrants, inefficient legal machinery, and failure to vote has worsened the overall development of this wandering class. The pandemic lockdown 1.0 triggered reverse migration opening the plight of migrant workers to many hidden issues. The Hon'ble Supreme Court through beneficial construction, provided relief measures and withdrawal of prosecution proceedings of such returnees under the Disaster Management Act.

The State under Directive Principles of State Policy and under the Guiding Principles of Internal Displacement known as 'Deng Principles' should regularise the Gig sector and ensure Socio-Economic Democracy.

Definitions:

• ***Gig Economy:***

It has no precise meaning but is increasingly used to describe people who;

(a) Don't work in fixed shifts

(b) Are not required to carry out a minimum number of works each day or

(c) Who, in theory, can work as much or as little as they choose[2]

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1 Kanak Kanthi Bagchi and Nirupam Gobi, *Social Security for Unorganised Workers in India,* p.22 (ed.2012, Madhav Books, Gurgaon, 2012),https://Shodhganga.inflibnet.ac.in/bitstream/10603/76677/12/12_chapter%205 pdf.

2 LexisNexis, *The Gig Economy Report*, LexisNexis® (July, 29, 2020, 10.00 PM), https://www.lexisnexis.co.uk/pdf/gig%20economy%20report%20-%20final.pdf.

• ***Gig Worker:***

As per the Code, is a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship. Further, platform workers are defined as workers who are involved in work, in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment[3].

• ***Internally Displaced Person:***

As per the Deng Principle[4] Internally Displaced Persons (IDP) 'are persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violation of human rights or natural or man-made disasters, and who have not crossed internationally recognised State borders'.

• ***Workmen:***

Section 2(s)[5] defines workman as any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward, terms of employment be express or implied and includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of dispute.

According to Section 2(n)[6] 'workman' means any person (other than a person whose employment is of casual nature and who is employed otherwise than for the purposes of the employer's trade or business.

Section 2(j) defines "workman" as any person employed in or in connection with the work of any establishment to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment are express or implied[7].

• ***Migrant Labour/ Worker:***

Encyclopedia Britannica defines migrant labour as casual and unskilled workers who move about systematically from one region to another offering their services on a temporary, usually seasonal basis[8].

The United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families defines a migrant worker as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a citizen.[9]

A "Migrant Worker" as per International Labour Organization (ILO) instruments is a person who migrates from one country to another (or who has migrated from one country to another) with a view to being employed other than on his own account, and includes any person regularly admitted as a migrant for employment.[10]

• ***Wages:***

Wages means all remuneration, capable of being expressed in terms of money which would if the terms of contract of employment express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment[11].

3 The Code on Social Security 2019. § 2(35).

4 UNHCR, *Guiding Principle on Internal Displacement*, English version, UN Refugee Agency, India, 2004(July, 30, 2020, 1.16 AM), https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html.

5 Industrial Disputes Act 1947. §2(s).

6 Workmen's Compensation Act1923. §2(n).

7 Interstate Migrant Workmen Act 1979 (last visited on 19th July 2020 at 11.10PM).

8 The Editors of Encyclopedia Britannica, *Migrant Labour*, Encyclopedia Britannica; 2018, https://www.britannica.com/topic/migrant-labour.

9 Usher E. Migration and labour. In: Usher E, editor. Essentials of migration management: a guide for policy makers and practitioners. Geneva: United Nations Publications; 2004(July 19,2020, 11.29 PM).

10 ILO background note: the contribution of labour migration to improved development outcomes. Mainstreaming of migration in development policy and integrating migration in the post-2015 UN Development Agenda. Geneva: International Labour Organization; 2015. (July,19, 2020, 11.36 PM), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---portray/---migrant/documents/genericdocument/wcms_220084.pdf.

11 Minimum Wages Act, 1948. §2(h).

Reasons for Inter-State Migration:

Under Article 19 (1) (e) of the Constitution of India, every citizen has the freedom of movement anywhere within the territory of India. Some of the factors that influence inter-state migration are as follows;

- Better Quality of Life: Economic or Social
- Internal disturbances: Communal or Political
- Geographical barriers hindering growth

Effects/ Risks of Inter-State Migration:

Mobility in search of better options brings with it a Pandora of risks towards this floating class such as;

- Loss of Livelihood due to lack of accountability on Non-State Actors
- Food insecurity
- Exodus
- Infringement of right to life with dignity
- Unreasonable restriction on right to Movement from State of employment to home state
- Non-applicable of Social Security laws and Displacement allowance for loss of earnings
- Impetuous approach from State of employment due to non-committal political leadership
- Denial of Right to Know since considered as invisible class
- Deplorable sanitary conditions in the shelter homes leading to scary stay
- Ostracism due to the stigma of carrier/ spreading the infection
- Denial of right to live in the State of employment who significantly contributed in building of such towns and cities

Legal Status of Inter-State Migrant Workers

The ongoing pandemic highlighted the inefficiency of the State and its authorities in diligently handling such human crisis. Issues cropped up during this unprecedented time highlighted the violation of human rights in a horrible and scary manner. Thousands of migrant workers died in the struggle of re-uniting with their near and dear ones fearing death. Many who got stranded in the State of employment due to restriction on movement and lack of transportation had to resort to begging to survive.

- Some of the legal issues haunting Migrant workers are as follows;

1. ***Lack of Legal Status/ Identity***

   Lack of Vinculum Juris between the migrant worker and the Employer deprives the former from claiming the legal status of 'workman' as per the Industrial Disputes Act 1947[12]. The Hon'ble Supreme Court held that to be a workman within Section 2 (s) of the said Act, he should be employed in an industry and there should be master-servant relationship[13]. Further, Indian labour laws are ambiguous on the classification of Employment as Employees or Self-Employed unlike the Assembly Bill 5 (AB5)[14] which addresses the 'employment status' of workers when they are claimed to be an independent contractor and not an employee. In *Hussainbhai, Calicut v. Alath Factory Thozhilali Union, Kozhikode and Ors*[15], the Hon'ble Supreme Court highlighted the economic control which is vital to determine the relationship between principal employer and the contract worker.

2. No legal head count or data available due to non-maintenance of government records/ registers by the respective States to keep a track of the inflow and out flow of this sector.
3. Uncertain short-term livelihood adding to seasonal or reverse migration
4. Denial of Right to Vote due to absence of documents to prove domicile in the State of employment. No leave granted by the employer to cast vote in the state of origin.
5. Prey to Unfair Labour Practices – as they are labeled as self-employed, these workers are

12 Section 2(s) of the said Act 1947 (last visited on 29th July 2020 at 12.00PM).

13 Atam Prakash and Ors v. State of Haryana and Ors, AIR 1986 SC 859.

14 Assembly Bill No. 5, *Chapter 296*, California Legislative Information (July 29, 2020,11.00PM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

15 AIR 1978 SC 1410.

made to work beyond maximum work hours, without holiday pay, no provisions for sick leave, no minimum wage. The *Deliveroo's* case in 2016[16] is a glaring example of exploitation in which collective bargaining rights where denied to the gig workers as they didn't fall under the term 'Workers' to avail benefit.

6. Infringement of Constitutional Freedoms and Guarantees – Rights guaranteed under Articles 14, 16, 19(1) (a), 19 (1) (d), 19 (1) (e), 21, 23 under the Constitution of India are being deprived to these residual sectors. Hon'ble Supreme Court in *People's Union for Democratic Rights v. Union of India*[17] held that employing workers at wage rates below the statutory minimum wage levels was equivalent to forced labour and prohibited under Article 23 of the Constitution of India. Further, Hon'ble SC held that under Article 39(d) of the Constitution of India, it is the duty of the State to frame policies towards securing equal pay for equal work for both men and women[18].
7. Violation of basic Human Rights – the very fundamental necessities of a human being such as food, shelter laid down under the Protection of Human Rights Act 1993[19]is not provided to them by the State of employment. They are forced to live in sheds, unhygienic, small cubicles or stingy accommodations at lower rates which violates their right to life and dignity guaranteed under Article 21 of the Constitution of India[20].
8. No Legal Recourse – Since they lack legal identity under labour laws, they can't sue the Employer or Organization before labour courts and get adequate relief.
9. No health and Safety Laws – Due to mobility of work place, lack of clarity w.r.t their legal identity, health and safety related laws such as The Sexual Harassment at Workplace (Prevention, Protection and Redressal) Act 2013, laws relating to safety of women working in night shifts, Employees Compensation Act 1923 in case of injuries or accidents caused in the course of employment are not applicable to gig workers.

Suggestive Measures

Eleanor Roosevelt, a prominent drafter of Universal Declaration of Human Rights (UDHR 1948), rightly said in his speech *"Human Rights begin close to home"*. The United Nations define Human Rights as 'rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination[21].

The Deng Principles, which deals with the protection and assistance needs of IDPs, should be applied at the National level.

Mr. Kofi Annan, the Security-General of the United Nations has noted 'internal displacement is the great tragedy of our times. The internally displaced people are among the most vulnerable of the human family'[22].

The lack of specific laws to handle situations such as the COID 19 pandemic fput the whole Country under distress. Fundamental issues relating to migrant labourers livelihood, life, food, security, shelter, and minimum statutory labour protection, Employer's responsibility in case of displacement, health, sanitation, privacy, and safety were given secondary approach. The primary focus was to create panic, restrict movement or forcible evict stranded migrant workers fearing spread of infection in the State of employment without any due process of law leading to violation of International Humanitarian law and Deng Principle.

16 Sanders, Astrid & Countouris, Nicola (2016), *R. (on the application of Independent Workers Union of Great Britain) v. Central Arbitration Committee*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, International Labour Law Reports Online, 35 (2016) ISSN 0168-6526(trading as Deliveroo) (July 20, 2020, 12.55 AM), http://eprints.lse.ac.uk/101831/1/Sanders_IWGB_v_CAC_2018_published.pdf.

17 AIR 1982 SC 1473

18 State of MP v. Pramod Bhartiya, AIR 1993 SC 286.

19 The Protection of Human Rights Act 1993, §2(d).

20 Chameli Singh v. State of U.P, 1995 Supp(6) SCR 827.

21 United Nations, *Peace, Dignity and equality on a healthy Planet*, UN, (July 27, 2020, 7.01 PM), https://www.un.org/en/

22 *Supra* note 4 at p.5.

Some of the correctional measures which can be applied in the policy making are as follows;

1. **Collaborative Transparent Administration and Focal Points:** As per the Deng Principle, humanitarian assistance needs to be provided establishing Standing Committees at District, State, National level to act as Focal Points for issues relating to internally displaced. Also, crisis can be managed with ease through collaborative administration and political co-ordination between the Centre, State governments, Disaster Management (DM) authorities and other stake holders. Local Self Governance plays a key role in the good governance and welfare of its citizens.
2. **Special Training for DM authorities:** Section 12 of the Disaster Management Act 2005 (DM Act 2005) is not conclusive as it barely lays down minimum standards for relief. The authorities don't have any specific guidelines nor clinical exposure/ training to handle large scale human crisis.
3. **Disaster Management Board at various levels:** Disasters don't have territorial limits. They can occur in any place, city, and district or at village level at different intervals or simultaneously. One needs preparedness and plan of action to deal with such emergencies. At every level of the society, Disaster Management Boards need to be established, strengthened and equipped to handle worst crisis[23].
4. **Deng Principle as Plan of Action:** Guidelines laid down under Section V of the Deng Principle can form the base for framing plan of action w.r.t Section 2 (e) (vii) and (viii) of the DM Act 2005. The Boards need to be trained in rehabilitation, reconstruction, evacuation, rescue and relief measures. Front line workers need to be supported and strengthened to carry out their responsibilities[24].
5. **Labour friendly policies:** In India, labourers are the invisible class for welfare measures. The labour policies in India should be tweaked from being organizational friendly to labour friendly.
6. **Judicial Activism:** Even in this unprecedented situation, the Courts should take *Suo Moto* cognizance against the violators irrespective of the prohibition as laid down in Section 71 of the said Act 2005. Lack of grievance redressal mechanism under the said Act 2005 should not be a benefit to the enforcement agencies to encroach upon an individual's constitutional freedoms.
7. **Classification of Workers:** India with a huge population in itself poses a great challenge for any measure to be implemented successfully. Workers both Organised and Unorganised sectors make matters technically difficult for the Labour department to keep a record. Hence workers should be classified in to different categories based on the roles they perform such as – Class I, Class II, Class III and Class IV. Inputs can be taken from Service laws which divide employees based on their roles.
8. **Urban Poverty Elevation:** Every State[25] should take steps to bridge the gap between rich and the poor by providing means of employment, education, health, shelter, secure environment, and infrastructure to the deprived and suppressed class to elevate urban poverty from the society.
9. **Domicile Issues:** Migrant workers or unorganised sectors since are mobile lose their Domicile and fail to get benefits. The receiving State can accept the documents of these workers authenticated by their State of Origin and induct the same in to their data base. One common document like Aadhar card could be made for these workers to receive benefits irrespective of which State they belong to or residing into.
10. **Charter of Human Rights:** prepare a charter of rights governing food security, public health, human rights, livelihood irrespective of the nature of work, origin, nationality, gender, race, colour, religion inexcusable even in disastrous situations. Human Rights cross borders yet apply in equable manner and don't get diluted on the status of a person[26].
11. **Policy based on Deng Principle model to handle human disaster[27]:** this pandemic has opened multiple issues to be addressed

23 Principle 7, *Supra* note 4 at p.5.

24 *Supra* note 4 at p.5.

25 INDIA CONST. art 38.

26 Principle 18, *Supra* note 4 at p.5.

27 Principle 28, *Supra* note 4 at p.5.

at the different level. Now a lesson learnt, detailed policy has to be framed to address return, resettlement, reintegration issues of internal displaced. Policy should focus more on doctoring a disease or solving problems rather than curtailing liberty and creating havoc.

12. **Privacy Issues:** Strict action should be taken against erring officials who misuse Aarogya Setu App user's personal data, constantly monitor the user, leak the data stored, falsely identify a person as COVID positive leading to ostracism. The Government needs to incorporate General Data Protection Regulations (GDPR) in its domestic policies and monitor proper handling of data and information stored in the electronic devices.
13. **Legal Status:** issue of Vinculum Juris between the migrant worker and the Employer could be resolved by covering this unorganised sector in to the ambit of formal sector. Casting primary liability on the Contractor and secondary liability on the Employer would solve the issues of this informal sector.
14. **Comprehensive Legislation:** A detailed and effective legislation to deal with emergency health crisis like COVID -19 needs to be framed based on the inputs from Corona virus Act 2020 laid down by UK[28] and Infectious Diseases Regulations 2020[29] enacted by Singapore. Novel and Innovative Policy solution to address a 21st Century problem and not an outdated Epidemic Act 1897 to follow.
15. **Environmental Knowledge for Disaster Risk Management:** Solutions are also available in the Environmental Knowledge for Disaster Risk Management, which aims at mitigating risks arising out of natural disasters such as COVID-19. The environmental laws focus on the 'green-disaster responses' which include pre-disaster risk reduction and post-disaster sustainable recovery processes to avoid rebound or secondary calamities and crisis. In 1972, The World Commission on Environment[30] emphasized on three principals focusing on environmental sustainability amidst pandemic such as Inter-Generational Equity, Polluter Pays principle and Precautionary principle.

Conclusion

Local Governance is the best feature of our Indian Constitution and this democracy at grass root level is a step to achieve a 'Welfare State'. As stated, it becomes the paramount duty of the States to cater to the needs of every citizen to attain a Welfare State. These duties are enumerated at both National level in Part – IV of the Constitution of India and at International level in Deng Principle and UDHR. States during crisis such as COVID-19 should take onus of IDP's safe return, resettlement and reintegration into the mainstream society.

28 Coronavirus Act 2020, (July 30, 2020, 11.03 PM), https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted.

29 Infectious Diseases Act, Chapter 137, Infectious Diseases (COVID-19- Stay Orders) Regulations 2020, (July, 30, 2020, 11.03 PM), https://www.moh.gov.sg/docs/librariesprovider5/pressroom/press-releases/annex-a---id-(covid-19).pdf.

30 Stockholm Declaration on Human Environment 1972, https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf.

LIABILITY DIMENSION OF THE BAGHJAN GAS LEAK CASE IN ASSAM UNDER THE LEGAL FRAMEWORK

- Dr. Matiur Rahman & Mr. Jayanta Boruah***

Key Words: Baghjan, Compensation, Econcentrism, Environmental disaster, Oil India Limited and Public Liability

Background

The Baghjan Oil Well disaster in Upper Assam has caused long term environmental damage impacting both the ecology and the economy of the region.[1] Facts remain that the Baghjan 5 gas well of Oil India Limited (OIL) caught fire around 1.00 PM on 9th June, 2020 that brought serious danger to the lives of many people in the nearby villages. The disaster caused massive damage to flora, fauna and biodiversity.[2] According to Expert Reports, OIL must pay several crores to the victims as compensation including the costs for eco restoration of the damaged ecosystems.[3] From a jurisprudential point of view, the polluter pays principle is an international mandate and, thus, OIL ought to be liable for the disaster it caused. Apart from this, OIL is a state within the meaning of Article 12 of the Constitution of India and therefore must conform to the mandates of Article 48-A of the same. The National Green Tribunal, in the meanwhile, interfered imposing an initial penalty of Rs. 25 crores on OIL and also passing repeated directives to ensure environmental human rights of the victims including eco-restoration.[4] The Public Liability Insurance Act, 1991 is a panacea to ensure environmental justice to both the victims and the flora, fauna and biodiversity of the region. This article will, therefore, focus on the applicability of the legal provisions to ensure that justice is served to the victims of this Baghjan disaster.

Geography and Ecology of Baghjan Oil Field

The Baghjan Oil Field is located in Tinsukia district in the State of Assam, near Baghjan Village, that consists of a residential population of about 4,488 people.[5] It touches the vicinity of the famous Dibru Saikhowa National Park in Assam connecting it to the natural wetland of Maguri Motapung *Beel*.[6] It also touches the Namdapha National Park via the Dehing Patkai Wildlife Sanctuary. These regions are the part of the Indo-Burma Biodiversity Hotspot.[7] The OIL gas well No. 5 is only 900 meters away from the Park and also adjoins the rest of the biodiversity rich forest region surrounding it. The Indo-Burma

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1 Simantik Dowerah, *Baghjan fire Oil India's failure to stand by local community after blaze, protect ecology ruins its image in Assam,* https://www.firstpost.com/india/baghjan-fire-oil-indias-failure-to-stand-by-local-community-after-blaze-protect-ecology-ruins-its-image-in-assam-8464251.html (last accessed on Aug 31, 2020).

2 Nabarun Guha, *Fire at Assam Oil Well after Gas Leak threatens Life, Livelihood and Biodiversity,* https://science.thewire.in/environment/assam-oil-well-fire-baghjan-tinsukia/ (Aug 31, 2020).

3 Amarjyoti Borah, *Assam Baghjan Well fire: Expert Penal cites major lapses by OIL before* https://en.gaonconnection.com/assam-baghjan-well-fire-expert-panel-submits-stinging-report-before-ngt-citing-major-lapses-by-oil-india/ (last accessed on Aug 31, 2020).

4 The Wire, *Baghjan Oil Field Fire: NGT slaps 25 Crore on OIL,* https://thewire.in/law/assam-baghjan-oil-fire-ngt (last accessed on Aug 31, 2020).

5 Sadiq Naqvi, *Blowout in Oil India Well threaten National Park in Upper Assam,* https://www.downtoearth.org.in/news/pollution/blowout-at-oil-india-well-threatens-national-park-in-upper-assam-71464 ((last accessed on Aug 31, 2020)).

6 *Id.*

7 Holidify, *Dibru Saikhoa National Park Tourism,* https://www.holidify.com/places/dibru-saikhowa-national-park/ (last accessed on Aug 31, 2020).

Biodiversity Hotspot is also situated within its vicinity[8]

Aftermath of the Baghjan Blowout

The blowout that took place on the 9th of June immediately started causing huge loss in the entire surrounding. The blowout forced many tea garden laborers to flee from their working gardens in search of a safe location and the disaster also damaged many houses in the nearby villages causing a huge loss of property. The Baghjan tragedy also resulted in death of individuals and livestock of the local people. OIL has therefore been held responsible for the outbreak of the inferno which leaped more than 300 feet into the air.[9] Since the gas well is located near the National Park, it is likely to cause even more danger to the wildlife.[10]

Subsequent to the disaster a "Closure Notice" was issued by the Pollution Control Board of Assam on June 19, 2020 to OIL alleging that it violated environmental laws while operating at the oil field. The aforesaid notice ordered to close down all its production and drilling operations at the Baghjan Oil Field in Tinsukia district.[11] However, the PCBA recalled its closure notice when the oil assured to respond to all the queries of the PCBA.[12]

The NGT also stepped into the matter by passing an order against OIL to pay Rs. 25 Crores as compensation on an interim basis and also recommended for the constitution of an Expert Committee that will have to investigate the matter for devising suggestions for providing relief, rehabilitation and restoration measures along with eco-restoration.[13] Based on the orders of NGT, the Expert Committee started investigating on 13 major aspects related to the disaster that included the cause of oil and gas leak, damage and health hazard caused to the public, extent and loss of damage to life, wildlife, environment, whether any contamination has been caused to water, air and soil of the area of the oil well and its vicinity, extent of contamination of waters of nearby rivers due to oil spill, impact of eco-sensitive zone of the Maguri Motapung Wetland and the Dibru-Saikhowa National Park, impact on agriculture and fishery, the mitigation measure that have been adopted by OIL, the extent of liability for the blowout and the cause of failure to prevent the mishap, assessment of compensation for the victims and the cost of restoration of the damage to property and the environment, preventive and remedial measures etc.[14] The Expert Committee, in its report, cited serious deficiencies in OIL's planning of critical operations besides the "mismatch between planning and execution in site".[15]

Evolution of Environmental Liability Insurance under Common Law and the Sustainable Development Principle in India

Environmental Liability Insurance (ELI) establishes a framework for environmental liability based on the doctrine of "polluter pays principle" with

8 Down to Earth, *Blowout in Oil India Well threatens National Park in Assam,* https://www.downtoearth.org.in/news/pollution/blowout-at-oil-india-well-threatens-national-park-in-upper-assam-71464 (last accessed on Aug 31, 2020).

9 Correspondent, *Baghjan Blowout Fire and Panic,* ASS. TRIB., June 10, 2020 at 1.

10 Ananya Singh, *Baghjan Oil Well Fire threatens Survival causes "irreversible" Ecological Damage* https://www.thecitizen.in/index.php/en/NewsDetail/index/13/18917/Baghjan-Oil-Well-Fire-Threatens-Survival-Causes-Irreversible-Ecological-Damage (last accessed on Aug 31, 2020).

11 Tora Agarwala, *Assam Pollution Control Board tells OIL to shutter Baghjan ops,* https://indianexpress.com/article/north-east-india/assam/pollution-control-board-assam-issues-closure-notice-to-baghjan-oilfield-ops-6468411/#:~:text=OIL's%20set%2Dup%20in%20Baghjan,environmental%20transgressions%20by%20the%20PSU (last accessed on Sept 16, 2020).

12 The Hindu, *Pollution Control Board revokes Closure Notice to OIL,* https://www.thehindu.com/news/national/other-states/assam-pollution-control-board-revokes-closure-notice-to-oil/article31896673.ece (last accessed on Spt. 17, 2020).

13 The Wire, *NGT accepts a new case against OIL for Baghjan blowout,* https://thewire.in/environment/ngt-accepts-a-new-case-against-oil-for-baghjan-blowout (last accessed on Sept. 16, 2020).

14 The Hindu, *Baghjan blowout panal faults OIL on safety,* https://www.thehindu.com/news/national/other-states/baghjan-blowout-panel-faults-oil-on-safety/article32216308.ece (last accessed on Sept 17, 2020).

15 Bar and Bench, *Baghjan Gas Leak) NGT Expert Committee finds prima facie violations of eco norms, directs relief to 3 classes of people in initial report,* https://www.barandbench.com/news/litigation/baghjan-gas-leak-ngt-expert-committee-finds-environmental-law-violations (last accessed on Sept 17, 2020).

a view to prevent and remedy environmental damage.[16] In other words, environmental liability insurance covers the cost of restoring damage caused by environmental accidents, such as, contamination of water, air, land and biodiversity damage.[17] Under the Indian Legal System, ELI, as understood by the common people and as interpreted by the judiciary covers the cost of repairing environmental damage arising from both common law claims i.e., damages and claims arising from the Public Liability Insurance Act, 1991.[18] It also lays down that the absolute liability for harm to the environment extends not only to compensation granted the victims of pollution but also to the cost of restoring the damaged environment,[19] since remediation or regeneration of the damaged environment is the part of the process of sustainable development.[20]

The World Commission on Environment and Development (WCED) constituted by UN General Assembly, in its report in 1987 under the caption "Our Common Future" defined sustainable development as "the development that meets the need of the present without compromising the ability of the future generations to meet their own needs."[21] ELI is therefore assumed to be a bold step in India for meeting the challenges of a highly industrialized economy and also to supplement the processes of sustainable development in this sub-continent.

Significantly, after the Bhopal Gas Leak Tragedy of December, 1984, and the famous "Oleum Gas Leak Case", the Parliament of India passed the Public Liability Insurance Act, 1991, thereby implementing the mandates of sustainable development and the judicial pronouncements of the Supreme Court in the "Oleum Gas Leak Case". It needs to be stated that this legislation for the first time, acknowledged the principle of no-fault liability. This Act of 1991 provides for mandatory insurance for the purpose of providing immediate relief to the persons affected by accidents occurring while handling hazardous substances. It is a legislation to protect the innocent members of the general public through providing mandatory public insurance.[22]

The reason for the introduction of the Act can be better understood from the facts and consequences of the following cases. It was on 3rd December, 1984 when about 40 tons of highly toxic Methyl Iso-Cyonate (MIC) which had been manufactured and stored in the Union Carbide Corporation Chemical Plant in Bhopal, a subsidiary of the Union Carbide Corporation, USA allegedly escaped into the atmosphere killing nearly 4000 people and inflicting injuries on more than 2 lakhs others (initial estimate). The MIC genetically affected the future generation as well. The Government of India immediately reacted after the incident and passed the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, thereby, conferring 'exclusive right' on the Central Government to represent the gas victims for claiming compensation. In exercise of the powers conferred by this legislation, the Central Government filed a suit in the District Court, New York, USA, which dismissed the suit applying the common law doctrine - *"Forum Non-Convenience"*. The Court declined its jurisdiction on the ground that the Indian Courts are the more convenient and proper forum for such an action. Thereafter, the Government of India filed a suit

16 Insurance Information Institute, *Environmental Liability Insurance,* https://www.iii.org/article/environmental-liability-insurance (last accessed on Sept. 17, 2020).

17 ABI, *Environmental Liability Insurance,* https://www.abi.org.uk/products-and-issues/choosing-the-right-insurance/business-insurance/liability-insurance/environmental-liability-insurance/ (last accessed on Sept. 17, 2020).

18 Sukanya Pal, *A Compulsory Environmental Insurance for Industries,* https://www.downtoearth.org.in/coverage/environment/a-blueprint-13720 (last accessed on Sept. 17, 2020).

19 Prof. Dr. Michael G Faure & Mr. David Grimeand, *Financial Assurance Issues of Environmental Liability,* https://ec.europa.eu/environment/legal/liability/pdf/insurance_gen_finalrep.pdf (last accessed on Sept 19, 2020).

20 Pragya Ohri, *India: Need for Sustainable Development,* https://www.mondaq.com/india/clean-air-pollution/559702/need-for-sustainable-development)last accessed on Sept 18, 2020).

21 Sustainable development.org, *Report of the World Commission on Environment and Development: Our Common Future,* https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (last accessed on Sept 18, 2020).

22 Dr. Matiur Rahman, *Environmental Liability Insurance in India,* 6, INDIAN JOURNAL OF APPLIED RESEARCH, 821, 821-823, (2016).

in the Bhopal District Court which had ordered the UCC to pay an interim relief amounting to Rs. 350/- crores to the gas victims. On a civil revision petition filed by UCC, the Madhya Pradesh High Court reduced the amount of 'Interim Relief' payable to Rs. 250 crores. The UCC knocked at the Supreme Court claiming that the judgment was unsustainable because it amounted to a verdict without trial. The Union of India also appealed before the Supreme Court because the Madhya Pradesh High Court had reduced the amount of Interim Relief. The Supreme Court secured a compromise between the UCC and the Government of India. Under the settlement, the UCC agreed to pay US $ 470 million in full as compensation.[23] The leading American Tort Lawyer Melvin M. Belli rightly characterized the settlement as "the most unethical, unconscionable thing in tort law"[24] Prof. Upendra Baxi had also criticized this settlement by saying that "not only was the compensation inadequate but the victims' claims were also not heard by the Court that was party to the award...."[25]

Subsequently, within a period of one year after the Bhopal Tragedy, there was another incident of leakage of Oleum Gas from one of the units of Shriram Food and Fertilisers Industries belonging to Delhi Cloth Mills Ltd. As a consequence of this leakage, it was alleged that one person had died and several others were injured by the same. Mahesh Chandra Mehta an environmental activist and an Advocate on Record of the Supreme Court moved the Apex Court through a writ petition under Article 32(1) of the Constitution by way of Public Interest Litigation. The Constitutional Bench of the Supreme Court of India took a bold decision holding that we are not bound to follow the rule of strict liability laid down by the House of Lords in *Ryland v. Fletcher* in England over a century ago. And the Apex Court introduced the Rule of Absolute Liability - as part of Indian law. It further made clear that this new rule is not subject to any exceptions as earlier recognised in *Ryland v. Fletcher* in England.[26] Arguing for this new Rule, Bhagwati, C.J. said: "*We have to evolve principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.*"[27]Thus, these two cases primarily led to the emergence of the concept of absolute liability which further provided scope for mandatory insurance in India.

Relevant Provisions of Public Liability Insurance to the Baghjan Case

These two significant cases caused the Parliament to pass the Public Liability Insurance Act, 1991 for implementing the rule of absolute liability on the part of the "owner" and the "insurer" as well to pay relief to the victims of environmental accidents.[28] Section 3 of the Act makes the owner liable to provide for reimbursements for medical expenses up to 12,500.00 Rs.; in addition to this, in cases of fatal accidents an additional amount of 25,000.00 to every person; and if any partial or permanent disability is incurred by any person then such person shall be provided with an amount of 25,000.00 in case of permanent disability and such other amount in proportionate to the percentage of disability as certified by the authority on this behalf. Here the meaning of the term 'insurance' as defined under Section 2(e) stands for insurance against the liability of the owners to pay compensation to the victims. The Act further provides for a Relief Fund which is

23 Debayan Roy, *SC to begin hearing Bhopal Gas Tragedy: All you need to know aboutv 36 years old case,* https://theprint.in/india/sc-to-begin-hearing-in-bhopal-gas-tragedy-all-you-need-to-know-about-36-yr-old-case/362531/ (last accessed on Sept 18, 2020).

24 A Dhanda, *The Bhopal Victims on the Labrynath of the Law: An Introduction* http://14.139.60.114:8080/jspui/bitstream/123456789/699/5/The%20Bhopal%20Victims%20in%20the%20Labyrinth%20of%20the%20Law.pdf (last accessed on Sept 19, 2020).

25 Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal,* 29, OSGOODA HALL LAW JOURNAL, 3, 3-50, (1991) https://core.ac.uk/download/pdf/232617653.pdf.

26 Roopali Lamba, *Case Analyst: M.C. Mehta v Union of India (Shriram Industries Case),* LATEST NEWS https://www.latestlaws.com/articles/case-analysis-m-c-mehta-v-union-of-india-shriram-industries-case-by-roopali-lamba/ (last accessed pn Sept 20, 2020).

27 *Supra* note 23.

28 *Id.*

defined under Section 2 (ha) as a fund to mean Environmental Relief Fund established under Section 7A of the said Act.[29] Thus, this means that this Act has made the owners liable to pay compensation to the victims of environmental damages under the Principle of Absolute Liability, since it has been made a mandate for the owner to take out insurance policies against such liabilities under Section 4 of the Act. Thereby, through the application of these provisions, it can be said that OIL becomes absolutely liable to pay compensation to the victims of Baghjan case.

Thus, the Environmental liability Insurance can also be held to be based on the principles of sustainability to reflect the concept of 'Green Insurance.' Insurance Industry now-a-days plays a pivotal role in sustainable development by recognising it as an objective. Now the new concept that is emerging in the current scenario is Sustainable Insurance, which is a strategic approach towards sustainability with an objective to reduce risk, develop innovative solutions, and improve business performances by giving contribution to environmental, social and economic sustainability.[30] All these instances make OIL liable for paying compensation since the Baghjan Disaster has led to a significant damage to the natural ecosystem as well as the livelihood of the local people.

Criminal Liability for the Baghjan Disaster

In addition to the above provisions, Section 268 of Indian Penal Code holds a person criminally liable for causing public nuisance even without any intention for causing harm. The Section also provides that common nuisance is also not excusable.[31] Similarly, Section 269 of the same Code provides that if any person does any act negligently that possesses the potential of spreading diseases dangerous to life shall be made liable without paying regard to the plea of absence of mens rea.[32] If the Expert Committee Report on the Baghjan Case is taken into consideration then one can hold that the blowout was due to negligence of OIL workers and the gas leak amounts to an act of public nusiance.[33] Thus, it can be said that OIL also becomes criminally liable for this blowout.

Conclusion

The Brundtland Report, 1987 made several business and management strategies considering how and why corporations should incorporate environmental concerns into their own strategies. Today, companies have accepted their responsibility to do no harm to the environment. Corporate Social Responsibility is defined as the duty to cover the environmental implications of the company's operations, products and facilities; eliminate waste and emissions: maximize the efficiency and productivity of its resources; and minimize practices that might adversely affect enjoyment of the country's resources by future generations. Further, we must also acknowledge the role of Environmental Impact Assessment which makes public hearing and environmental clearance for 25 projects with high risks mandatory before establishing any such eco-sensitive projects and any violation of EIA Notification will be regarded as a violation of Constitutional mandate in India. But according to Niranta Gohain, OIL has never obtained any environmental clearance before constructing such hazardous oil wells in the eco-sensitive zone near Dibru-Saikhowa, which is not only a violation of EIA Notification but also of Constitutional mandate since OIL comes within the meaning of State under Article 12 of the Constitution. We have seen that the Bhopal Gas Leak case, Oleum Gas Leak case and now the Baghjan Gas Leak case have become repeated evidences showing how economic development has been causing environmental hazards raising a question that whether humanity has earned a life full of luxuries or a death due to uncertainties? Further, it has been witnessed that how justice has been betrayed in the Bhopal Gas Leak case and also even in the Baghjan case where the amount of compensation decided is insufficient for eco-restoration.

From all the facts and circumstances, we can conclude that OIL has incurred both civil and criminal liabilities for causing serious threat

29 Public Liability Insurance Act 1991.

30 *Supra* note 23.

31 Indian Penal Code 1860 § 268.

32 *Id.* § 269.

33 *Supra* note 14.

to the ecological balance of the Baghjan area after the blowout and since OIL itself is a State within the meaning of Article 12 of the Indian Constitution, it further becomes more responsible for causing such disaster to the environment by virtue of Article 48-A. Such liabilities are based on the Principles of Sustainable Development and Absolute Liability which shall be implemented very

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The Role of Principles of Environmental Justice in Securing Equality in the Distribution of Environmental Resources - A Critique

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Key Words: Environmental Justice, Flora & Fauna, Protection of Nature, Principles, Racial Discrimination.

Introduction

Human beings have a deep captivating curiosity towards their habitat and as a consequence their approach since evolution of mankind is very practical when it is about the environment. The sustenance of the environment was based on the human compassion towards the plants and wildlife. The knowledge about the cultivation strengthened the affiliation and control over the nature as humans commenced altering and administering with the strengths of the environment.

The term 'environment' is extensively utilized and has a comprehensive variety of explanations, connotations and elucidations In widespread practice, the term 'environment' is merely, 'nature' and when stretched to the tangible resources it would comprise of the natural and artificial structures and in this regard the nature is habitually meticulously correlated to concepts of wild and of uncultivated lands that have the potential to transform itself to a habitable place or an altar for development. The primary cause of global environmental degradation is the unsustainable rate of consumption of environmental resources by the planet's most economically privileged inhabitants. This description corresponds to societal, pecuniary factors such as poverty, financial and employment etc. and their role in the protection of the environment[1].

The need for development is ever persisting for a better life on this planet and is seen as the driving force towards the human activities of inventions and discoveries[2]. Environmental Protection and Development are seen as two distinct concepts and are also referred to as contradictory in their nature. The reasoning for the same is questionable, however development would leave a tangible impact on the environment either by reducing its aesthetic value or affecting the lives of living beings who are depended on it. There has been an emergence of innovative ways of development which protect the environment without causing significant changes.

Environmental Protection Movements have always aimed at protecting the natural resources and wild life, the reason being that they alone were at the receiving end suffering the hazardous effects of environmental degradation. The impact on the individuals and their lives were always undermined as it was felt that they were suffering punishment for their wrong doings. In reality, the people who initiated the developmental activities which caused the degradation, were never faced with any problems or lost their material wealth as they managed to secure their interest well in advance anticipating the loss.

The weaker sections of the society who were discriminated on several parameters were always kept out of the mainstream society and became ignorant towards their rights and the means to redress their problems. They remained as mute spectators of the development and the liability of environmental degradation was fastened on them. The educated class of people with their superior knowledge were quite prudent in

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1 H M Osofsky, *Learning from Environmental Justice – A New Mew Model for International Environmental Rights*, 78 STANFORD ENVIRONMENTAL LAW JOURNAL,79 (2005).

2 DR. PARANJAPE N V, ENVIRONMENTAL LAWS AND MANAGEMENT IN INDIA, 212-214 (Thomson Reuters, 2015).

realising the potential of the natural resources to earn the material benefits[3]. There was disparity in the sharing of the economic benefits of the environment. The marginalized section of people was deprived of their rightful share in the material benefits accruing from the Environmental resources. Environmental Justice can secure equality in the protection of the environment and also the protect people by equal distribution of the benefits and hazards.

In the modern-day context, the term 'environment' is being used indistinguishably with that of 'ecological system', which may be demarcated as a locality of cooperating creatures composed with their corporeal environments. The concept of interconnectedness within the environment has prompted the study of ecological science and administration, as the ecological matters are prone to being distressed or tarnished inadvertently or as a consequence of deviations by the human beings in their life's patterns.

Environmental Justice

The compound word 'environmental justice' is loaded with two distinct disciplines of 'environment' and 'justice'. The meaning and the contents of this term eventually rests on the manner of the application of the abstract concept of 'justice' to the tangible process of Environmental Protection. 'Justice' in its simple sense refers to the socially acceptable behaviour towards others to promote peaceful coexistence[4].

'Justice' as a protean concept can be understood by analysing its scope and purpose as discussed in various theories of Justice. Environmental Justice means "environmental equity" and singularly focused on the distribution of environmental risks and investments along with its benefits among the people without any form of discrimination with an intention to promote access to justice in environment-related matters. The emerging area of environmental justice is closely associated with that of the philosophical, religious, ethical, social, economic and political justice.

The novel concept of Global Environmentalism is apposite in the study of Environmental Justice. Global environmentalism arises from social conflicts on environmental entitlements[5], with regard to the issues of burden of pollution on the people, impact of environmental risks on the natural resources and ultimately the loss of access to natural resources and environmental services to the people. The contemporary global environmental movements which emerged as a response to the unbridled economic activities and industrialisation are considered to be the primary source of Environmental Justice. The scope of Environmental Justice is related to the scope of livelihood ecology, which is an assessment of the impact caused by the economic activities on the Environment and aims at the geographical displacement of sources and sinks. The concept of environmental justice draws its moral force from the struggles to protect the Environment from various sections of people.

There is a need to assess the impact of Environmental Protection Movements on the framing of the Principles of Environmental Justice and to analyses the scope of the Principles of Environmental securing the equality in protection of Environment and equal distribution of benefits of Environmental resources. Environmental movements have been concerned with purely ecological issues including wilderness preservation, endangered species, overpopulation, recycling and energy consumption. It is an attempt to shift the focus of the environmental movement away from these issues toward more anthropocentric concerns such as racism, classism, and sexism since these forms of oppression lead to unequal burdens of environmental pollution being felt by people of color, women and low-income people.

In the pursuit of the community goal of Sustainable Development, Environmental Justice does not attach reverence to the Natural Resources, instead it is viewed as material interest as it is the source of livelihood and also aims for equality in distribution

3 R. RAJAGOPALAN, ENVIRONMENTAL STUDIES: FROM CRISIS TO CURE, 101-104 (3 ed. Oxford University Press 2011).

4 ELIZABETH FISHER, ENVIRONMENTAL LAW – A VERY SHORT INTRODUCTION 13-16 (Oxford University Press 2017).

5 RUCHI ANAND, INTERNTAIONAL ENVIRONMENTAL JUSTICE A NORTH SOUTH DIMENSION 52-59 (Taylor & Francis- 2017).

of resources and risks. The contemporary form of social justice among humans and wildlife is responsible for the paradigm towards materialism in Environmental Justice as against the religious reverence.

Definition of Environmental Justice

Environmental Justice indicates the free exercises of individual or collective rights and their needs and dignities are preserved, fulfilled, and respected to secure the self-actualization and community empowerment[6]. Prof. Sheila Foster in a research article, defines, Environmental Justice as,

"*neither uniformly nor precisely defined, environment justice is widely understood to be concerned, at the least, with distributional and procedural equity in environmental and natural resource decision*"[7].

Environment justice is a much more holistic concept that include the right to a safe, healthy, productive and sustainable environment for all. In this context, the "environment" is considered to include the ecological, physical, social, political, aesthetic and economic environments[8]. Environmental Justice thus refers to the conditions in which such a right can be freely exercised, whereby individual and group identities, needs, and dignities are preserved, fulfilled, and respected in a way that provides for self-actualization and personal and community empowerment.

The condition of Environmental Justice exists in an environment where there is equitable distribution of resources and there is absence of discrimination at all levels. Explaining the condition of such form of justice, Bullard, Robert in a research article states as follows,

"when environmental risks and hazards and investments and benefits are equally distributed with a lack of discrimination, whether direct or indirect, at any jurisdictional level; and when access to environmental investments, benefits, and natural resources are equally distributed; and when access to information, participation in decision making, and access to justice in environment-related matters are enjoyed by all".

Environmental injustice exists when members of disadvantaged, poor, ethnic, minority or other groups suffer disproportionately at the local, regional (sub-national), or national levels from environmental risks or hazards, and/or suffer disproportionately from violations of fundamental human rights as a result of environmental factors, and/or denied access to environmental investments, benefits, and/or natural resources, and/or are denied access to information; and/or participation in decision making; and/or access to justice in environment related matters[9].

A condition of environmental justice exists when environmental risks and hazards and investments and benefits are equally distributed with a lack of discrimination, whether direct or indirect, at any jurisdictional level; and when access to environmental investments, benefits, and natural resources are equally distributed; and when access to information, participation in decision making, and access to justice in environment-related matters are enjoyed by all[10].

History and Evolution of Environmental Justice

The available literature is insufficient to determine the definite origin of the Environmental Justice. However, the previous works on this subject matter, reveal that, it was in United States of America, there was a formal recognition accorded to the Environmental Justice, when

6 Tesming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 2 HARVARD ENVIRONMENTAL LAW REVIEW 22 (2002).

7 Sheila R. Foster, *Environmental Justice in an Era of Devolved Collaboration,* 459 HARVARD ENVIRONMENTAL LAW REVIEW 463 (2002).

8 STUART BELL, BALL & BELL ON ENVIRONMENTAL LAW THE LAW AND POLICY RELATING TO PROTECTION OF THE ENVIRONMENT 115 (5 ed. Bookbarn International 2000).

9 ROBERT D BULLARD, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 125-127 (South End Press 1992).

10 Burrington, Stephen H., & Bennet Heart. *City Routes, City Rights: Building Livable Neighbourhoods & Environmental Justice by Fixing Transportation*, CONSERVATION LAW FOUNDATION (Sep 04,2020, 11:25 AM), https://www.sustainable.org/creating-community/justice-a-equity/589-city-routes-city-rights-building-livable-neighborhoods-and-environmental-justice-by-fixing-transportation.

it was followed in a Class Action Suit of *Bean v. Southwestern Waste management, Inc* relating to the rights of the Residents in a protest over the incessant landfilling of the garbage.[11]

Commission for Racial Justice was appointed in the USA to study the Environmental Pollution and Racial Discrimination in distribution of its hazards. The study revealed that Race was found to be the most potent variable in predicting the unequal treatment on environmental issues. The racial discrimination was protested and lead to the origin of environmental justice movement, a culmination of the social justice and environmental movements. The modern civil rights movement is also associated with the Principles of Environmental Justice, for aims to secure Civil Rights of Non Disclination in distribution of Environmental Hazards and Benefits. Rawls' theory of justice has also been utilized for advancing the goal of environmental justice under which the idea of distribution has been a key element. The International Human Rights is relevant for the discussion on Environmental Justice as it deals with rights relating to life, health, and cultural integrity, the right to be free from race and sex discrimination, the rights to information, participation, and also contains the provisions relating to the redress for environmental harm[12].

The 1st National People of Colour Conservational Leadership Summit is the significant milestone in development of Environmental Justice. The Summit expanded the need for awareness in areas of related to Environmental Protection and its impact on the public health, employee protection, land use, conveyance, housing, resource distribution, and public enablement. The Summit also confirmed that it is conceivable to shape a multi-ethnic popular program on conservation and environmental justice by adopting a set of Universally acceptable principles for Environmental Justice. There was exchange of eco-friendly programs and joint strategies for reconceptualizing Equality of environmental rights of the people in sharing the benefits and burden of the Environmental Protection[13].

Principles of Environmental Justice

The seventeen Ideologies on conservational righteousness as adopted in the First National People of Color Environmental Justice Summit in 1991, which are collectively called Principles of Environmental Justice are relevant at all times for promoting Environmental Justice. Environmental Justice affirms reverence towards the Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction. It mandates that the public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias[14].

The analysis of the selected Principles reveals that, they mandate the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things. These principles also aim to protect the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment and also affirms the right of those who work at home to be free from environmental hazards. It prescribes the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources. In reality when these principles are followed in spirit, it enables individuals to make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations[15].

The Principles of Environmental Justice if implemented in all the jurisdictions, can aid shaping economical activities to be ecologically sensitive and assure social justice in distribution

11 Bean v. Southwestern Waste management, Inc, 482 F. Supp. 673 (S.D. Tex. 1979).

12 JULIE SZE, ENVIRONMENTAL JUSTICE IN A MOMENT OF DANGER 128-132 (University of California Press 2020).

13 DAVID NAGUIB PELLOW, WHAT IS CRITICAL ENVIRONMENTAL JUSTICE? 13-16 (Wiley 2017).

14 RACHEL STEIN, NEW PRESPECTIVES ON ENVIRONMENTAL JUSTICE GENDER, SEXUALITY AND ACTIVISM 222-225 (Rutgers University Press 2004).

15 DAVID SCHOLSBERG, DEFINING ENVIRONMENTAL JUSTICE THEORIES, MOVEMENTS AND NATURE 12-19 (Oxford University Press 2009).

of benevolent and pernicious effects of environmental pollution.

Conclusion

The skim of environmental movements across the time lines of history reveals that they have been concerned with purely ecological issues including preservation of endangered species, securing the protection of resources from human activities and promotion of recycling of resources for human consumption. The Environmental Justice movement and its subsequent codification in the form of 17 Principles can be seen as the attempt to shift the objective of environmental protection movement from anthropocentric concerns such as racial discrimination, economic disparity and sexism, as these forms of societal discrimination have been instrumental in discriminatory treatment towards the shifting of burdens of environmental pollution on the people based on their color, race, sex and income earning capacity. The equitable and effective solutions to global environmental problems, can be found when the Principles of Environmental Justice are seen as a morally compelling narrative which recognises the historic roots of environmental injustice to provide redress to the nations and communities which are burdened by environmental degradation[16].

Environmental Protection can be achieved by following Principles of Environmental Justice as it will make people attentive towards the need for public participation to prevent the environmental degradation. The societal problems of poverty, illiteracy, lack of information, and government indifference or hostility have excluded vulnerable communities from effective participation in decision-making regarding climate change, biodiversity protection, and environmental impact assessments for local, regional or national development projects[17].

It is pertinent to note that implementation of Principles of Environmental Justice is the need of the hour to secure equality in the rights of people towards the access of the environmental resources and to prevent discriminatory distribution of the hazards of the environmental degradation.

16 Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle,25* BROOKLYN JOURNAL OF INTERNATIONAL LAW 53 (1999).

17 GITANJALI NAIN GILL, ENVIRONMENTAL JUSTICE IN INDIA THE NATIONAL GREEN TRIBUNAL 187-189 (Taylor & Francis 2016).

ANNOUNCEMENTS

FOUR - DAY ONLINE TRAINING PROGRAMME IN TWO BATCHES ON "ENVIRONMENT LEGISLATIONS, INTERPRETATION, ENFORCEMENT, LEGAL AND STATUTORY REQUIREMENTS – CASE STUDIES"

ABOUT THE PROGRAMME

Center for Environmental Law, Education, Research and Advocacy (CEERA), NLSIU, in collaboration with Andhra Pradesh Pollution Control Board (APPCB) is organising a four days online training in Environmental Legislations. The training programme is happening in two batches and will focus on the legal, regulatory and interpretation challenges to Environmental Governance in India. Resource persons from the legal academia, practitioners, activists, industry experts would deliver sessions on various topics from the themes below.

THEMES

- Constitutional Law and Regime on Environmental Protection
- Statutory Enforcement Mechanisms on Control of Pollution
- Law relating to Collection, Disposal and Management of wastes
- NGT and its Powers and Judgments
- Law and Policy on Abatement of Pollution and Climate Change
- Environmental protection Act: Law making in India
- Criminal Law Enforcement and Pollution Control: Procedural Issues and Collection of Evidence
- Cleaner Technology and Environmental Protection: Law and Compliance

DATES

BATCH 1: 1st - 4th DECEMBER, 2020

BATCH 2: 7th - 10th DECEMBER 2020

For Further Details Contact
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Ministry of Environment, Forest & Climate Change

Online Workshop ON The Use of Hazardous Pesticides and The Impact on Environment and Health: Legal and Social Implications

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
BENGALURU

ABOUT THE WORKSHOP

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade is a collaborative effort for the promotion of human health and environment. India ratified the Rotterdam Convention and in pursuance of the same authorized the Ministry of Environment, Forest and Climate Change, Ministry of Chemicals and Fertilizers and the Ministry of Agriculture and Farmers' Welfare to perform the role of national authorities in the country. India has enacted laws and rules for regulating pesticides both prior to and after the ratification of the Rotterdam Convention but domestic laws that fully embody the principles of the Convention are yet to be formulated.

The online workshop organized by the Centre for Environmental Law, Education, Research and Advocacy (CEERA), NLSIU, in collaboration with the Ministry of Environment, Forest and Climate Change focuses on discussing and building awareness about laws governing hazardous pesticides in India. The workshop is designed keeping in mind the stakeholders from the government, farmers and agriculture associations, lawyers, academicians and students.

Participation in the workshop will strictly be on registration basis.

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SAND MINING REGULATORY REGIME IN INDIA AND THE MAJOR SUSTAINABILITY CHALLENGES: A CRITICAL REVIEW

*- Ms. Aneesha Dominic**

Key Words: Sustainable Sand Mining, International Obligations, National Laws, Judicial Trends

Introduction

'Sand' is a word which needs no special description. There would be images that would come to one's mind while thinking of this single word. It may be windblown sand in a desert or that available in a children's sandbox. But probably, there would be no one who would have thought of a world without sand. And the term 'Sand Mining' has become so common that no one cares about the same as a wreaking havoc.

'Sand Mining', as it may be understood, refers to the extraction of sand through an open pit or from ocean or river beds. Sand is mined from beaches, inland dunes and dredged from ocean beds and river beds. In India, the main source of sand includes the rivers, lakes, reservoirs, agricultural fields, marine sand and palaeo-channels[1].

Understanding the issue of sand mining, it can be seen that sand is the single most mined commodity and around 85% of the material we pull up from the earth every year is sand[2] and the global demand for sand continues to increase with the rise of urban development in many parts of world. Sand is also stated to be the most consumed substance after water, being used in virtually every construction or manufacturing process. Globally the annual aggregate consumption of sand is somewhere around 53 billion tonnes which is equivalent to every person on earth using 20kg of sands every single day.[3].

The demand for sand has increased to such an extent that meeting this demand would exceed the replenishing capacity of this natural resource. The demand for sand has forced the nations with limited sand to avail the same from other countries. The United Nations Environment Program has already estimated that the total quantum of sand that is being mined each year amounts to almost 40 billion tons a year[4]. But it is also pertinent to note that this estimate is only with respect to the cement manufacturing industry. So, the rest is yet to be assessed.[5].

In the global scenario, evidence suggests that excessive consumption of sand poses several challenges for environmental sustainability. China is stated to be the most consuming country on sand. Construction of sky-scrappers and huge buildings is common in U.S.A also. Dubai is also such a city which, the United Nations reports, to have consumed about 186.5 million cubic meters of marine sand for the creation of the famous artificial island of the world, the Palm Jumeirah. The island nation of Singapore also relies heavily

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1 Noyonika Mukerji, *Illegal Sand Mining- Its effect on Ecology and Environment,* NLU ASSAM(last accessed on May 27, 2020 10:15 AM), http://www.nluassam.ac.in/data3/lexterraissue23/Article%202.pdf.

2 Mathew Hall, *6 Things you need to know about Sand Mining,* MINING TECHNOLOGY (last accessed on October 20, 2020, 06:49 PM) https://www.mining-technology.com/features/six-things-sand-mining/

3 Fred Pearce, *The Hidden Environmental Toll of Mining the World's Sand*, YALE ENVIRONMNET 360(last accessed on May 26, 2020, 10:12 AM), https://e360.yale.edu/features/the-hidden-environmental-toll-of-mining-the-worlds-sand.

4 United Nations Environmental Programme, *UNEP Global Environmental Alert Service: Sand, rarer than one thinks*, UNEP IN EUROPE (last accessed on October 20, 2020, 07:01 PM) http://unepineurope.org/index.php?option=com_content&view=article&id=86:unep-global-environmental-alert-service-sand-rarer-than-one-thinks&catid=15&Itemid=101.

5 *Id.*

on sand imports[6]. India is also not in a better position than any of these countries. With the increased population rate, reports states that India is the second most consuming country of sand mineral.

While analysing the sand consumption scenario in India, it can be seen that the sand is been mined so extensively from rivers as well as from the beaches to meet the demands as India has the third largest construction industry after U.S and China. India has many states which is rich in heavy mineral sand. When illegal and indiscriminate sand mining is been discussed, it can be seen that the major cause or reason for it is ever growing sand mafias in the country. Illegal groups are engaged in excavating sand illegally to meet their high demands on sand and supply shortages[7]. And often the inception and prolonged continuation of illegal activities has been the result of deep-seated corruption at different levels of administration.[8] It can also be seen that more often the environmental guidelines and laws are not followed in the strict sense. Another important issue that concerns the country when the regulatory measures for sand mining are considered is the lack of data relating to the amount of sand mined each year in India. The only data that is readily available is from the usage of cement, construction of roads and stowing of mines.

International Obligations Relating to Sand Mining: A Brief Overview

At the international level, number of obligations exists that portrays the relationship between environment and human rights. But it is an astonishing fact that no convention or declaration of United Nations exists in the name of sustainable sand mining even though sand mining has transboundary impacts on the environment and ecology as a whole. Any how the human rights approach towards natural resource conservation which indeed indirectly implies sand in it is visible after the adoption of UDHR[9]. It does not, however, make any direct reference to 'environment' or 'sand'. As in the UDHR[10], there is no specific provision that explicitly provide for the right to environmental quality in the ICCPR[11] or the ICESCR[12], but indirect inferences can be drawn in favour of the same from them.

At the global level, there are also other human rights treaties which have directly included the value of the environment in their systems of protection even though no specific address is made on sustainable sand mining operations. Significant developments took place at the behest of the UNEP[13], which linked the fundamental value of the environment for the survival of human beings and included concepts such as Environment Impact Assessment of development projects for ensuring sustainable development and obligation on the part of the authorities to provide information.

And very importantly, the only document that can be directly related is the UNEP reports which specifically point out the want of sustainability in sand mining operations. UNEP Report on 'Sand Rarer than One Thinks, 2014[14]' thus points out that river sand mining will act as a serious cause for floods. This Report is still relevant because the recent floods that affected Kerala as well as different states in India, have serious causes of which sand mining is one among them. Improper Environmental Impact Assessments as well as monitoring systems also lead to indiscriminate sand exploitations which are highly relevant to the

6 Laurie Winkless, *We're Running Out Of Sand And Cities Are To Blame,* FORBES (last accessed on May 27 2020 12:27PM), https://www.forbes.com/sites/lauriewinkless/2019/08/22/were-running-out-of-sand-and-cities-are-to-blame/#4c27c83e1240.

7 Brandon Baker, *What are 'sand mafias?,* PHILLY VOICE (last accessed on October 22, 2020 07:20 PM) https://www.phillyvoice.com/what-are-sand-mafias/

8 Satinder Bhatia , *The Central theme in sand mining,* THEHINDUBUSINESSLINE (last accessed on May 25, 2020 15:42AM), https://www.thehindubusinessline.com/opinion/the-central-theme-in-sand-mining/article22996153.ece.

9 Universal Declaration of Human Rights, 1948.

10 *Id.*

11 International Convention on Civil and Political Rights, 1976.

12 International Convention on Economic, Social and Cultural Rights, 1976.

13 United Nations Environment Programme, 1972.

14 Claire Le Guern, *A UN Report on Sand Mining: "Sand Rather One Thinks",* COASTAL CARE(last accessed on May 19, 2020 10:03 AM), https://coastalcare.org/2014/04/a-un-report-on-sand-mining-sand-rarer-than-one-thinks/

present Indian scenario of loosening stringency of Environmental Impact Assessments. The same has been emphasized in the UNEP source book named 'Managing Mining for Sustainable Development, 2018[15]' which highlights that the community consultation should be made a compulsory step in Environmental Assessment Procedure. Here, it is so ironical that India in its latest EIA[16] Draft Notification of 2020 has attempted to skip this prime step in environmental clearance. Note made in the UNEP publication named 'Sand and Sustainability: Finding New Solutions for Environmental Governance of Global Sand Resources, 2019'[17] that India, while enacting legislations at the national and state level and conferring the regulatory governance to the sub-national level administrations, without adequate human resources and financial resources would tend to build up only a formal structure and no effective and efficient control and governance in practice is also highly relevant.

Legal Control on Sand Mining: Understanding Delegation of Powers and Regulatory Framework

The fundamental and the supreme legislation being the Constitution of India, it empowers the Union to enact laws relating to mines and minerals under the Union List. Entry 54 of List I in the Seventh Schedule of the Constitution empowers the Central government to regulate mining activities and the development of minerals and Entry 23 of List II read with Article 246 (3) empowers the state governments to frame rules and regulations in respect of mining activities and mineral development. The principal legislation governing the total mining sector in India is the Mines & Minerals (Development and Regulation) Act of 1957(hereinafter referred to as MMDR Act) which underwent significant changes under the MMDR Amendment Act of 2015.

Sand is a minor mineral, as defined under Section 3(e) of the MMDR Act. Section 15 of the MMDR Act empowers state governments to make rules for regulating the grant of mineral concessions in respect of minor minerals. Further, Section 23C empowers state governments to frame rules to prevent illegal mining, transportation and storage of mineral sand for purposes connected therewith. Control of illegal mining is, therefore, under the legislative and administrative jurisdiction of state governments. Under the power granted to them State Governments have framed their own minor minerals concession rules. But the fact is that the delegation of powers has not been made in an effective manner. With no central oversight, poorly governed states have seen sand mafias thrive. So, the sustainable sand mining in India remains a massive challenge crying for attention[18].

The environmental clearance process, which requires all projects by the private sector or government to seek regulatory approval prior to the commencement of construction, is the centerpiece of environmental regulation in India. The crux of this process is the environmental impact assessment which is called to be the Bible of environmental clearance in India. But is an ever-changing and inconstant law in India. It has been subjected to a number of changes either by governmental orders or judicial decisions. These have resulted in a number of contrary interpretations each year with the changing laws.

The latest Draft Environmental Impact Assessment Notification of 2020 raises the question of diluting the stringency of environmental laws in India. It tries to legalize the projects which have already started the construction work or excavation without prior environmental clearance. It thereby undermines the various orders held by the National Green Tribunal which has ruled against post facto approvals. The one outstanding feature

15 Uyanga Gankhuyag, *Managing Mining for Sustainable Development,* UNDP (last accessed on May 23, 2020 03:39 PM) https://www.undp.org/content/dam/undp/library/Sstainable%20Development/Extractives/UNDP-MMFSD-HighResolution.pdf.

16 Environmental Impact Assessment Draft Notification, 2020.

17 *Sand and Sustainability: Finding new solutions for environmental governance of global sand resources*, UNEP, (last accessed on May 21,2020,9:23 AM), https://wedocs.unep.org/bitstream/handle/20.500.11822/28163/SandSust.pdf?sequence=1&isAllowed=ye=1&isAllowed=y.

18 Prasanna Singh, *The Sand Mining Disaster: Why is it so difficult to control*, (last accessed on May 26, 2020 12:02 AM), https://www.iamrenew.com/policy/the-sand-mining-disaster-why-is-it-so-difficult-to-control/

of the EIA process in India is the need to conduct public hearings before which certain classes of projects are approved. It is an important step in environmental clearance because it gives voice to the concerns of the affected communities by such sand mining or any other mining activities. But it is so unfortunate that this latest notification has expanded the list of projects that do not need to seek public consultation before they seek environment clearance.

Decentralization of Environmental Clearance process which was brought in the year 2006 highlights that the government has used decentralization as a key policy move to expedite clearances. Development projects have been thereby increasingly placed under the ambit of state-level authorities, such as State Expert Appraisal Committees and State Environmental Impact Assessment Authorities. Simultaneously, district-level authorities, such as District Environment Impact Assessment Authority and District Expert Appraisal Committee have been created to deal with environmental clearances pertaining to small-scale mine leases. Amendment to the EIA Notification of 2009, made Environmental Clearance compulsory for mining of minor minerals in areas less than or equal to 5 ha. Even though it prima facie tends to comply with the *Deepak Kumar*[19] judgment, many a times reports suggests that the rejection rate at the state level has been a merely 1 per cent. So, decentralization is good in ensuring sustainability, but while delegation of powers, it should be ensured that the authorities are functioning in a way which can ensure good administration.

National Mineral Policy of 2019 which speaks about the need for conservation of minerals for the future also speaks about the exploration of beach sand. And it states that efforts will be made to encourage the extraction of beach sand minerals. So, this clearly shows the irony that is been created by the policy. How can conservation and exploration happen face to face, in the absence of sustainable means of mining? The creation of 'Exclusive Mining Zones' as mentioned in the policy is stated to avoid such delay that may arise in the commencement of mining operations. But creation of such zones would have serious impact on the forest and the communities in relation to it. It creates loopholes in obtaining clearances. And it fails to provide for the development of an effective, comprehensive environmental impact assessment report which can thereby be helpful in maintaining a sustainable mining and economic development there by.[20]

Ministry of Environment, Forest and Climate Change issued the Sustainable Sand Mining Management Guidelines, in the year 2016[21], after a number of landmark judgments by the honorable Supreme Court and National Green Tribunal which warranted the need for such a guideline. The guidelines dealt with the issues relating to regulation of sand mining and provides for guidelines so as to ensure that the river sand mining is done in a sustainable manner. MoEFCC issued Enforcement & Monitoring Guidelines for Sand Mining, 2020 and underlined the need for protection of rivers and species from sand mining and calls for replenishment study in rivers. It also highlights the need for survey report in every district for identifying the sand bearing area and also the "mining and no mining zones". The guideline also directs the State to initiate with online portals to ensuring transparency in the sale and purchase of sand and river bed material online. It also suggest for the use of latest technologies such as the use of drones for checking illegal mining, land use monitoring etc. It also emphasized on involving the public in the process of curbing illegal mining activities.

While the Sustainable Sand Mining Guidelines, 2016, require the preparation of District Survey Reports (DSR), which is an important initial step before grant of mining lease, the government has found that the DSRs carried out

19 (2012) 4 SCC 629.

20 Srestha Banerjee, *Creating exclusive mining zones and simplifying clearances, Will the new National Mineral Policy ensure responsible mining?*, DOWN TO EARTH https://www.downtoearth.org.in/news/mining/willthe-new-national-mineral-policy-ensure-responsible-mining--63741 (last accessed on October 20, 09:43 AM).

21 Ministry of Environment, Forest and Climate Change, *Sustainable Sand Mining Management Guidelines*, *2016* (last accessed on May 19, 2020 1:34 PM), http://www.indiaenvironmentportal.org.in/files/fileFinal%20Sustainable%20Sand%20Mining%20Management%20Guidelines%202016.pdf.

by state and district administrations are often not comprehensive enough, allowing space for illegal mining. The new Enforcement & Monitoring Guidelines for Sand Mining, 2020, therefore provides a detailed procedure as to how the DSRs are to be made. Anyhow, even though the new guidelines seem to be robust, still the main cause for illegal sand mining that is the demand and insufficient supply of sand, has not been addressed.

Sand Mining Framework[22], issued by the Ministry of Mines, 2018 points that the usage of M-Sand has to be promoted and it would be a more alternative to sand. But with the promotion of use of manufactured sand have increased serious issues such increase in illegal quarrying. So, it would be like stones to be scarified for the sand.

Judicial Attitude in Regulating Sand Mining In India

When the laws relating to sand mining is analysed, it is evident that the considerable and timely interventions of the judiciary in India have played a very important role in reinforcing the administrative control and preventing unregulated sand mining in the country. Well, it can be analysed that the Supreme Court has imbibed and adopted the basic principle of sustainable development and public trust doctrine in enunciating a regulatory sand mining framework in the country.

The landmark judgment was the case law of *Deepak Kumar* v. *State of Haryana*[23], which can be said to have played a vital role in changing the sand regime in the country. The Environmental Impact Assessment Notification of 1994 excluded mining of minor minerals. So minor minerals were brought under the ambit of the Environmental Impact Assessment Notification of 2006 but again excluded mining of minerals with a lease area less than 5 hectares from prior environmental clearance. And in this case the court stated that prior environment clearance mandatory for mining of minor minerals irrespective of the area of mining lease.

In *Gurpreet Singh Bagga* v. *Ministry of Environment, Forest and Climate Change*[24], the National Green Tribunal referred to the *Deepak Kumar* judgment and reiterated about the need for sustainable development as acknowledged in the Article 21 of the Indian Constitution and issued directions to the State to take necessary actions so as to prevent illegal mining activities.

In *National Green Tribunal Bar Association* v. *Ministry of Environment & Forests & Ors*[25], the Tribunal found, with reference to the guidelines issued by the Supreme Court in *Deepak Kumar* judgment that even the person carrying on mining activity in less than 5 hectares, are expected to take EIA Clearance from MoEF/SEIAA was vitiated. In the case of *National Green Tribunal Bar Association* v. *Dr. Sarvabhoum Bagali*[26], Tribunal noted that mining activity in the proximity of any bridge or embankment is permissible only after adopting the safeguards specified in the Sustainable Sand Mining Management Guidelines of 2016.

The Tribunal in the case of *Sudarsan Das* v. *State of West Bengal & Ors*[27]as well as in *National Green Tribunal Bar Association* & *Anr* v. *Union of India & Ors*[28], observed that the existing mechanism has not been successful and there is an utter failure in the current monitoring mechanism followed by the State Boards, SEIAAs and DEIAAs, it is required to be revised for effective monitoring of sand and gravel mining and a dedicated monitoring mechanism be set up.

Conclusion

Sand mining, if left uncontrolled, poses severe environmental as well as social issues. And as sand usage is a necessity, there is a dire need for adoption of sustainable sand mining operations. So as to make the concept of sustainable sand mining a reality, a better administration is highly essential. It can be achieved only through better

22 *Sand Mining Framework*, Ministry of Mine (last accessed on May 18, 2020 12:20 AM) https://www.mines.gov.in/writereaddata/UploadFile/sandminingframework260318.pdf.

23 (2012) 4 SCC 629.

24 Original Application No 184 of 2013(M.A. Nos. 865/2013 and 669/2014).

25 Original Application No. 171 of 2013.

26 Original Application No. 368 of 2015.

27 Original Application No 173/2018.

28 Original Application No 360/2015.

management of sand mining on decentralized basis. Reducing the demand for sand as well as use of alternative sources of sand is highly essential to achieve the same. Following are some suggestions which the researcher puts forth for better sustainable sand mining means:

- Governance of Global Sand Resources
- Strict Compliance to the Regulatory Frameworks
- Withdraw the draft EIA Notification of 2020.
- Ensuring Accountability and Fairness in the administration of sand mining regulations.
- Reducing Consumption of Sand.
- Use of Alternatives to Natural Sand.
- Reclamation of Mined lands.

OUR CURRENT PROJECT

AGRI- CONSORTIA RESEARCH PLATFORM ON WATER

CEERA, NLSIU in association with Indian Institute of Water Management, Odisha and University of Agricultural Sciences, Bangalore

The Centre has been working on AGRI-Consortia Research Platform on Water granted by Indian Council of Agricultural Research - Indian Institute of Water Management, (ICAR-IIWM), Bhubaneswar on the theme "Institutional and Market Innovations governing Sustainable use of Agricultural Water" since 2016. The project initially granted for a period of five years from 2016-2020 has been extended for another year till 2021. This project is being undertaken in collaboration with ICAR-IIWM and the University of Agricultural Sciences, Bengaluru.

Deliverables under the project include:

- Evaluation of regulations, laws, rules of State and Central Governments governing water resources aiming towards institutional innovations for sustainable use of water resource.
- Research in identifying policies and laws, and institutions of governance related to management and use of water resource, with a special thrust on agricultural purposes.
- An analysis of the Inter State Water Dispute [Inter-State Water Disputes Act, 1956 and River Boards Act, 1956], the National Water Policy of 2012 and Water Policies of Odisha and Karnataka, roles of Panchayats, ULBs, User Associations, Community Institutions, and Civil Society Organizations and principles governing water distribution and governance.
- A critical evaluation of the laws and policies concerning groundwater use and management in Karnataka and Odisha.
- An analysis of the Cauvery Dispute.
- A compilation and analysis of existing laws, policies and rules, concerning management and use of water resources for agricultural purpose, at the central level and in twelve states (Karnataka, Odisha, MP, Gujarat, Rajasthan, Maharashtra, Andhra Pradesh, UP, Punjab, Uttarakhand, Kerala and West Bengal).
- A comparative analysis, highlighting the commonalities, positives and the negatives of the laws, policies and other related aspects of water management.

Deliverables for the year 2020-2021

- A compilation and analysis of existing laws, policies and rules, concerning management and use of water resources for agricultural purpose in the state of Kerala and West Bengal.
- A comparative analysis, highlighting the commonalities, positives and the negatives of the laws, policies and other related aspects of water management.
- Recommendations and suggestions to incorporate best practices to conserve, preserve and augment water resources.
- Empirical data collection to substantiate and recommendations and suggestions for better management and use of water resources with special emphasis on the role of Panchayats and ULBs.

UNENDING PLIGHT OF MIGRANT WORKERS: COVID-19 AND THE SUSPENSION OF LABOUR LAWS

*- Mr. Milind Rajratnam & Ms. Srishti Bhargav**

Key Words: Migrant Workers, COVID-19, Government Schemes, International Labour Organization, Labour Laws.

Introduction

Migration is a strategy opted by millions of people to support their livelihoods. Migration movements are usually pronounced from economically disadvantaged regions to prosperous regions. The rapid industrialization has resulted in the migration of a large chunk of the working population from rural to urban areas. This fact is substantiated by the latest Census data, according which India has a total migrant population of 454 million.[1]

People who migrate from their native state to another state in the pursuit of better employment opportunities are referred to as inter-state migrant workers. They are preferred over local workers and are hired in large numbers because they are readily available at cost-effective wages. While the inter-state migrant workers constitute a large chunk of the overall workforce, there is a dearth of official data on their actual numbers. Therefore, in an attempt to fill this gap, Professor Amitabh Kundu, an esteemed member at the Research and Information System for Developing Countries, conducted a comprehensive study of the Census 2011, National Sample Survey Office data and the Economic Survey, 2017. His study reveals that there are total 65 million inter-state migrants in India, of which 33 percent are workers.[2]

The majority of these inter-state migrant workmen are unskilled, illiterate and they are often made to work under extreme conditions on meagre amounts of wages. On multiple accounts, the Apex Court has also taken note of the exploitation carried out on migrant workers due to their social and economic backwardness, illiteracy, denial of rights and the improper implementation of labour laws.[3] To examine the plight of migrant workers in the country, the Ministry of Urban Housing and Poverty Alleviation has set up the Working Group on Migration. This Group sent its report to the Central Government in 2017, but action on the report is still awaited.[4]

In the meantime, the sudden announcement of nationwide lockdown due to the outbreak of COVID-19 has given a low blow to millions of migrant workers across the nation. To those who survived on daily wages by working in small or informal sectors, the lockdown implied non-payment of wages which in turn implied that they had to struggle for food and housing amidst the chaotic situation. A telephone survey conducted with more than 3000 migrant workers by Jan Sahas (an NGO based in New Delhi) revealed that most of the migrant workers are daily wage workers and due to the lockdown one-third of them were left with no money or access to food and water.[5]

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1 *Data on Migration 2011,* Office Of The Registrar General & Census Commissioner, India (June 23, 2020, 10:04 AM), https://censusindia.gov.in/2011census/migration.html.

2 *A Review on India's Migration Issue, Immigration Policy and Solutions*, The Policy Times (June 23, 2020, 10:10 AM), https://thepolicytimes.com/a-review-on-indias-migration-issue-immigration-policy-and-solutions-i-prof-amitabh-kundu-i-ris/.

3 Gurdeep Singh, Migrant Workmen and the Law: Identification, Motivation, Legal Awareness, Wages and Welfare Measures, Social Security 352-355 (Deep & Deep Publications March 2003).

4 Nagesh Prabhu, *Pandemic will deepen job and livelihood crisis of migrants: Study*, The Hindu (June 16, 2020, 12:04 PM), https://www.thehindu.com/news/national/karnataka/pandemic-will-deepen-job-and-livelihood-crisis-of-migrants-study/article31439073.ece.

5 *The COVID-19, Migration and Livelihood in India*, Researchgate (June 15, 2020, 9:44 PM), https://

The current migrant crisis has presented before us the breakdown of the existing laws and policies that were meant to ensure the welfare of migrant workers. This article presents a critical analysis of the legal framework in India governing the employment of migrant workers and compares it with the International Labour Standards. It further elaborates on the constitutionality and impact of the suspension of labour laws on migrant workers. In addition, the benefits and drawbacks of the measures adopted by the government to secure the interests of migrant workers amidst the ongoing pandemic have also been discussed.

Labour Laws and the Migrant Workers in India

After Independence, the Parliament enacted more than 40 central legislations aimed at ensuring the welfare and protection of workers but most of them mainly focus on the welfare of workers in the organised sectors. According to the Employment Working Paper, 2019 of the International Labour Organization, over 90% of the workforce in India is employed in the unorganised sectors[6] and the National Commission for Enterprises in the Unorganised Sector (hereinafter "NCEUS") estimated that a substantial portion of such informal employment is drawn from the migrant workers.[7] Despite this, the current laws have largely failed to provide them with adequate social or legal protection.

In 1977, the Ministry of Labour established the Compact Committee (hereinafter "the Committee") to analyse the working conditions of the inter-state migrant workmen and to suggest measures for their welfare and protection.[8] The Committee was of the view that the Contract Labour (Regulation and Abolition) Act, 1970 is inadequate to resolve the issues of migrant workers and therefore recommended that a special legislation should be enacted for them.[9] The recommendations of the Committee manifested in the form of the Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979 (hereinafter "the Act").[10]

The Act is applicable to all the contractors and establishments employing five or more inter-state migrant workers, and it mandates for their registration with the Central/State governments.[11] For employing an inter-state migrant worker under the Act, the contractor must obtain a license from the native state of the worker and also from the state where the worker is to be employed.[12] Section 16 of the Act lays down the duties of the contractors hiring inter-State migrant workmen and it necessitates for providing them proper housing facilities, equal pay for equal work, protective clothing and free medical services, among other things.[13] In addition, the contractors are also obliged to pay

www.researchgate.net/publication/341756913_The_COVID-19_Migration_and_Livelihood_in_India_A_Background_Paper_for_Policy_Makers_International_Institute_for_Population_Sciences_Mumbai_The_COVID-19_Migration_and_Livelihood_in_India.

6 Santosh Mehrotra, *Informal Employment Trends in the Indian Economy: Persistent informality, but growing positive development*, EMPLOYMENT Working Paper No. 254, International Labour Organization (Sep. 10,2020,9:44PM), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---upskills/documents/publication/wcms_734503.pdf.

7 *Financing of Enterprises in the Unorganised Sector & Creation of a National Fund for the Unorganised Sector (NAFUS)*, National Commission For Enterprises In The Unorganised Sector (Sep 10, 2020, 11:11 AM), http://dcmsme.gov.in/Report_on_NCEUS_NAFUS.pdf.

8 *The Inter-State Migrant Workmen Act*, Labour Commissioner Government Of NCT Of Delhi (June 17, 2020, 11:11 AM), https://labour.delhi.gov.in/content/inter-state-migrant-workmen-act.

9 *The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979*, Labour Directorate, Government Of Odisha (June 17, 2020, 11:11 AM), https://labdirodisha.gov.in/?q=node/88.

10 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979.

11 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, § 1(4).

12 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, § 8.

13 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, §16.

adequate displacement[14] and journey allowances to the migrant workers.[15]

Moreover, Section 20 of the Act provides for the appointment of inspectors who are expected to maintain records of all the recruitments of inter-state migrant workers and they are also duty-bound to ensure the proper enforcement of the Act.[16] Although the Act is progressive in its approach, it is clear from the current migrant crisis that it was not implemented in its letter and spirit by any of the state governments. Had it been properly implemented, the state governments would have had the complete details of all the inter-state migrant workers arriving in their state, and consequently, they would have been better equipped to take actions to protect these workers amidst the lockdown. The statistics of the State Government Labour Departments also substantiate the poor implementation of the Act as despite the large migrant workforce, only 5 percent of them were registered under the Act.[17]

According to some experts, the main reason behind the poor implementation of the Act is the onerous compliance requirements prescribed by it. The payment of different allowances, registration requirements, etc., makes the process of hiring a migrant worker more tedious and costly. As a result, most of them are hired without complying with the provisions of the Act.[18]

Another problem with the Act is that it defines an inter-state migrant worker as an "individual hired by or via a contractor in one State under an arrangement for employment in an establishment in another State".[19] This definition leads to the restrictive application of the Act and implies that the migrant workmen who migrate and are employed on their own (e.g. rickshaw pullers, street vendors, etc.) are outside the purview of the Act. This provision seems to be problematic as according to the NCEUS, only 35 percent of the overall migrant workforce is working as regular workers by their contractors.[20] In 1991, the National Commission on Rural Labour had also emphasized on the need to cover all categories of migrant workers irrespective of the way they are employed and recommended for the expansion of the definition of "inter-state migrant workmen" that is provided under the Act.[21]

Therefore, in light of the above analysis, it is evident that although the inter-state Migrant Workmen Act is a progressive legislation, colossal changes are needed for its proper implementation and to provide adequate protection of law to all categories of migrant workers.

Constitutionality of the Suspension of Labour Laws

In a bid to boost the economy amidst the ongoing pandemic, the Uttar Pradesh government has come up with *the Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020* (hereinafter "the Ordinance") which has suspended more than 40 central and state labour laws for a period of three years.[22] The only

14 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, §14.

15 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, § 15.

16 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, § 20.

17 Chetan Chauhan, *Migrant workers' law in focus as crisis intensifies*, Hindustan Times (June 30, 2020, 12:10 PM), https://www.hindustantimes.com/indianews/migrant-workers-law-in-focus-as-crisis-intensifies/story-JdasIACACTryx1008KVyrN.html.

18 K.P. Krishnan, Anirudh Burman and Suyash Rai, *Migrant Workmen Act, 1979, must be rationalised to remove requirements that disincentivise formalisation*, Carnegie India (June 26, 2020, 10:10 PM), https://carnegieindia.org/2020/05/09/migrant-workmenact-1979-must-be-rationalised-to-remove-requirements-that-disincentivise-formalisation-pub-81751.

19 The Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979, § 2(e).

20 Dipti Govil, Reshmi R.S., R.B. Bhagat, Archana K. Roy and Harihar Sahoo, *A Policy Brief on the COVID-19, Migration and Livelihood in India: Challenges and Strategies*, International Institute For Population Sciences (June 27, 2020, 12:44 PM), https://iipsindia.ac.in/sites/default/files/iips_covid19_mlli_PB.pdf.

21 Pradeep Kumar Pandey, *Protection of Inter-State Migrant Workers in India - An Analysis*, THE LEGAL Analyst (June 26, 2020, 9:29PM), https://www.researchgate.net/profile/Pradeep_Pandey3/publication/25601679.

22 The Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020.

legislations that are exempted from suspension are the Building and Other Construction Workers Act, the Workmen Compensation Act, the Bonded Labour System (Abolition) Act, and Section 5 of the Payment of Wages Act.[23]

Following the footsteps of Uttar Pradesh, at least ten states, namely, Madhya Pradesh, Himachal Pradesh, Haryana, Uttarakhand, Rajasthan, Odisha, Punjab, Assam and Gujrat have also notified certain amendments to their existing labour laws.[24] Such a move by the State governments would not only lead to the sacrifice of labour rights at the altar of capitalism but will also violate the fundamental rights of workers.[25]

The primary legislations governing industrial relations in India are the Trade Unions Act, 1926, the Industrial Disputes Act, 1947 and the Industrial Establishments (Standing Orders) Act, 1946. The suspension of these laws will devoid the workers of their right to raise disputes against the autocratic decisions of their employers and will also violate their Fundamental Right to form unions or associations.[26] All these laws have accorded a great deal of protection and bargaining power to the working class, due to which, their suspension in the absence of any alternative dispute settlement mechanism would lead to the non-settlement of industrial disputes and would thereby hamper the industrial production.

The Ordinance also suspends the Equal Remuneration Act, 1976, which was enacted to ensure the concept of "equal pay for equal work" irrespective of caste, religion, gender or race.[27] This concept flows from one of the Directive Principles of State Policy enumerated under Article 39 of the Constitution[28]. Also, in the opinion of the SC, refusing equal pay for equal work is a clear violation of Article 14 of the Indian Constitution.[29]

Moreover, the Factories Act, 1948 was enacted to ensure the health and safety of workers and to protect them against the occupational hazards.[30] However, the suspension of Factories Act would enable the managers to operate the factories without abiding by the health and safety protocols. In this regard, the SC in *Consumer Education & Research v. Union of India*[31] has observed that "*the right to safe and secure working conditions of workers is part of their right to life enshrined under Article 21 of the Constitution and the employer is duty-bound to comply with proper health and safety protocols*". Given the catastrophic impact of COVID-19 worldwide, the cleanliness and sanitation regulations are the most essential, but the Ordinance fails to consider this aspect.

At a time when millions of migrant workers have been left unemployed and are returning to their hometowns without any basic resources, the government should adopt proactive measures to secure their interests instead of suspending/ relaxing the existing labour laws that not only strip off the basic human and fundamental rights of the workers but also pave a way for modern-day slavery.

Subversion of the International Obligations

With the aim to safeguard the rights of workers, the International Labour Organization (hereinafter "the ILO") was established in the year 1919.[32] India is one of the founding members of the ILO and is also a permanent member of the Governing Body of the ILO. It has ratified 47 ILO conventions including 6 of the 8 core ILO conventions and 1 protocol so far[33].

23 The Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020, § 3.

24 Aayush Rathi and Sreyan Chatterjee, *Indian states' decision to suspend labour law amid COVID-19 crisis is delirious policy-making not backed by empirical analysis*, FIRSTPOST (June 25, 2020, 7:12 PM), https://www.firstpost.com/india/indian-statesdecision-to-suspend-labour-law-amid-covid-19-crisis-is-delirious-policy-making-not-backed-by-empirical-analysis-8391901.html.

25 Dr. Parveen, *Taking Labour Laws Seriously*, Livelaw (June 27, 2020, 12:04PM), https://www.livelaw.in/columns/taking-labour-laws-seriously-157295.

26 Indian Const. art 19(1)(c).

27 Equal Remuneration Act, 1976.

28 Indian Const. art 39.

29 Randhir Singh v. Union of India, AIR 1982 SC 879.

30 Factories Act, 1948.

31 Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

32 *Member States,* International Labour Organisation (June 23, 2020, 11:40 AM), https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm.

33 *Ratifications of India,* International Labour Organisation (June 23, 2020, 11:48 AM), https://www.ilo.org/dyn/

Last year, the world celebrated the centenary of the ILO where it was claimed that "all those who work have rights at work" [34] but the actions of some Indian states indicate the contrary. The suspension of labour laws by the state governments in India is in contravention with many of the ILO conventions which were ratified by India. For instance, India ratified the Hours of Work (Industry) Convention, 1919 (C-001)[35] in the year 1921 which mandates to adopt and promote the policy of "8 hours work per day or 48 hours work per week". However, some of the Indian states have increased the hours of work from 8 hours to 12 hours per day (72 hours work per week) by notifying new rules and ordinances, which is a clear violation of the Hours of Work Convention.

India is also a signatory of Tripartite Consultation (International Labour Standards) Convention, 1976 (C-144)[36] which aims to facilitate effective dialogue between the government, the employer and the workers with regard to the issues and matters concerning employment. But, the decision regarding the suspension of labour laws was taken by the state governments without even consulting the employers or trade unions,[37] which is completely against the objectives of the said convention.

Moreover, the Declaration on Fundamental Principle and Rights at Work[38] adopted by the International Labour Conference in 1998[39] states that all the member States, irrespective of the extent of their economic development, shall support and promote the rights of association and the effective recognition of collective bargaining, among other things. Nonetheless, the suspension of the Trade Union Act, 1926[40] and Industrial Dispute Act, 1947[41] leads to the clear violation of the said declaration. In light of the above discussion, it is apparent that the suspension of labour laws is not in conformity with India's commitments to the ILO.

Implementation and Utilization of the Social Welfare Schemes

In order to offer some relief to the migrant workers, both the Centre and State government of India have rolled out different schemes and policies. Recently, the Central government has announced the *Pradhan Mantri Garib Kalyan Anna Yojana*[42], which aims to provide free ration to all the ration cardholders. Under the Scheme, all the eligible beneficiaries will get, in addition to the benefits provided under the Public Distribution System, 1 kg of preferred pulses and 5 kgs of wheat or rice on a monthly basis. Nevertheless, a survey conducted on more than 11,000 migrant workers by the Stranded Workers Action Network revealed that more than 90% of the migrant workmen didn't received ration under the Scheme during the lockdown[43].

normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102691.

34 *Report of the Director-General: Decent Work,* International Labour Organisation (June 23, 2020, 12:00 PM), https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.

35 Technical Convention Hours of Work (Industry), 1919.

36 Tripartite Consultations (International Labour Standards) Convention, 1976.

37 K.R. Shyam Sundar, *No dialouge with Trade Unions, India's Labour Laws Are a Product of Unilateralism,* The Wire (June 24, 2020, 10:35 AM), https://thewire.in/labour/labour-laws-trade-unions.

38 *India and ILO*, Government Of India Ministry Of Labour And EMPLOYMENT (June 22, 2020,11:45AM), https://labour.gov.in/lcandilasdivision/indiailo#:~:ext=There%20ar%2047%20ILO%20conventions,been%20denounced%3B%204%20instruments%20abrogated.

39 *ILO Declaration on Fundamental Principles and Right at Work,* International Labour Oraganisation (June24,2020,1:30PM), https://www.ilo.org/declaration/langen/index.htm#~:text=The%20ILO%20Declaration%20on%20Fudamental,the%20level%20of%20economic%20development.&text=In%20turn%2C%20their%20observations%20are%20considered%20by%20the%20ILO's%20Governing%20Body.

40 Trade Union Act, 1926.

41 Industrial Disputes Act, 1947.

42 *Cabinet approves extension of Pradhan Mantri Garib Kalyan Anna Yojana Allocation of additional foodgrain for further five months from July to November, 2020,* Narendra Modi (June 24, 2020, 10:30AM)https://www.narendramodi.in/cabinet-approves-extension-of-pradhan-mantri-garib-kalyan-anna-yojana-allocation-of-additional-foodgrain-for-further-five-months-from-july-to-november-2020-550478.

43 *21 Days and Counting: COVID-19 Lockdown, Migrant Workers and Inadequacy of Welfare Management in India,* Standard Workers Network, The Hindu (June 25,2020, 5:30 PM), https://www.thehindu.com/news/resources/article31442220.ece/binary/Lockdown-

Another social welfare scheme, i.e., the *Garib Kalyan Rozgar Abhiyan*[44] was launched by the Central Government. This Scheme intends to provide employment to all the migrant workers who have had returned to the 116 recognised district of six states namely; Rajasthan, Odisha, Jharkhand, Madhya Pradesh, Bihar, Uttar Pradesh.[45] Nevertheless, in reality, this scheme will cover only two-third of all the migrant workers who have returned back to their home, which is discriminatory to the left one-third migrant workers.[46]

Efforts in the interest of migrant workers are also made by several state governments through various schemes and initiatives. For instance, in Bihar, the Government has launched the "Bihar Corona Sahayata Yojana". [47] This Scheme aims to provide Rs. 1000 per month to each worker who is still stuck in another state. In order to get the benefits, the worker will have to download the "Bihar Corona Sahayata App" and register himself through the app. However, this Scheme has failed to a large extent as most of the migrant workmen do not have smartphones to install the app.[48]

With a view to help those who do not hold ration cards, the Delhi Government came up with an innovative scheme to provide them rations through its website called ration.jantasamvad.org.[49] Under the Scheme one could avail free ration by applying for e-coupons through the website. Unfortunately, the website crashed within a few days of its launch affecting more than 6.5 lakh families.[50]

A detailed evaluation reveals that the common thread in all these schemes brought by the Central and the State Governments is that, they can only be availed by those who have the required technical knowledge and possess smartphones, ration cards or have bank accounts associated with that scheme, but the available data shows that most migrant workers do not have them.[51] A study conducted by the Centre for Migration and Inclusive Development, reveals that around 46% migrant workers use basic feature mobile phones, 51.6% have smartphones and 2.3% do not have mobile phones.[52] Therefore, in such a situation, it becomes really difficult for them to avail such social welfare schemes. According to a survey by Indus Actions (an NGO based in Delhi) the schemes rolled out by the government during the pandemic did not benefit around 20% migrant workers and their families because of the lack of official statistics on the actual count of migrant workers in their state and the lack of documents (i.e. Aadhar, ration cards, etc.) with the workers[53]. It is therefore evident that,

and-Distress_Report-by-Stranded-Workers-Action-Network.pdf.

44 *PM's address at the launch of Garib Kalyan Rojgar Abhiyaan,* PM India (June 24, 2020, 10:35AM), https://www.pmindia.gov.in/en/news_updates/pms-address-at-the-launch-of-garib-kalyan-rojgar-abhiyaan/.

45 *Jal Jeevan Mission*, Department Of Drinking Water And Sanitation (June 25, 2020, 10:15AM), http://ejalshakti.gov.in/JJM/JJM_Login.aspx.

46 Atul Sharma and Shyam Sunde, *Garib Kalyan Rozgar Abhayan: Will the scheme be of help?,* Financial Express (June 25, 2020, 10:25 AM), https://www.financialexpress.com/opinion/garib-kalyan-rojgar-abhiyan-will-the-scheme-be-of-help/2024107/.

47 *Bihar Government Schemes*, Disaster Management Department (June 25, 2020, 11:10AM), http://aapda.bih.nic.in/(S(pszv4hsoogbk4lsozrrryuxh))/Default.aspx.

48 Manish Chandra Mishra, *Bihar's Rs. 1000 Not Reaching Broke and Hungry Migrants*, India Spend (June 25, 2020, 11:30 AM), https://www.indiaspend.com/bihars-rs-1000-relief-not-reaching-broke-hungry-migrants/.

49 *How to get Ration with E-Coupon,* Delhi Government (June 25, 2020, 1:15 PM), https://ration.jantasamvad.org/ration/.

50 *COVID-19: Website for rationscheme down in Delhi amid Lockdown,* The New Indian Express (June 25, 2020, 1:00 PM), https://www.newindianexpress.com/cities/delhi/2020/apr/11/covid--19-website-for-ration-scheme-down-in-delhi-amid-lockdown-2128662.html.

51 M.P. Praveen, *Migrant workers without smart phones left in the lurch*, The Hindu (June 24, 2020, 10:50AM), https://www.thehindu.com/news/national/kerala/migrant-workers-without-smart-phones-left-in-the-lurch/article31455463.ece.

52 MP. Praveen, *Migrant workers without smart phones left in the lurch,* The Hindu (June 25, 2020, 1:20 PM), https://www.thehindu.com/news/national/kerala/migrant-workers-without-smart-phones-left-in-the-lurch/article31455463.ece.

53 Satvik Varma, *Why India's Legal and Labour System Needs to be Reconfigured to Really Help Migrant Workers,* The Wire (June 25, 2020, 6:00 PM), https://thewire.in/labour/india-labour-legal-system-migrant-workers.

although the government schemes intend to attenuate the sufferings of migrant workers, the lack of preparedness and dearth of data creates a hindrance in the outreach of these schemes to the needy.

Conclusion

The analysis presented in the article makes it evident that suspension or relaxation of labour laws not only violates the constitutional mandate but is also against India's international commitments. Though poorly implemented, the existing labour laws provide at least some degree of social and legal protections to the migrant workmen and often serve as a bargaining tool for the activists and trade unions. Therefore, if these ordinances and notifications are not rolled-back, they will strip the workers of their fundamental and human rights and will make their exploitation a "new normal". Recently, the Supreme Court has quashed the Gujrat government's notification which extended the minimum working hours.[54] The Karnataka High Court[55] and the Allahabad High Court[56] have also issued notices to their respective governments to withdraw the changes made in the working hours by their ordinances. However, the other states in the list have still not made any changes to their rules and ordinances. In this regard, Article 254 of the Indian Constitution states that if a state-enacted law is in conflict with a Central Law then it can prevail in the state only after receiving the Presidential assent.[57] Hence, although these Ordinances are placed before the President, there is still a ray of hope as his assent on the same is still pending.[58]

With regard to the social welfare schemes for migrant workers, it is necessary not only to introduce them but also to implement them. The authors recommend that for the proper implementation and better outreach of these schemes, the government should adopt a pragmatic approach while framing them by first collecting reliable data on the beneficiaries and then framing the schemes accordingly .

54 Gujarat Mazdoor Sabha v. The State of Gujarat, Writ Petition (Civil) No. 708 of 2020.

55 Mustafa Plumber, *Following HC Rap, Karnataka Govt Withdraws Notification Increasing Working Hours Under Factories Act*, Live Law (October 18, 2020, 7:01 PM) https://elibrary.rmlnlu.ac.in:2111/newsupdates/karnataka-govt-withdraws-notification-increasing-working-hours-under-factories-act-158229?infinitescroll=1.

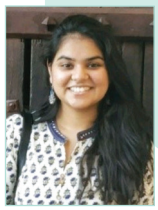
56 Live Law, *UP Govt Withdraws Controversial Notification For 12-hour Shift For Industrial Workers* (October 19, 2020, 7:10 PM) https://elibrary.rmlnlu.ac.in:2111/news-updates/upgovt-withdraws-controversial-notification-for-12-hour-shift-for-industrial-workers-156857.

57 INDIA CONST. art 254.

58 Zia Haq, *President Kovind yet to approve labour law changes*, Hindustan Times (October 19, 2020, 7:01PM) https://www.hindustantimes.com/indianews/prez-yet-to-approve-labour-law-changes/story-Gq45G2x8VTpmLNCNRlhMkO.html.

MIGRANT CRISIS: CLASSIFICATION OF WORKFORCE IN A GIG ECONOMY & PROPOSAL FOR A REGULATORY FRAMEWORK

*- Ms. Shristi Borthakur & Ms. Trushita Shrivastava**



Key Words: Gig Economy, Gig Workers, Skilled, Unskilled, Labour Law.

Understanding the Gig Economy

The world has witnessed three global industrial revolutions, yet it will not be an understatement to say that our world has changed more in last 20 years, the 'Industry 4.0' or "Second Machine Age",[1] than it did in the last century. As industries succumb to the drastic forces of globalisation and technology, independent work, 'gig' economy are all proposed alternatives to the conventional work- environment. The International Labour Organization employs 'informal economy' as an umbrella term for the alternatives suggested.[2]

Independent jobs are not new to the economy, but the digital revolution has been a catalyst in the progression. Gig means a temporary contractual job or a short-term contract of freelance work that a person may take project-to-project basis.[3] Under the regime of gig economy, the continuing and substantial shift in the job market increases pace towards contract-based system.[4] However, with the changing nature and growing competitiveness of the world economies, gig economies emerge as alternatives, even in the absence of digital platforms.[5]

While piece-meal work has long been a staple of low- and middle-income work, this new version involves workers from many socio-economic levels. The professional gig economy segments have seen growth double in two years.[6] The boom in start-ups in the past 5 years has further boosted the competition. For example, on-demand delivery service *Dunzo* and cab-hailing companies *Uber* and *Ola* together employ millions of workers who are not considered 'traditional employees' and are paid per order or ride. Mere range of workers of from software specialist to a food delivery person is evidence enough to nullify wrongful association of gig economy in terms of particular sector or nature of job.

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1 Wendi S. Lazar & Nantiya Ruan, *Is There a Future for Work?*, Symposium: The Future of Low- Wage Worker, 21 Georgetown Journal on Poverty and Policy, 344-354 (2018), <https://www.law.georgetown.edu/poverty-journal/wp-content/uploads/sites/25/2019/02/25-3-Is-There-A-Future-For-Work.pdf>.

2 International Labour Organization (ILO), *Recommendation Concerning the Transition from the Informal to the Formal Economy*, 12 June 2015, R204, <https://www.ilo.org/ilc/ILCSessions/previous-sessions/104/texts-adopted/WCMS_377774/lang--en/index.htm>.

Sec 2 defines "informal economy" as- (a) refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements; and

(b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties (last accessed on Jul 12, 2020).

3 Jamie Woodcock & Mark Graham, The Gig Economy- A Critical Introduction (Polity 2019) (ebook).

4 TR Gopalkrishnan, *How to Ensure Fair Rights for Gig Economy Workers: New Labour Laws, Transparent Contracts are the Way Forward*, Firstpost (July 07, 2020, 20:53 pm), <https://www.firstpost.com/india/how-to-ensure-fair-rights-for-gig-economy-workers-new-labour-laws-transparent-contracts-are-the-way-forward-8511791.html> (last accessed on Jul 22, 2020).

5 Valerio de Stafano, *The Rise of "Just-in-Time" Workforce: On-Demand Work, Crowdwork and Labour Protection in the Gig Economy*, Conditions of Work and Employment Series No. 71, International Labour Organization, p. 6-7 (2016), <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf>.

6 Flexing It, Professional Gig- Economy - 2018-19 Report Card (2019), <https://www.flexingit.com/media/eoc_resume/professional-gig-economy-2018-19-report-card.pdf>.

There have been certain developments for the gig economy sector. India, under the present government, initiated a process of codification of labour legislations to keep welfarism intact while introducing technology in its enforcement. The Code of Social Security, 2019 seeks to gives cognizance to the gig economy under the realm of social security granted to a worker. The efficacy of this Code, as well as other developments, will be analysed in the succeeding sections of this paper. This paper seeks to identify areas for strengthening the capacities of the gig economy and draws inspiration from developments around the world.

Classifying Gig Workers

The rapid rise of gig economy platforms that use digital technologies to intermediate labour on a per-task basis has triggered an intense debate about the economic and public policy implications.[7] If we observe the characteristics, a gig worker is employed for income- generating activities that are not associated with a particular employer on a long- term basis. These characteristics are also shared by a migrant worker and the nature of their livelihood. Gig-migrant workers were not included in the social security sphere and lack of transparency and regulation in the conditions of their employment designated such workers to be taking the hardest hit in the pandemic.

For skilled workers with a desirable skill, the gig economy often permits a more engaging, entrepreneurial lifestyle. Gigs, for them are an array of stepping stones to acquiring a permanent job or an endeavour to refine their skills. Platforms attracting young talent and business aspirants are ushering in a white-collar sheen to what used to be blue-collar pursuits, with up-skilling, benefits and insurance cover.[8] Gig & platform economy has significantly contributed in structuring the unorganised blue-collar jobs transition to a structured formal sector,[9] due to the presence of a contractual agreement directly between the platform and workers.

Moving on to unskilled / semi-skilled workforces who turn to such work out of necessity, gigs are merely 'the best of bad options' between migration and the stricken conditions of the place of origin. The employment in agriculture is unstable and generates lower revenues; hence, an expansion of inflow of migrant workers, charmed by the growing industrial clusters, migrates to an urban-manufacturing sector seeking better employment and higher wages.[10] However, lack of protection & uncertainty of gigs has established that 'taking them out of poverty' and 'taking them towards prosperity' are mutually exclusive circumstances.

Despite a slight- but on-going shift in perspective, it is noteworthy to emphasize that absence of state policies, laws and structure have assisted the degraded working environment in the unorganised sector which is often denoted by elements of low productivity, negation of basic human standards at the workplace, etc. It is also wise to asset liability on the negatively leaning balance of socio-economic factors towards migrant workers. The nation-wide lockdown exemplified two points: (a) Migrant workers are the backbone of the country[11] & (b) the crisis was an eye-opener for everyone on the muddled stance on such mode of employment, by extension on the economy.

Existing Labour Provisions and The Gig Economy

India has extensive and comprehensive labour welfare legislations dealing with different spheres

7 Cyrille Schwellnus, Assaf Geva, Mathilde Pak and Rafael Veiel, *Gig Economy Platforms: Boon or Bane?*, Economics Department Working Papers No. 1550, OECD (2019), <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2019)19&docLanguage=En>,.

8 Shephali Bhatt, *Humans of Gig Economy: The Cultural Transformation of the Delivery Agent*, The Economic Times (January 05, 2020, 10:01 am), <https://economictimes.indiatimes.com/industry/services/retail/humans-of-gig-economy-the-cultural-transformation-of-the-delivery-agent/articleshow/73100994.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> (last accessed on Jul 18, 2020).

9 Dr. Saikat Sinha, *Current Scenario of Unorganised Sector*, Speaker's Research Initiative, Parliament of India (August 15, 2015), <http://sri.nic.in/unorganised-sector> (last accessed on Jul 15, 2020).

10 Shuji Uchikawa, Industrial Clusters, Migrant Workers and Labour Markets in India (Palgrave Macmillan 2014) (ebook).

11 N. S. Tanvi, *The Face of Exploitation*, The Hindu (May 11, 2020, 01:33 pm), https://www.thehindu.com/opinion/op-ed/the-face-of-exploitation/article31551780.ece (last accessed on Jul 12, 2020).

of labour issues. However, with the advent of gig workers in the economy, it raises the begs the question of whether the existing framework caters to the same. It is understood that gig workers enjoy substantial control over their employment, and therefore, do not fall within the ambit of a traditional employer- employee relationship.[12] This is in contradistinction with the existing view of the Supreme Court that states that for the application of the concept of unfair labour practices and related concepts, the existence of a direct employer employee relationship is *sine qua non*.[13] At this juncture, it is pertinent to note that labour legislations policies are founded on the idea that the state as well as the employers has certain responsibilities towards the workers, and the workers are entitled to certain social welfare schemes and benefits. Thus, the attempt at this point is to see whether the existing framework extends the same to voluntary and temporary gig workers, which is seldom explored given the unique challenges that a gig economy rises.[14]

- ***Gig Workers as Employees***

In the context of gig workers, the definition of an employee given under the Minimum Wages Act is important. The Act contains a list of scheduled employment for which minimum wages have been fixed, and provides that the same would be applicable for *any person who is employed for hire or for reward to do any work* in such scheduled employment.[15] It further provides that it would also be applicable to an employee so declared to be an employee by the Government. Without any such notification in place, the possibility of gig workers drawing wage lesser the applicable minimum wage is alarming.

Legislations such as the Employees' Provident Fund and Miscellaneous Provisions Act or the Employees' State Insurance Act, although does not necessarily exclude temporary workers, presupposes that the Acts will be made applicable for employees who are employed for an extended period of time, and are devoted to the particular employer. Where gig workers work on project-to-project basis, and are also free to take up work in another establishment, it is easier to exclude them from the benefits of such funds.

The prevalent perspective on gig workers, especially with respect to work-on-demand, is that they are better classified as independent contractors, thereby precluding them from forming associations to protect their rights and engaging in collective bargaining.[16] Especially in a digital gig economy, such a perspective has negative implications on security of work, as well as employment opportunities, career development and employment status.[17] This is a very popular view taken in the context of app-based taxi services such as *Uber*, etc. On this point, the courts in UK are of the view that the "true position" of such drivers are that of workers for such platforms, as such companies derive their income through the labour of the drivers.[18] Given that the *Uber* model is universal, and various similar national apps adopted the same model, this view of the UK courts ought to apply to India as well.[19] However, there exists a need to apply

12 Sonam Srivastava and Kushagra Srivastava, *The Gig Economy Calls for Identification within the Indian Labour Laws*, Faculty of Law, University of Oxford (July 04, 2019), <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/gig-economy-calls-identification-within-indian-labour-laws>.

13 Sarva Shramik Sangh v. Indian Smelting & Refining Co. Ltd., 2004 SCC (L&S) 272, ¶15 (India). *See also*, Hussainbhai, Calicut v. Alath Factory Thezilali Union, Kozhikode & Ors., 1978 SCC (L&S) 506, ¶5-7 (India). *See also*, Workmen of Niligiri Cooperative Marketing Society v. State of Tamil Nadu, (204) 3 SCC 514 (India).

14 International Labour Organization, *Helping the Gig Economy Work Better for Gig Workers*, https://www.ilo.org/washington/WCMS_642303/lang--en/index.htm (last accessed on Jul 12, 2020).

15 Minimum Wages Act 1948 § 2(i).

16 *Supra* note 14 at p.3.

17 Richard Heeks, *Decent Work and the Digital Gig Economy: A Developing Country Perspective on Employment Impacts and Standards in Online Outsourcing, Crowdwork, etc.*, p.12-14 (Centre for Development Informatics, University of Manchester, Working Paper No. 71, 2017), <http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/di/di_wp71.pdf>.

18 Uber B. v. & Ors. v. Aslam & Ors., [2018] EWCA Civ 2748 (United Kingdom). *See also*, Chamber of Commerce of the United States of America v. City of Seattle & Ors., 2018 SCC OnLine US CA 9C 276 (United States).

19 Darcy du Toit, *The Employment Rights of Uber Drivers: A Battle Won, the War Goes On*, Oxford Human Rights Hub (January 14, 2019), https://ohrh.law.ox.ac.uk/the-employment-rights-of-uber-drivers-a-battle-won-the-war-goes-on/ (last accessed on Jul 18, 2020).

such reasoning to various other sectors as well, to truly cater to the well-being of gig workers.

In the backdrop of such a perspective, the gig economy and workers are in need of a better policy and legislative push to make them entitled to benefits available under existing laws. This becomes an emerging issue in the face of growing on-demand service platforms, which has popularised and formalised this form of economy, to the extent it becoming an adequate and substantial alternative among the unskilled youth population.[20] The strict understanding of an employee excludes gig workers, thereby depriving them from social protection available to other workers.

Recently, the Supreme Court of the United Kingdom held that as long as there existed a relation that was akin or analogous to employment, certain liabilities and obligations can be attached; that liability and responsibility would be attached only where the work was carried out in the name of the employer and no on their own account.[21] Prior to this, the Supreme Court of California had developed an "ABC Test" to bring independent contractors within the ambit of traditional employment.[22] The application of such standards to determine the existence of an employer- employee relations are better suited for the gig economy, as they do not completely override the existing requirement. It only expands the scope of a traditional employer-employee relationship, and retains the core understanding of what constitutes employment.

- ***Gig Economy and Contract Labour***

From another perspective, gig workers are similar to workers on contractual arrangements, but not the same. In India, work on contractual arrangements is regulated under the Contract Labour (Regulation and Abolition) Act, 1970. Contract labour is similar to gig work in the sense that both are generally employed for a particular or temporary work. However, in the case of contract labour, the Act presupposes that they are employed to a particular person, who then contracts them out to various works and establishments. Thus, they still fall within the ambit of a traditional employment, and the Contract Labour Act, to the extent, imposes responsibilities on both the contractor as well the principal employer for whom they are working at a particular time. This phenomenon is absent in the case of gig workers. Given that gig workers are increasingly seen as independent contractors, there exists scope for such workers to be interpreted as "contractors" under the Act, in order to enable them to get licensed under the Act.[23] However, at present, there is also an absence of judicial interpretation on this point.

- ***New Developments in Labour Policies in India – Code on Social Security, 2019***

With the growth and expansion of a gig economy, it would wrong to suggest that there exists no recognition of gig workers. The new Labour Code on Social Security Bill ["Code"] has introduced the concept of gig and platform workers and contemplates social security schemes for such workers. It defines a gig worker as *a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship*.[24] It creates a distinguishment for the digital gig economy and separately defines platform gig workers.[25] When brought into force, the Code would enable gig workers and platform workers to avail life and disability cover, health and maternity benefits, etc.

20 Nilanjan Banik, *Opinion: India's Gig Economy Needs Affirmative Policy Push*, Economic Times (January 06, 2020, 15:49 pm), https://government.economictimes.indiatimes.com/news/economy/opinion-indias-gig-economy-needs-affirmative-policy-push/73121847 (last accessed on Jul 20, 2020).

21 Various Claimants v. Barclays Bank Plc, [2020] 2 WLR 960 (United Kingdom).

22 Dynamex Operations West, Inc. v. Superior Court of Los Angeles, No. S222732 (Cal. Sup. Ct. Apr. 30, 2018) (United States). ["Dynamex Case"] The Court adopted a standard that presumes that all workers are employees, and can be classified as contractors only in exception cases. Such exceptional cases would arise (a) where the worker is entirely free from control and direction of the employer, (b) where the work is performed outside the usual course of the hirer's business, and (c) worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

23 *Supra* note 12 at p.2.

24 Code on Social Security 2019 [Bill No. 375 of 2019] §2(35).

25 Code on Social Security 2019 [Bill No. 375 of 2019] §2(55) & (56).

However, even the Code distinguishes between an employee in the traditional sense, and a gig worker. Furthermore, gig workers, inter-state migrant workers, etc. are included under the ambit of the organised sectors, and their protection relies on the government notifying schemes that may be made applicable to them. Not recognising the presence of gig workers in the formal or organised sector, would have problematic implications. Such part of the gig worker population is vulnerable to corporate exploitation. There is also ambiguity as to whether workers of the unorganised sector are to be treated as employees.[26] Furthermore, social protections accorded to the organised and unorganised sector are not at par with each other. With the increasing rate of urbanization, it is imperative that the state aims to bring both these sectors at par with each other, an understanding that has also been advocated by the ILO.[27]

Additionally, the framing of schemes for the protection of gig workers and other unorganised workers is directory and not mandatory, thereby taking away from the objective of such a move. Referring to the recent migrant crisis in India, the absence of proper policies and safeguards in place to cater to exigent circumstances, such as the COVID-19 pandemic, cause a social upheaval of a magnanimous scale. Lack of work security and the consequent non-payment of wages, rights that are otherwise available to employees, led to the mass exodus or reverse migration in India. In a more unique sense, this situation also gave rise to a "remedies without rights" situation.[28] Had there been an adequate framework in place for ensuring work security and a minimum standard of benefits of the unorganised sector and gig economy, such an exodus could have been prevented. Thus, if the Code were to be brought into force, after Indian has learnt the lesson on the lacunae of our labour laws, it would not be stand up to its own ideals.

International Standards and Proposal of Framework for Gig Workers in India

The world has not been oblivious to the growth and expansion of the gig economy, and different regions and countries have brought about new laws or modified their existing laws to cater to the gig economy and workers therein. In 2019, the European Union adopted new rules on *Transparent and Predictable Working Conditions in the EU* ["EU Directive"]. It introduced minimum rights that are available to all employees, including those employed in non-standard jobs, such as gig workers,[29] to put an end to abusive practices that accompany casual contracts.[30] More recently, the state of California brought about a law known as the AB5 to reclassify independent contractors as regular employees.[31]

There is sufficient ILO jurisprudence to include gig work and platform work within the ambit of Decent Work and Future of Work,[32] to encourage the inclusion of gig workers in existing national laws and to build upon their unionization and bargaining capacities. The ILO advocates for the adaptation of single employment contracts to abolish the distinction between permanent

26 DVARA Research, *Comments Submitted to the Ministry of Labour and Employment on the Draft Labour Code on Social Security, 2019*, p.3 (October 24, 2019), https://www.dvara.com/research/wp-content/uploads/2019/10/Comments-submitted-on-the-Draft-Labour-Code-on-Social-Security-2019.pdf (last accessed on Jul 18, 2020).

27 *Supra* note 2 at p.1.

28 Anuj Bhuwania, *The Curious Case of Absence of Law in Migrant Workers' Crisis*, Article 14 (June 16, 2020), <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases>. *See also*, Satvik Varma, *Why India's Legal and Labour System Needs to be Reconfigured to Really Help Migrant Workers*, The Wire (May 19, 2020), https://thewire.in/labour/india-labour-legal-system-migrant-workers (last accessed on Jul 22, 2020).

29 European Parliament, *Gig Economy: EU Law to Improve Workers' Rights*, https://www.europarl.europa.eu/news/en/headlines/society/20190404STO35070/gig-economy-eu-law-to-improve-workers-rights-infographic (last accessed on Jul 24, 2020).

30 *EU Law Fixes Minimum Rights for 'Gig Economy' Workers*, BBC News, April 16, 2019, https://www.bbc.com/news/world-europe-47947220 (last accessed on Jul 24, 2020).

31 Assemb. B. 5, 2019, 2018-2019 Reg. Sess. (Cal. 2019).

32 Janine Berg, et al., *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World*, Report, International Labour Organization (2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_645337.pdf (last accessed on Jul 20, 2020). *See also*, The Future of Work Centenary Initiative, 3 Issue Note Series, International Labour Organization, p. 5, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_534115.pdf>. [hereinafter "Future of Work Centenary Initiative"].

and temporary contracts. It also encourages the phenomenon of forming of cooperation by freelancers and other self- employed workers.[33]

Based on the premise of this article, India would benefit from considering the following proposals-

- With the approval of the new Labour Codes, India has moved beyond the stage of recognising gig workers. However, as discussed above, the applicable Indian law understands of gig workers forms as separate classification than a traditional employee. With the growing complexities of the market and economy, gig economy has the potential to creep into even the most sophisticated forms of employment. Thus, it is necessary to view gig economy as a parallel form of economy, rather than a kind of work.
- It is necessary to expand the scope of employment, and the understanding of the employer- employee relationship thereof, rather than to carve out a separate class of workers. Well- being of gig workers can adequately be ensured only when they are part of the mainstream workforce.
- The laws and policies applicable to the gig economy ought to be made applicable to all workers employed in a temporary or on- demand basis, with due consideration to the motivations of such workers as being part of the gig economy. As discussed in the earlier parts of the paper, based on the two classifications proposed, there are different motivations and factors, socio- economic and cultural, which pushes people to take up gig work. Thus, in order to cater to them, a minimum threshold of benefits and protection would be desirable. In this regard, India can draw inspiration from the EU Directive.
- In order to ensure a minimum standard of protection, it is imperative to ensure that policies and applicable schemes are put in place are not dependent on political will, but rather on the obligations of a welfare state enshrined under the Constitution.

Conclusion

Modern economies in various countries around the world are experiencing the rise of new work arrangements that assist in mobilising and demobilising a portion of their workforce. With growing economic competitiveness, companies, especially start-ups are moving towards a trend of casual or flexible employment that now necessitates an overhaul of existing understanding of labour. Although the primary objective may be reducing employer liability and reducing the cost of complying with labour policies, it has led to a negative impact that has the ability to put majority of the modern workforce in peril. Ensuring conditions of decent work, minimum wage and other benefits are necessary and important, regardless of the nature of employment. The lack of such protection and benefits, as argued above, are key contributors to social upheaval of the kind that India recently witnessed in its migrant crisis. Thus, there is a growing and urgent need to relax, if not expand, the understanding of employment.

33 Future of Work Centenary Initiative, at p. 7 (last accessed on Jul 22, 2020).

INTENSIVE PIG FARMING: MAPPING THE CHANGING CONTOURS OF ANIMAL LAWS

*- Ms. Sanjana S Jain & Mr. Vishnu Mangalvedkar**

Keywords: Animal Welfare, Behavioral Science, Gestation Crates, Intensive Pig Farming, Model Legislation.

Introduction

The sensitivity and cognitive abilities of pigs demand consideration and for their humane treatment. The objective location memory of pigs speaks volumes about their intelligence and cognitive abilities of pigs. And the pigs which are sentient beings experience joy, loneliness, frustration.[1] In a world where decisions are influenced by profit and selfish considerations, there is little room for empathy towards animals. Hence, we can only hope that the first step of transformation, if taken in the direction of welfare of pigs, an animal that is regarded as the fifth intelligent being, would go a long way in garnering support for establishing welfare of other farm animals shortly.

To achieve this, it is important to highlight the current position of law along with existing grounds which could be invoked for approaching the courts and advocating the rights and entitlements of the voiceless. With the welfare of pigs at the backdrop, it is important to highlight the possible catalysts which may protect animals. The first such catalyst to involve the courts may be achieved by an anthropocentric approach where the litigant shows a direct causal link between the health of the animal and the health of the human.[2] A second attempt may be made by highlighting existing legislations and violation of such legislations[3] where intensive pig farming techniques have been resorted to. The last and most important catalyst shall occur upon mapping the changing contours of animal laws and the possibility of conferring legal personhood to animals. This shall encourage a more eco-centric approach towards animal welfare[4] which will therefore increase animal welfare litigation as a whole. All these catalysts will be analysed within the course of this article.

Anthropocentric Approach- Relationship between Animal Health, Animal Welfare and Human Health

The most common approach to litigation is where the litigant bases his claims on the pretext of a causal link between human and animal health. The safety of the food chain is dependent on the welfare of an animal, as the stress factors of an animal can infect them with diseases. Chronic stress experienced by farm animals negatively impacts its immune system. Further, the existence of close links between animal welfare, animal health and foodborne diseases can pose a risk to the health of humans through diseases like Salmonella.[5] The concept of 'One Health' envisioned by the World Organization for Animal Health (OIE) further maps this link.[6] The pigs which were tested positive for Japanese Encephalitis, a carrier disease which is easily transmitted from pigs to humans by mosquitoes, bring forth the acuteness of the problem. The possibility of the disease being spread in unorganised pig farms is indeed a clarion call for organising the pig

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1 Sarah Von Alt, *Pigs Are Intelligent and Sensitive, So Why Are You Eating Them?,* Mercy For Animals, (Aug. 9, 2020, 9:20 AM), https://mercyforanimals.org/pigs-are-intelligent-and-sensitive-so-why.

2 M P Jain, Indian Constitutional Law (Jasti Chelameswar J, Dama Seshadri Naidu J ed., ed. 8, LexisNexis 2018.

3 N R Nair v. Union of India, AIR 2000 Ker 340.

4 Narayan Dutt Bhatt v. Union of India, 2018 SCC OnLine Utt 645.

5 *Animal Welfare*, EFSA (Aug. 6, 2020, 4:30 PM), https://www.efsa.europa.eu/en/topics/topic/animal-welfare.

6 *One Health At Glance*, World Organisation for Animal Health (Aug. 6, 2020, 5:00 PM), https://www.oie.int/en/for-the-media/onehealth/.

sector.[7] Another consequence of absence of a stress-free environment to pigs is that pigs which undergo stress before being slaughtered produce a lower level of lactic acid, which if produced in larger quantities would have helped in making the carcasses firm. Reduced lactic acid, reduces meat quality and its price, increases the possibility of food poisoning bacteria which might poison consumer's diet.[8]

While adjudicating on the issues of food safety, the Court held that such food articles that are hazardous or injurious to public health are of potential danger to the fundamental right to life guaranteed under Article 21.[9] To further Articles 21 and 47, the states are required to protect human life.[10] The Duty of the state to secure the life of an individual is in correlation to the right to life of an individual.[11] In the light of the above dictum, the unregulated pig industry appears to be the matter of concern and the risk posed to the human community justifies the need for legislation which could encompass considerations regarding the welfare and stress-free environment of pigs. In addition to this, the legislation could specify standards and limitations on stocking density. The inclusion of provisions regarding stocking density is of utmost significance because pigs stocked in a constrained atmosphere exhibit stereotypical behaviour which in turn negatively affects human health.[12] Thus one of the plausible solutions is to ban gestation crates.[13]

Eco-centric Approach to Increase Litigation

The legislators, while making laws in the animal-based agricultural industries, essentially look into factors froman anthropocentric angle as they are based onconcerns for human health rather than animal welfare.[14] Though most legislations impose duties on human agents, unfortunately, it can be noticed that they don't give explicit rights to animals. We can understand the anthropocentric approach of lawmakers by the way of Hohfeldian analysis of rights. Newcomb Hohfeld explained the legality of rights and duties by calling them jural correlatives. Rights and Duties are called jural correlatives since one concept cannot exist in isolation from the other. A legal right and duty always exist together.[15] Some may argue that legislation on animal-based agro-industries imposes duties on human agents, hence, the correlative of duty, i.e., a right, automatically exists with animals. However, this argument is flawed. With comprehensive reading, we understand that the jural correlative of duty imposed on human agents is the right to human life and health as promised under Article 21 of the Constitution of India.[16] This can especially be seen in various slaughterhouse rules and FSSAI regulations adopted by the legislators. However, some sole provisions under the PCA Act do provide hope in the way of eco-centric rights to animals.

It may be contested that the rights-based approach often used by environmental litigators by the way of Article 21 may be faulty in a world with an anthropocentric view. This may further be the single greatest challenge to animal welfare litigation in particular. By the way of interpretation, Article 21 though broadly interpreted, limits itself to *human* life and personal liberty of *humans* since the case of *Maneka Gandhi v Union of India.*[17] This acts as a major roadblock in establishing locus standi and cause of action. Thus, it is vital to have a more eco-centric rights-based approach which

7 Pragya Kaushika, *Fresh survey finds three more pig samples positive for JE virus*, Indian Express (Jul. 17, 2020, 9:15 AM), http://archive.indianexpress.com/news/fresh-survey-finds-three-more-pig-samples-po/895936.

8 *FAO Guidelines for Humane Handling, Transport and Slaughter of Livestock*, FAO (Jul. 19, 2020. 5:45 PM), http://www.fao.org/3/X6909E/x6909e00.htm.

9 Centre for Public Interest Litigation v. Union of India and others, AIR 2014 SC 49.

10 Indian Const. Art 47.

11 State of Punjab & Ors v. Ram Lubhaya Bagga, AIR 1998 SC 1703.

12 *Food Safety and Environmental Issues in Animal Welfare*, World Organisation for Animal Health (Aug. 8, 2020, 5:30 PM), https://www.oie.int/doc/ged/d2708.pdf.

13 Christy Slaby, *Pig Farrowing Crates: A Comfy Place or Life-time of Confinement*, Crate Free Illionis (Aug. 7, 2020, 6:10PM), https://cratefreeil.org/pig-farrowing-crates-a-comfy-place-or-a-lifetime-of-confinement/.

14 Donnelly, Bebhinn, Patrick Bishop, *Natural Law and Ecocentrism,* 19 Journal of Environmental Law, 2007, 89-101, *JSTOR* (Aug. 27, 2020, 3:20 PM), www.jstor.org/stable/44248584.

15 Hohfeld Wesley Newcomb, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 The Yale Law Journal, no. 1, 1913, 32. *JSTOR* (Aug. 8, 2020, 10:05 AM), www.jstor.org/stable/785533.

16 Indian Const. art 21.

17 Maneka Gandhi v Union of India, (1978) 1 SCC 248.

concentrates on animal rights which invariably increases animal welfare litigation.[18]

The judiciary, on the other hand, has constantly taken a generous stance. One of the first instances of application of this approach by the courts can be seen in the case of *N.R. Nair v. Union of India*[19], where the Kerala High Court was commenting on animals used in circuses observed that;

"In our considered opinion; legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side."[20]

Thus, keeping in mind the rights of animals in the eco-centric approach, the corresponding duty on humans as explained by Tom Regan can be examined. Tom Regan while categorising beings as moral agents and moral patients, observed that moral agents are beings who can think for themselves and their welfare, as opposed to moral patients who cannot do so. Hence, there lies a duty on moral agents to act for the welfare of the moral patients and to ensure that such beings lead a dignified life.[21] The statutory framework provided in this paper is expected to facilitate human beings to assume their role as moral agents.

To highlight the inherent rights of animals which further their legal personhood, the following cases have been examined. In the case of *AWBI v. A Nagaraja*[22] and *People for Animals v. Md. Mohazzim*[23], emphasis was placed on the internationally recognised five freedoms - Freedom from hunger, thirst, malnutrition, freedom from fear and distress, freedom from physical and thermal discomfort, freedom from pain, injury and distress, freedom to express normal patterns of behaviour. Hence, these freedoms provided to animals have enabled a broader interpretation of animal rights where the eco-centric approach has been strengthened by a broader interpretation of existing legislation. However, a few changes to the existing legislation and a probable new legislation will go a long way in increasing or furthering the approach towards animal welfare.

Intensive Pig Farming and Animal Laws

It is imperative to examine the grave violations that occur in intensive pig farms while being mindful of the changing contours of animal laws. The gestation crates used in these farms is one of the matters of concern. Gestation stalls are individual pens which house the pigs reared for meat in narrow enclosures.[24] Due to its small area, pigs confined in the Gestation crates suffer from various welfare problems like weakened bones, lameness, poor social interaction, urinary infection, confined injuries like pressure sores, abrasions, and stereotypes. As pigs in their natural environment perform thermoregulatory activities like wallowing and shade-seeking, roosting and nest building, pigs which are inquisitive, when deprived of such an environment, experience mental health concerns.[25] Stereotypical behaviour commonly observed among sows in stalls are vacuum chewing and bar biting.[26] The intelligence and cognitive abilities of pigs to perceive its surroundings[27] prove the gravity of the issue and

18 Cryer, Paul, Kopnina, Helen, Piccolo, John J, Taylor, Bron, Washington, Haydn, *Why ecocentrism is the key pathway to sustainability,* The Millennium Alliance for Humanity and the Biosphere(Sept. 12, 2020, 2:26 PM), https://mahb.stanford.edu/blog/statement-ecocentrism/

19 *Supra,* note 5.

20 *Id.* ¶ 13.

21 The Animal Ethics Reader, (Susan J. Armstrong & Richard G. Botzler ed., 2 ed. Routledge 2008).

22 Animal Welfare Board of India v. A. Nagaraja and Ors, 2014 (4) ABR 556.

23 People for Animals v. Md. Mohazzim, 2015 SCC OnLine Del 9508.

24 *Welfare Implications of Gestation Sow Housing*, American Veterinary Medical Association, (Aug. 19, 2020, 7:15 PM), https://www.avma.org/resources-tools/literature-reviews/welfare-implications-gestation-sow-housing.

25 *An HSUS Report: Welfare Issues With Gestation Crates for Pregnant Sows*, The Humane Society Of The United States (Aug. 14, 2020, 11:20 AM), https://www.humanesociety.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf.

26 *An HSI Report: Welfare of Intensively Confined Animals in Battery Cages, Gestation Crates, Veal Crates*, Humane Society International (Sept. 18, 2020, 10:50 AM), https://www.hsi.org/wp-content/uploads/assets/pdfs/welfare-of-intensively-confined-animals-international-word-sept-4-08.pdf.

27 *Stop Look-Listen Recognising the Sentience of Farm Animals*, Compassion in World Farming (Aug. 20, 2020, 12:05 PM), https://www.ciwf.org.uk/media/3816920/stop-look-listen-summary.pdf.

the severity of welfare problems suffered by the confined pigs.

In the light of Animal Welfare Jurisprudence, the question whether the housing of pigs in gestation crates violates Prevention of Cruelty to Animals Act can be answered.The Hon'ble Court in the *Jalikattu*[28] *case by* reading Sec.3 and 11 of the PCA with Article 51A(g), expanded the meaning of life under Art.21 and declared that the animals are entitled to the right to live in a healthy and clean environment and the right to get protection from human beings against the infliction of unnecessary pain or suffering.[29] As Animal Laws in the country are based on the animal welfare principle, the crux of the principle needs to be analysed. All those activities which inflict pain to an animal, if higher in proportion, than the benefit reaped out, then such activity shall have no justification whatsoever under the principles of animal welfare. It is submitted that proponents of the Animal welfare principle believe that as long as the decent and humane treatment is assured to the animals reared for consumption, such consumption and slaughter is justified.[30]

Sentience of animals, growing needs of the consumption are the reasons behind choosing an approach of balancing interests of humans and non-humans, and such approach is reflected in the doctrine of necessity that is the Section 11(3) of Prevention of Cruelty to Animals Act.[31] Section 11(3) of the Act states, "the commission or omission of any act in the course of the destruction or the preparation for destruction of any animal for food.", is not punishable, provided that no unnecessary pain is inflicted on animals. Determinants which have to be considered while deciding whether an animal is subjected to unnecessary pain are whether the suffering could have been avoided or whether the conduct causing suffering was for the legitimate purpose. In light of this, when the term 'legitimate purpose' is discerned, it can be asserted that the gestation crates neither provide any benefit to animals, humans nor does it protect any property, person or any other animal. As there is a close link between housing conditions and stress in animals which is furthered into a link between deteriorated animal health and human health, the unnecessary pain in the form of behavioural concerns suffered by the animals in gestation crates is clearly of no benefit to the animals and the humans. Thus, it can be ascertained that the gestation crates do not come within the purview of the legitimate purpose, and hence the instant issue is a clear case of infliction of unnecessary pain while preparing an animal for destruction.[32]

Looking into the aspect of cruelty, one requirement for an act to amount to cruelty is that if such infliction of pain could have been avoided and if it wasn't. On this note, the reports released by various organisations dedicated for animal welfare is taken note of. International Coalition for The Animal Welfare, which considered the welfare implications of sows, expressed that the efforts should be in favour of rearing pigs in a well-designed, well maintained outdoor system or an indoor system with provisions for ample space, enrichment materials and bedding. After drawing comparisons between the housing system which uses stalls and the housing system which allows group rearing of sows, it can be concluded that sows kept in stalls have reduced muscular strength, reduced cardiovascular fitness, suffer from leg pathologies and increased stereotypical behaviour compared to the alternative group reared pigs.[33] The recommendations put forward by the RSCPA were on similar lines.[34] However, the issue of aggressive behaviour of sows reared in groups can be resolved to a greater extent by facilitating the animals to direct their exploratory behaviour on the suitable materials like hay wood, shavings provided. By maintaining the stable groups of pigs instead of mixing them with the new groups, aggressive tendencies can be curbed. The free-

28 *Supra,* Note 24.

29 *Id.*

30 Cass R Sustein, *Rights of Animals*, 70 University Of Chicago Law Review(2003).

31 Prevention of Cruelty to Animals Act 1960 § 11(3).

32 *Supra,* note 24.

33 *OIE Recommendation for The Farm Animal Welfare*, International Coalition For Animal Welfare (Jul. 9, 2020, 8:20 AM),http://www.icfaw.org/Documents/ICFAW%20recommendations%20on%20the%20on-farm%20welfare%20of%20pigs.pdf.

34 *Farm Animal Welfare Factsheets*, RSCPA (Aug.16, 2020, 5:10 PM), https://www.rspca.org.au/sites/default/files/RSPCA-Farm-Animal-Welfare-Factsheets-Amended.pdf.

ranging system is another housing system which can act as an alternative. The failure on the part of the legislators and slaughterers who instead of adopting the housing systems in the interest of the animals, have left the confinement in crates, unabated. Thus, pig farms in India continue to act in violation of Sections 11(1)(a)[35], 11(1)(l)[36] and 11(1)(e)[37] of the PCA, 1960.

Suggestions and Recommendations

I. Suggestion for Model Legislation

To ensure that the rights of pigs and their general wellbeing is maintained, a legislative framework could incorporate provisions to secure the requisite freedom for farm animals. Further, it would be a remarkable initiative if the Act could make provisions banning the usage of gestation crates, as the OIE guidelines prefer the adoption of such physical environment for animals which could enable them to comfortably rest, move around and exhibit normal postural changes.[38] To achieve most of these objectives, the model legislation can be inspired from Prevention of Cruelty to Animals (Egg Laying Hens)Rules and Prevention of Cruelty to Animals (Broiler Chicken) Rules recommended by the Law Commission.[39] For this, the authors propose new model legislation which should be based on the following suggestions and recommendations:

- The Animal Husbandry Department of the State may, while granting the license, impose such infrastructural conditions in accordance with the guidelines laid down by the Animal Welfare Board or State Board.
- Certification of pig farms by the Animal Husbandry Departments of the States, with a distinction between the produce obtained from stall-free pig farming and the produce obtained from farms which house pigs in gestation crates, is suggested.
- The new legislation should provide for nutrient content, feeding regime, litter and stimulating environment, stocking density of pigs based on its weight to ensure a healthy environment for animals.
- The enrichment material should: (a) be of suitable material, particle size and easy to maintain; (b) be of good quality (clean, dry, dust-free, and absorbent); (c) be of a sufficient depth for dilution of faeces; The enrichment material which has the potential of allowing the pigs to exhibit their natural behaviour shall be provided.
- To further sanitary and cruelty free environment, the legislation should mandate every farm owner to provide for veterinary care.
- The proposed recommendations should not contradict but complement the existing Slaughterhouse Rules. The farms shall sell pigs only to licensed slaughterhouses, failing which the licenses of farms should be retracted.

II. Suggestions for Amendment to The Prevention of Cruelty to Animals Act, 1960

The economic analysis of law suggests that people do less of a sanctioned activity when heavier sanctions are imposed on the perpetrators.[40] Basing the conclusion on behavioural science, it can be ascertained that the unnecessary infliction of pain to the farmed animals especially pigs should be met with strict actions. Even the concept of justice is based on the principle that the punishment prescribed should be proportional to the crime it targets. Cesare Beccaria opined that the sanctions imposed by law should be proportional to the gravity of the offence, which shall be measured by taking the harm to the society into consideration.[41] In the case of *Om Kumar v. Union*

35 Prevention of Cruelty to Animals Act 1960 § 11(1)(a).

36 Prevention of Cruelty to Animals Act 1960 § 11(1)(l).

37 Prevention of Cruelty to Animals Act 1960 § 11(1)(e).

38 *Introduction to Recommendations for Animal Welfare-Terrestrial Animal Health Code*, World Organisation for Animal Health, (Aug. 19, 2020, 4:30 PM), https://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/current/chapitre_aw_introduction.pdf.

39 Law Commission Report No.269, Law Commission, (Aug. 10, 2020, 10:25 AM), lawcommissionofindia.nic.in/reports/Report269.pdf.

40 Richard Posner, Economic Analysis of Law (8ed. WoltersKluwer, Aspen Publishers 2011).

41 Joel Goh, *Proportionality- An Unsustainable Ideal in Criminal Justice System*, Semantic Scholar (Sep.

of India[42], it was held that the task of ascertaining whether the legislative and administrative authority maintains a balance between the adverse effect, legislative or administrative action might have on the rights, liberties while keeping in mind the interests of persons and the purpose for which the enactment was made in the first place, is on the judiciary. As it is observed that in case of animal rights violations, the severity of the punishment is lower than the gravity of the offence, hence the doctrine of proportionality, when applied in this regard, would indicate amendment to fines prescribed under Prevention of Cruelty to Animals Act as a viable solution.

Conclusion

On a concluding note, it is of significance to mention the theory propounded by Martha Nussbaum which brings into light the need to reconsider the position of animals in the eyes of law. On one hand, Martha Nussbaum, in her renowned book 'Frontiers of Justice' urged for extending justice and capability approach- approach to extend the issues of basic justice and entitlement, to animals.[43] In her book, she listed down the basic requirements to be met to achieve the goal of animal flourishing which includes life, bodily health, integrity, senses...[44] On the other hand, the concept of Transformative constitutionalism envisions a society which embraces the ideals of justice, liberty and equality.[45] Drawing conclusions from both the concepts, it can be concluded that legislation would indeed facilitate a progressive transformation in favour of pigs. This legislation would emerge as a first remarkable step towards guaranteeing rights to pigs which could ultimately provide a conducive environment for guaranteeing rights to other farm animals.

11, 2020, 9:50 AM), https://pdfs.semanticscholar.org/25ad/43cab27eb1c3434d817c5cb9f1fae55b3650.pdf.

42 Om Kumar v. Union of India, AIR 2000 SC 3689.

43 Anders Schinkel, *Martha Nussbaum on Animal Rights*, 13 Ethics And The Environment, 41-69, (2008) *JSTOR* (Sep. 15, 2020, 10:05AM), https://www.jstor.org/stable/40339148.

44 Martha C. Nussbaum, Frontiers Of Justice, (1 ed. Harvard University Press 2009).

45 Navtej Singh Johar v. Union of India, AIR 2018 SC 1321.

SPECIAL JURISDICTION OF NGT - THE NEED OF THE HOUR

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Key Words: Special Jurisdiction, Suo-Moto Powers, Reforms

Establishment of The Tribunal and its Jurisdiction

The requirement for an environmental court was first expressed in India in the *Oleum Gas Leak case*.[1] An urgent need was felt for the involvement of experts in the administration of justice related to the environment and protection thereof. Later, the Court expressed a similar view in *Indian Council for Enviro Legal Action*.[2] In *AP Pollution Control Board*, in the year 2001, the Supreme Court requested the Law Commission of India to examine this question.[3] Hence, the Law Commission *inter alia* suggested, in its 186th Report, in September of 2003, setting up of environmental courts having both original and appellate jurisdiction. Finally, the National Green Tribunal was established via the coming in force of the Act in 2010.

As per the Act, the NGT has original jurisdiction over all civil cases involving a substantial question relating to environment, inclusive of enforcement of any legal right relating to environment, and any question arising out of the implementation of Schedule-1 of the Act.[4] An appeal against an order of the NGT lies directly to the Supreme Court. Ordinarily, the powers of High Courts and Supreme Court to judicial review cannot be ousted. However, the Apex Court has recognised the philosophy of NGT being a specialized body to provide speedy justice, and has pointed out that Tribunal act as only a court of first instance[5], thus upholding the transfer of powers of the High Courts to the NGT.

Emergence of Powers Beyond the Act

Over the years, there has been a constant need for broader jurisdiction, realised during the functioning of the Tribunal, in order to enable the fulfilment of objectives of setting up of a specialized environment Tribunal. The two pertinent developments, in recent times, in this regard, have been; **[i]** the existence of a 'special jurisdiction' in the form of the NGT, and **[ii]** the power to take *suo moto* cognizance of matters.

Special Jurisdiction of the NGT

The Apex Court, in the 2019 case of *Mantri Techzone Pvt. Ltd. v. Forward Foundation and Ors.*[6], opined that *"the Tribunal has special jurisdiction for enforcement of environmental rights"* with regard to powers of the NGT. This statement was substantiated by the reasoning as follows "*The Tribunal has been established under a constitutional mandate provided in Schedule VII List I Entry 13 of the Constitution of India, to implement the decision taken at the United Nations Conference on Environment and Development. The Tribunal is a specialized judicial body for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment. The right to healthy environment has been construed as a part of the right to life Under Article 21 by way of judicial pronouncements."*[7]

While the context of the word "special," in the aforementioned judgement, is not specified, a few assumptions may be drawn regarding the same.

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1 MC Mehta v. UOI, AIR 1987 SC 965.

2 Indian Council for Enviro-Legal Action v. UOI, 1996 2 SCC 212, 252.

3 A.P. Pollution Control Board v.s Prof MV Nayudu, 2001 (2) SCC 62.

4 The National Green Tribunal Act, 2010, § 14.

5 L Chandra Kumar v. UOI, AIR 1997 SC 1125.

6 LG Polymers, Original Application No. 73/2020.

7 Id.

The NGT Act, 2010 already provides for a bar of jurisdiction of civil courts regarding environment matters overseen by the Tribunal[8], and the Supreme Court has invalidated this transfer of power in hands of the Tribunal, to supersede that of even the various High Courts[9]. It is, thus, difficult to believe that the term *special* refers only to exclusivity of jurisdiction held by the tribunal over certain matters, and should be distinguished from *limited jurisdiction* generally conferred on specialized courts.

In light of the reasoning given by the SC, the NGT is an upholder of the right to healthy environment, and any other legal right relating to environment. Indeed, to achieve this, the court must possess certain discretion and authority, of extraordinary nature, over and above the confines of the NGT Act, without which it shall fail to achieve the aforementioned objectives. Such an interpretation would be a logical extension of the observations of the SC in previous matters regarding powers of the Tribunal, where the Apex Court has recognised that powers bestowed upon the environment tribunal cannot be read narrowly; any interpretation, which furthers the interests of the environment, must be given a broader reading.[10]

Exercise of *Suo Moto* Powers

- **A case for *Suo Moto* Powers**

The NGT Act nowhere expressly provides the Tribunal powers to take *suo* moto cognizance for protection of the environment. Despite this, the Tribunal has, at multiple instances, interpreted the various provisions to encompass the same, on its own accord.

In a specific instance of *suo moto* cognizance taken by the Tribunal earlier this year, concerning the Vizag gas leak, the Tribunal provided a compelling reasoning for the same. The Court observed; *"NGT has the purpose and power to provide relief and compensation to victims of environment damage, restitution of property, and restoration of environment. To effectuate this purpose, NGT has wide powers to devise its own procedure. In appropriate circumstances, this power includes the power to institute suo-motu proceedings"*[11]

The spirit of this NGT order can be acknowledged as the Tribunal not wanting to keep its hands tied in the face of drastic environmental damage and serious violation of right to life, public health, and damage to property. It often occurs that victims in environment matters are marginalized, because of poverty/disability, or belong to a socially/economically disadvantaged position, due to which they fail to approach the Tribunal. A failure to exercise *suo motu* jurisdiction in such circumstances would render these victims without remedy. If NGT is made powerless to institute *suo moto* proceedings where so warranted, it would be robbed of all its efficacy, as this would give rise to a situation where environmental damage causes loss of life, public health and property, but the court can only grant relief if the victims found the means to approach it first.

The SC noted in *State of Meghalaya v. All Dimasa Students Union*[12], that in order to fulfill objective of the NGT Act, 2010, the Tribunal has to exercise a wide range of jurisdiction and possesses a wide range of powers to do justice in a given case. Such powers conferred on the Tribunal are coupled with a duty to exercise them for achieving environmental objects.

In the *S.P. Gupta case*[13], *PUDR v. Union of India*[14] *and in Bandhua Mukti Morcha case*[15], the SC has opined that procedure is merely a hand-maiden of justice, and it should, thus, not stand in the way of access to justice for the weaker sections of India. Therefore, where the poor and the disadvantaged are concerned, as victims of an exploited society, without any access to justice, the Court should not wait or insist upon a writ to be filed, a letter by a public-spirited person, or a social action group acting *pro bono* public.

If the NGT is prevented from instituting *suo-motu* proceedings, most issues and violations concerning the underprivileged would remain

8 The National Green Tribunal Act, 2010, § 29.

9 *Supra* note 4, at p. 3.

10 State of Meghalaya v. All Dimasa Students Union , (2019) 8 SCC 177.

11 LG Polymers India v. UOI, MANU/GT/0200/2020.

12 State of Meghalaya v. All Dimasa Students Union , (2019) 8 SCC 177.

13 SP Gupta v. President of India, AIR 1982 SC 149.

14 PUDR v. UOI, 1982 AIR 1473.

15 Bandhua Mukti Morcha v. UOI, 1984 SCR (2) 67.

unaddressed, these citizens' inalienable right to life would be jeopardized and serious, and irreversible environmental damage would continue going unchecked. Most importantly, the Tribunal will stand eroded of its object and purpose.

- **The Dilemma of *Suo moto* Powers**

In the ongoing cases of *Municipal Corporation Greater Mumbai v. Ankita Sinha & Anr.*[16] and *Central Electricity Supply Utility of Odisha v. Government of India*[17], the power of NGT to take *suo moto* cognizance has been challenged and the Supreme Court has issued notice as well. The Madras High Court recently in *Vellore Citizens Welfare Forums v. Union of India*[18] observed that the NGT, unlike the LoEA, is not conferred with *suo motu* powers. The Court noted that the question of locus under Section 18 is sufficiently diluted to compensate for lack of *suo motu* powers, hence implicitly recognising that the NGT does not possess *suo motu* jurisdiction.

NGT's Jurisdiction: Down the Drains?

Imagine a party aggrieved by an order passed by the State Board under Section 18 of the Water Act, in normal course of action will prefer an appeal to the appellate authority. But what if the appellate authority itself is not constituted, can the party approach the NGT under the doctrine of necessity? This precisely was the issue in the case of *Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd. and Ors*[19] whereby the court answered this by ruling that "If an appellate authority is either not yet constituted, or not properly constituted, a leapfrog appeal to the NGT cannot be countenanced., The NGT is only conferred appellate jurisdiction from an order passed in exercise of first appeal. Where there is no such order, the NGT has no jurisdiction." This ruling is based on the strict interpretation of law to ensure that parties do not curtail the settled procedure. But at the same time since "procedure is only a handmaid of justice and not the mistress of it" it could very well ensure that an aggrieved party could be devoid of the case being adjudicated by the a specialised tribunal i.e. NGT to deal with environmental matters and thus due to a state government's own laxity in forming an appellate authority, the ends of justice may get frustrated.

Also, as part of the legal strategy, a pollutant may very well question the vires of a particular section which he is accused of contravening. NGT, not being a constitutional court, cannot decide the constitutional vires of a particular section or a cause of action despite it involving a substantial question related to environment. Also, NGT is not empowered it to examine validity of any Rules or Regulations made under the enactments mentioned in Schedule-I of N.G.T. Act.[20] Thus, this further creates a fetter on NGT's jurisdiction and can further create delays on the basis of jurisdictional issues rendering expeditious disposal of environmental cases a distant reality.

Problems with NGT

- No Enforcement Mechanism: The Legal Initiative for Forest and Environment (LIFE) conducted a survey whereby of the 1,392 projects granted environment clearance between January 1, 2017, and October 2017, the NGT kept in "abeyance" just one: its southern zone stayed the environmental clearance for a Neutrino observatory project at the Bodi West Hills in Tamil Nadu's Theni district.[21] Similarly, out of the Rs 645 crore compensation awarded by the NGT between 2014 and 2019 as environmental damages, only Rs 2 crores has been paid by the defaulting industries till now.[22]

16 Municipal Corporation Greater Mumbai v. Ankita Sinha & Anr, Civil Appeal Nos. 12122-12123 of 2018.

17 Central Electricity Supply Utility of Odisha v. Government of India Civil Appeal No. 5902 of 2019.

18 Vellore Citizens Welfare Forums v. Union of India (2016) 4 MLJ 25.

19 Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd. and Ors, AIR 2019 SC 1074.

20 Central India AYUSH Drugs Manufacturers Association and Ors. v. State of Maharashtra and Ors., AIR 2016 Bom 261.

21 The Indian Express, *Inside the NGT as it turns seven*, https://indianexpress.com/article/india/ngt-national-green-tribunal-delhi-smog-pollution-swatanter-kumar-inside-the-ngt-as-it-turns-seven-4943859/ (last accessed on Oct. 21, 2020).

22 Richa Sharma, Companies dodge compensation awarded by NGT for environmental damages, The New Indian Express (Sep 26, 2020, 5:35 PM) https://www.newindianexpress.com/nation/2020/may/08/companies-dodge-compensation-awarded-by-ngt-for-environmental-damages-says-study-2140576.html.

- Vacancy: As recent as 14 August 2020, the Supreme Court was appalled to find that the NGT was functioning with even less than minimum 10 members as mandated under Section 4 of the NGT Act with as much as 13 vacancies (7 Judicial Members and 6 Expert Members) and rightly ordered NGT to expedite the appointment process.[23]
- Furthermore, state governments refuse to coordinate and recognise committees formed by NGT in various cases leading to constant intervention by the Tribunal and a tussle between the NGT and the state government.[24]
- Under Section 5(2) of the NGT Act, which enlists the qualification of members such as "Masters in Science, Technology…etc" there is no provision for environmentalists or sociologists having practical expertise in the field. Moreover, these qualifications also serve as a backdoor for retired civil servants leading to further bureaucratization

Reforms to the Tribunal System in India; Lessons from Environment Courts Abroad

- As noted earlier, the Environment Tribunal system in India is far from perfect, and arguably does not possess enough jurisdictions to be effective in its functions.
- On the contrary, the Environment Court in New Zealand is probably one of the best environmental courts having a wide and a comprehensive jurisdiction. Most importantly, it is a court of record[25] and is the only court in New Zealand that has the express power to amend and alter subordinate legislation on the merits as well as is also empowered to render policy declarations, even on "abstract issues or issues not adequately framed by specific facts and arguments."[26] Also, it has the power to enforce the duties imposed on persons by the RM Act through civil or criminal proceedings.[27] Thus, in India, where enforceability by the NGT is a major issue, these laws could very well be incorporated in times to come.
- In Philippines, there as many as 117 environment courts to deal with issues regarding violations of legislation aimed at protecting the nation's environment and natural resources.[28] Moreover, these courts are further aimed at ensuring settlement and consent decrees rather than taking the litigation route[29] to ensure faster disposal of cases. Therefore, if a country like Philippines, comparatively smaller than India, can have this many environmental courts and regards environment as a serious concern, there is no iota of doubt that India should adopt the same.
- The authors suggest that India should establish more benches of the NGT, but the dilemma arises considering the large number of vacancies already evident in the current system.. In this situation, it will be pertinent to note the example of Brazil. Unlike many jurisdictions, the process for selecting trial and appellate environmental judges in Brazil is not managed by the government but rather the civil service.[30] Successful candidates are then selected on merit, based on a combination of their exam scores, education and experience.[31] Once selected, a newly admitted judge acts as a "substitute judge" which is an entry-level

23 NGT Bar Association (Western Zone) v. Union of India and Ors., Writ Petition (Civil) No. 1235/2017.

24 Press Trust of India, *NGT says committees formed by it cannot be dissolved by states without approval,* https://www.business-standard.com/article/pti-stories/ngt-says-committees-formed-by-it-cannot-be-dissolved-by-states-without-approval-119070800977_1.html,(last accessed on Oct 20,2020.)

25 Ceri Warnock, Reconceptualising the Role of the New Zealand Environment Court, 26 Journal of Environmental Law, 507–518 (2014).

26 Bret C. Birdsong, Adjudicating Sustainability: New Zealand's Environmental Court, 29 Ecology L.Q. 1, 28 (2002).

27 Resource Management Act 1991 (NZ) § 314-321.

28 Administrative Order Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases, S.C., No. 23-2008 (2008) (Phil.).

29 Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 2, R. 3 § 5.

30 George (Rock) Pring and Catherine (Kitty) Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals, The Access Initiative, 72 (2009).

31 *Id.*

position.[32] The substitute judge relieves more senior judges who are on leave or serve on ECTs that are overburdened. After a period of two years in office, these judges acquire life tenure up to the mandatory retirement age of seventy years.[33] This somewhat resembles the civil service examinations which happens in India. Therefore, rather waiting for a civil servant to reach a particular age and experience to become an expert member in the tribunal, entry level examinations can be held similar to district courts to ensure merit and expertise both with a longer time span for rendering service.

Conclusion

While the NGT has, since its inception in 2010, successfully strived to protect the environment and rights accruing from it, jurisdictional and administrative issues continue to plague its day-to-day functioning and hinder decision-making. It becomes the need of the hour, in such circumstances to enable these Tribunals to function freely and with broad powers in order to fulfill its objective of environment protection. The authors conclude that the Tribunal must be allowed to practice its *special jurisdiction* as recognised by the SC, and should not be stopped from exercising *suo moto* jurisdiction as and when required by the circumstances.

Further, administrative reforms, being the key to smooth and effective functioning of any State organ, should be incorporated throughout the NGT framework. For this, the Tribunal may take lessons from countries such as New Zealand, Brazil and Philippines. Setting up of larger number of benches of the Tribunal across the nation also an important concern in order to ensure access to environmental justice to all, provided it can be properly implemented in light of the abundance of vacancies .

32 Maria Angela Jardim de Santa Cruz Oliveira and Nuno M Garoupa, 'Choosing Judges in Brazil: Reassessing Legal Transplants from the US', 59 American Journal of Comparative Law, 529, 536 (2011).

33 *Id.*

RACIAL DISPARITY: AN IMPEDIMENT TO ENVIRONMENTAL JUSTICE

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Key Words: Environmental Racism, Race, EIA Draft Notification 2020, Environmental Justice

Introduction

Environmental Justice is a term coined in the mid-1980s. It is described as a social movement that looks to distribute equally and fairly the boons and banes of environmental actions.[1] It is the reasonable treatment with no relation to race, caste, creed or income, concerning the turn of events, usage, and requirement of ecological laws, guidelines, and approaches.[2] Environmental laws by nature are for the sustenance of the ecology for the benefit of all, thus being only fair that the brunt of such laws be borne by everyone equally. Environmental racism is the term used to describe environmental injustice that occurs within a racialized context both in practice and policy.[3] There are a few distinctive spatial levels where minorities have confronted prejudice which keeps them stuck in questionable situations. The authors opine that this is a compelling issue that has not been given its moment in the academic field. This article seeks to educate the readers about this aspect of environmental justice in two parts in the United States and in India in light of the recent EIA Draft Notification.

The Roots of Environmental Racism

Environmental racism has been historically linked to the environmental justice movement; however this link has been weakening.[4] The concept of the environmental justice movement is postulated on the belief that racism and classism affect the uneven distribution of environmental risks in the United States.[5] Dr Robert Bullard — the "father of environmental justice" — found "race to be more important than socioeconomic status in predicting the location of the nation's commercial hazardous waste facilities." The civil rights movement also broadened its focus to include the disproportionate risk the racial minorities suffer owing to the exposure to environmental hazards.[6] In light of instances of environmental racism the organizational campaigns working at primary levels have drawn attention to the racism that exists in policy making and has also exerted the importance of including the minority groups and also including their opinions and inputs while making policies.[7]

Environmental racism can be found in sociological theories which point to racial and ethnic oppression or giving rise to environmental injustices which restrict the right of minority groups to make decisions with respect to the surroundings they live in.[8] Another viewpoint contends that there are four elements that lead to environmental racism: the most prominent ones are- lack of affordable land, no means of mobility, lack of political power and poor economic conditions.[9]

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1 David Schlosberg, Defining Environmental Justice: Theories, Movements, and Nature. (Oxford University Press 2007).

2 "Environmental Justice". U.S. EPA. (9th Sept. 2020, 11:56AM).

3 Robert Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 Phylon 72, 82 (2001).

4 Tara Ulezaka, *Race and Waste: The Quest for Environmental Justice*, 26 Temple Journal Of Science Technology & Environmental Law 51, 52 (2007).

5 Lynn E. Blais, *Environmental Racism Reconsidered,* 75 North Carolina Review 75, 77 (1996).

6 Pat Bryant, Toxics and Racial Justice, 20 Soc. Pol'y 48, 51-52 (1989).

7 Perez et al., Evolution of the Environmental Justice Movement: Activism, Formalization and Differentiation. IOPscience (October 18th, 2020, 9:35AM), https://iopscience.iop.org/article/10.1088/1748-9326/10/10/105002.

8 Robin Saha, Environmental Racism, Encyclopaedia Of Geography, (Barney Warf, ed. Sage Publication 2010).

9 Rozelia Park, *An Examination of International*

Benjamin Chavis on the other hand believed that racism in environmental policies could be of five types: discrimination while framing policies, poor enforcement of laws, waste siting areas in minority habitats, sanctions received by government bodies to use hazardous substances in areas dominated by minorities and barring of individuals belonging to minority communities from holding leadership positions.[10] Usually these minority groups do not have the requisite financial resources or representation to oppose the dumping of these hazardous wastes in the proximity of their habitats.[11] The popularly known LULU-Locally Unwanted Land Uses, which benefit the larger share of the community quite often, lessen the quality of life of minority groups.[12] Sub-urbanisation also plays an important role in contributing to environmental racism. It is a vicious cycle where minorities reside in inner cities where due to shortage of money, the industries are less likely to invest in growth of the area.[13]

Instances of Environmental Racism

A few instances where environmental racism was evident include the following:

1. Warren County, North Carolina:

Environmental racism and justice emerged as one entity during the 1983 protest against the PCB landfills in Warren County.[14] The state officials of North Carolina tried to bury the soil highly contaminated with polychlorinated biphenyls (PCB) in a small town called Afton in the vicinity of Warren County, where such an action was considered illegal.[15] Consequently, during 1978, 30,000 gallons of PCB-infested waste was dumped along 200 miles of roads. Even though the U.S. EPA established that PCB imposed a threat to public health and the states must get rid of such polluted waste, the EPA region 4 selected Warren County to dispose of the PCB contaminated soil that was picked up from the road sides.[16] In 1982, NAACP filed a lawsuit to stop the filling of toxic waste, however, it did not make any difference and the PCB landfill was built.[17] Roughly after 2 decades of suspecting leaks, the federal officials finally initiated a clean-up by paying $18 million to a contractor.

2. Poisoned tap water in Flint, Michigan

The case of poisoned water in Flint, a city that is almost 57% black and notable impoverished, is an elemental instance of environmental racism. In 2014, the city, in order to cut down costs, changed the course of the Flint river. The city, however, failed to treat the water of its effluents and subsequently exposed nearly 1,00,000 black-inhabitants to menacing levels of lead and other contaminants such as E.Coli. The lead content met the EPA's definition of "toxic waste" and the residents used the same water for drinking. The residents' complaints of discoloured water resulting in hair loss and skin rashes were not taken cognizance of until the community laid immense pressure on the City to reinforce their former water supply.[18] In November, a class-action suit was filed and laid emphasis on how Michigan's Department of Environmental Quality (MDEQ) had failed in shrugging off its duties of treating the water and failed in treating the lead in the new water source which resulted in

Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes, 5 Indiana Journal Of Global Legal Studies 659, 662 (1998).

10 Ryan Holifield, *Defining Environmental Justice and Environmental Racism*, 22 Urban Geography. Milwaukee, V. H. Winston & Son, Inc. 78, 79 (2001).

11 Kelly Michele Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153, 183 (1991).

12 Frank Popper, *The Environmentalist and the LULU*, 27Environment: Science and Policy for Sustainable Development 7 (1985).

13 Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 Annals of the Association of American Geographers 12, 32 (2000).

14 Robert Bullard, *Environmental Racism: PCB Landfill Finally Remedied, but No Reparations for Residents*. South End Press (2004).

15 Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 61 (1994).

16 *Id.*at 61.

17 Susan Cutter, *Race, Class, and Environmental Justice*, 19 Progress in Human Geography 111, 113 (1995).

18 Peter Beech, *What is Environmental Racism?* World Economic Forum (29th September 2020, 10:57AM) https://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/

the discolouration of water. The entire act was against the Lead and Copper Rules along with the carelessness of MDEQ of meeting the safety standards as laid under the Safe Drinking Water Act.[19] The Michigan Civil Rights Commission concluded that the slow official reaction was a "result of systemic racism."[20]

3. Louisiana Cancer Alley

Cancer Alley is the 85-mile stretch of the Mississippi river that is encased with a dense number of chemical factories and refineries that are situated along the suburban areas and vulnerable communities. This stretch extends between New Orleans and Baton Rouge. This place is called so because the depleting river communities are being polluted by the factories that line the river. The town faces a risk of cancer 50 times than the average of the other states. In 2015, the EPA not only pointed out the higher risk of cancer throughout the region, but also pin pointed Reserve to be the most affected. This impoverishment is caused by industrial giants such as Shell, Koch and Exxon-Mobil which emit highly toxic air into the environment and lead to ailments ranging from cancer to respiratory diseases. [21]

Environmental Racism is a part of the bigger picture, i.e. systemic racism which must be eradicated to bring in a fairer society. Mere pressuring of people in positions of power to purge out the hazardous wastes from the environment will not suffice, but active measures must be taken to prohibit the siting of hazardous waste in the proximity of minority communities. This can be achieved by providing information to the local residents and most importantly providing them with a seat at the table while these crucial decisions are made. As the Environmental Justice Movement develops and advances to take on new global facets, the focal question remains on how these global patterns in attaining justice will interact and measure up the U.S domestic environmental justice movement.

The Scenario of Environmental Racism in India And the EIA Draft Notification Being A Casualty of Environmental Racism

Traditionally in India, the rights of forest dwellers and tribal populations were not recognised. From the time of Zamindari system, there have been successful attempts to systematically exploit the populations who depend on forest produce. Environmental racism is deep rooted in most legislations till date. Tribal populations and locals are closely related to the environment they live in. The forests are the main source of their livelihood and they consider the environment to be a part of their lives.[22] The Forest Conservation Act of 1980, was an important legislation with an objective to preserve the forest areas of the country. However, it was more of a bane to the locals as only "reserved forests" were not to be used for deforestation without the express consent from the Centre.[23] This Act unknowingly dug deeper into the pit of environmental racism as states did not invest in small but necessary activities such as schools and hospitals in "reserved forest" areas, making the indigenous population more backward than the rest of the state.[24] Similarly, the roots of environmental racism are also seen in The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, where there is a distinction made between the Scheduled Tribes and the Other Traditional Forest Dwellers (OTFDs).[25] The Scheduled Tribes, due to their caste, are given certain eligibility in the

19 Bhawani Venkataraman, *The Paradox of Water and the Flint Crisis.* 60 Environment: Science and Policy for Sustainable Development 4 (2018).

20 The Flint Water Crisis: Systemic Racism Through the Lens of Flint, Reporter of The Michigan Civil Rights Commission. https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf.

21 Antonia Juhasz, *Louisiana's 'Cancer Alley' Is Getting Even More Toxic — But Residents Are Fighting Back,* THE ROLLING STONE, (September 29, 2020, 3:05PM) https://www.rollingstone.com/politics/politics-features/louisiana-cancer-alley-getting-more-toxic-905534/

22 Mahendra Mohan Verma, Tribal Development In India: Programmes And Perspectives 516 (2 ed. Mittal Publications, 1996).

23 The Forest (Conservation) Act 1980, §2 cl.(i).

24 Satyakam Joshi, *Tribes Land and Forests: Emerging Legal Implications with reference to PESA and FRA,* National Institute of Rural Development and Panchayati Raj (October 20, 2020, 7:45AM) http://nirdpr.org.in/nird_docs/srsc/srsc230217-22.pdf

25 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Preamble.

recognition of their rights, however, the OTFDs have to prove uninterrupted residence of the forest area in question, for three generations.[26] This leads to deserving communities not being able to back their claims and therefore are not recognised by the state for the rights they deserve, as this dates all the way back to the British Era and the Zamindari system, when documents of evidentiary value were not given importance. The rejection rates of the OTFD people under the Act are alarming in Chhatisgarh and Odisha, standing at 90% and 98% respectively compared to the rates of 42% and 38% for STs in the same states,[27] showing the depth of environmental racism in the country. In such a situation, the EIA Draft Notification is also a casualty of the long-standing environmental racism in the country.

The Environmental Impact Assessment (EIA) is a process which scientifically evaluates the possible outcomes of any proposed economic activity by taking into account a variety of inter related socio economic, cultural and human health impacts, both negative as well as positive.[28] The EIA is a practical approach to the precautionary principle which states that, in cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventive measures.[29] The EIA Draft undermines the rule of co-operative federalism followed by the National Green Tribunal.[30]

The 2020 Draft Notification suggests the following changes which have brought about apprehension among the people:

1. The B2 list of activities:

Clause 13, Sub-clause 11 of the Notification deals with the list of Industries and Activities that do not need approval from relevant agencies to set up in ecologically sensitive zones. The projects under this category include offshore and onshore oil, gas and shale exploration, hydroelectric projects up to 25 MW, irrigation projects, among others. They also include Micro Small and Medium Enterprises (MSMEs) in dye and dye production.[31] The EIA 2006 Amendment prior to the 2020 Notification was adamant on the projects under the list to be scrutinised by an Expert Appraisal Committee instead of directly being exempted from approval agencies.[32] This change has been viewed as a threat to the environment, and is a retrograded move as it is against the motive of an EIA. In spite of this being a Draft Notification, not in effect, the State of Assam has already seen a massive oil blowout at Baghjan, that killed several and displaced over 7000 people.[33] It was reported that the oil well did not have the mandatory permissions under Sections 25 and 26 of the Water Act, 1974 and Section 21 of the Air Act, 1974.[34] Without oversight from necessary authorities as provided by the EIA Draft Notification, incidents like this will be more commonplace. This would contribute to the problem of environmental racism as city dwellers do not bear the brunt of such incidents, indigenous populations do.

2. Post Facto Clearance:

The provision of Post Facto Clearance[35] in the Draft Notification is a direct violation of the precautionary principle that has been adopted by environmental law bodies as their own. Post

26 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, §2 cl. (o).

27 Asavari Raj Sharma, *The 'Other' in the Forest Rights Act Has Been Ignored for Years*, The Wire India, (October 19, 2020, 5:00PM) https://thewire.in/rights/the-other-in-the-forest-rights-act-has-been-ignored-for-years.

28 *What is Impact Assessment?*, Convention On Biological Diversity (September 25, 2020, 10:34AM) https://www.cbd.int/impact/whatis.shtml.

29 Martuzzi & Tickner, *Introduction — the precautionary principle: protecting public health, the environment and the future of our children*, WHO Europe (September 25, 2020, 10:40AM) https://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf.

30 State of Rajasthan & Ors v. Union of India & Ors, AIR 1977 SC 1361.

31 Environmental Impact Assessment (Draft) Notification 2020, cl.13, scl. 11.

32 Environmental Impact Assessment Notification 2006.

33 The Economic Times, *Baghjan blowout: Major lapses by Oil India*, The Economic Times (September 22, 2020, 12:45AM), https://energy.economictimes.indiatimes.com/news/oil-and-gas/baghjan-blowout-expert-panel-report-alleges-major-lapses-by-oil-india/77233838.

34 Bonani Kakkar v. Oil India Ltd. & Ors. I.A No.30/2020, Principal Bench, NGT.

35 Environmental Impact Assessment (Draft) Notification 2020, cl. 22.

facto clearance allows for violation of the EIA during set up and operations, and applying for a certificate at a later date, with imposition of a calculated amount for violation of the EIA norms which is counter-productive and is violative of the entire rationale behind the implementation of an EIA regime. By its very definition, an EIA regime is to analyse the likely impact of any project before it's initiation to prevent untimely and unnecessary harm to the environment and therefore the indigenous populations. In the LG Polymers Gas leak case according to the EIA Notification 2006, the plant fell under Category 'A' industry and would require an updated EIA clearance on every instance of expansion of the plant.[36] The plant officially never had any clearance from the State Pollution Control Board (SPCB), Andhra Pradesh, and had expanded 5 times since its set up.[37] This is a prime example of negligence that would take place if post facto clearance became a reality in this country. The NGT recognised the importance of Environmental Clearances with respect to the precautionary principle and stated that the ministry shall should strengthen the monitoring mechanism for compliance of conditions of Prior Environment Clearance.[38]

It is a well-known fact that pollution of lands by industries renders them unusable for a long time. Therefore, granting retrospective clearance to industries indirectly leads to ruthless land grabbing of forests and its resources relied upon by locals. This land, on shutting down of heavily polluting industry previously situated on said land, is of no use to local populations and therefore widens the problem of environmental racism in the country.

3. Reduction of Compliance Reports:

The EIA 2020 Draft Notification seeks to replace the existing mandated number of compliance reports. It looks to reduce the number of reports from two per year to one per year. The effectiveness of any law or notification is best represented by the results it garners after implementation. Despite having regulations for pollution deeply rooted in the Environment Protection Act, 1986 and Separate legislations such as the Air (Prevention and Control of Pollution) Act, 1974; research shows that in the index of most polluted cities in the world, India has an eerie fourteen cities in the top twenty.[39] The report clearly shows the level of effectiveness of the existing legislations, and in order for the ministry to analyse the effectiveness of the laws and correct them, they would logically require more data points. In a country where enforcement is a big problem, reducing the number of compliance reports from industries gives them a motive and the leeway to pollute and exploit environmental norms; which is something the ecology cannot afford at this point in time. This move if implemented, would further discriminate against the local populations, making them vulnerable to higher environmental costs, as they do not have up to date information about the industries operating in their vicinity.

4. Reduction of Public Consultation Time:

The 2020 Draft Notification seeks to reduce the time of public consultation from 30 days to 20 days. Public Consultation is one of the pillars on which the EIA regime stands. India's development roadmap over the years shows a clear picture of how the transfer of wealth has taken places from poor marginalised sections of society to richer sections. Mega Dam projects over rivers are a good example of how city dwellers derive pleasure out of the bane of tribal homes. Greater the project, greater the centralised control over it. Thus, development has done very little to ease the social inequalities.[40]

The Supreme Court in *Hanuman Laxman Aroskar v. Union of India*[41] recognised the intrinsic as well as the instrumental role of public consultation which enabled widespread participation in environmentally questionable decisions. The

36 Environmental Impact Assessment Notification 2006, cl. 2.

37 In re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village Visakhapatnam in Andhra Pradesh, O.A No 73/2020, Principal Bench, NGT.

38 Sandeep Mittal v. Ministry of Environment, Gov. Of India, (2019) SCC ONLINE NGT 609.

39 IQAir Most Polluted Cities PM 2.5 Index, IQAir (September 30, 2020, 9:45AM) https://www.iqair.com/us/world-most-polluted-cities.

40 Biswaranjan Mohanty, *Displacement and Rehabilitation of Tribals,* 40 Economic and Political Weekly, 1318, 1320 (2005).

41 Hanuman Laxman Aroskar v. Union of India (2019) SCC SC 441.

Right to Information and public participation as conjoint processes[42]; the state's duty to disseminate information and increase public awareness[43] and the peoples' role as a jury instead of an audience to environmental decisions[44] are all well recognised principles laid down by the honourable Supreme Court in these landmark judgements.

Local populations near upcoming industrial projects are keen on participating in such decisions as such projects have many repercussions for their livelihood and habitat. This is seen in the recent writ petition filed in the Maharashtra High Court against the MPCB for making a mockery of public participation by giving online permissions to sand mining industries.[45]

In a situation where the notification is available in English and Hindi only, with a diverse population existing in the country, reducing the time for public consultation is a perverse decision not to cooperate with the local population. Reducing public consultation time adds to the problem of environmental racism as it discriminates against local populations by not giving them the platform to share their grievances.

The EIA Draft Notification, in the authors' opinion, worsens the problem of environmental racism. The above reasons given by the authors show that the Draft Notification is not up to the mark and the authors have good reason to conclude that it is a blatant attempt to dilute the current EIA regime. All the above clauses of the Notification increase the environmental burden on local population by reducing public participation. Post Facto Clearance and reduced number of clearances encourage the problem of land grab in ecologically sensitive zones and setting up of industries by putting majority of the environmental costs on the locals. In opposition to the proposed changes, the need of the hour is to reinforce natural guidelines by improving the nature of benchmark studies, presenting a more grounded arrangement of balanced governance and making the cycle more straightforward and comprehensive for various stakeholders, without discrimination. The Ministry should take into consideration the ramifications of such moves which appear to be pro-industry and anti-environment before disguising the moves under the banner of an environmental law.

42 Tirupur Dyeing Factory Owners Assn v. Noyyal River Ayacutdars Protection Assn., (2009) 9 SCC 737.

43 Research Foundation for Science Technology National Resource Policy v.Union of India, (2005) 10 SCC 510.

44 Samarth Trust and Anr v. Union of India and Ors, (2010) DRJ 117 113.

45 Vaibhav Ganjapure, *MPCB's sand mining public hearings on Zoom challenged*, Times Of India (September 12, 2020, 1:56PM) http://timesofindia.indiatimes.com/articleshow/76292144.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

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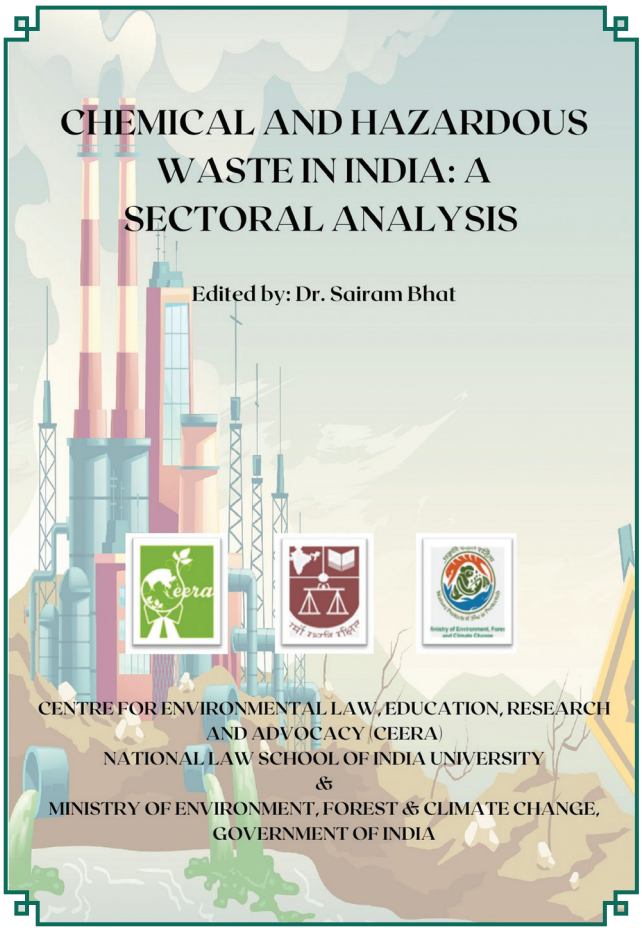

Trade -Off Between Economic Freedom and Environmental Justice: Analysing the Trends in Judicial Pronouncements in India VIS-À-VIS Environmental Economics

*- Mr. Sandeepani Neglur**

Key Words: Balance, Environmental Economics, Infrastructural Projects, Trends, Judiciary, Economic Principles

Introduction

Environmental Justice has been a relatively new concept which has evolved with the development of rights-based model in India wherein, the people's right to clean and free environment has been recognised as one of the fundamental rights in the Constitution of India[1]. Historically speaking, Vedic literature depict rules and procedures wherein environment has to be worshipped, constantly preserved and protected in order to ensure a better and cleaner form of human life[2]. A jurisprudential analysis of the rights-based model has been evolving constantly from an earlier time in order to preserve and protect[3]. Right to clean and safe environment has evolved from a more of an eco-centric form of environment rather than an anthropo-centric form of environment where sensitization of protection of environment was brought forward with the advent of economic development in India and with the growth of education coupled with judicial measures undertaken in order to preserve and protect the environment[4]. The court has an important role to play in this front by bringing out various principles to the forefront on the means of which economic development within the nation is ensured and protected constantly. The mandate of Article 21 of the Constitution has been widened to include various aspects of protecting environment within its ambit by the Judiciary in order to ensure that there are constant efforts undertaken to preserve and protect the environment at all costs[5].

Judicial Mandate under the Constitution: Protection of the Environment

Environment forms the primary element in any human being's life, but there is a gradual decline in the nature of environment because of the aspect of denigration of nature caused due to deforestation, loss of vegetation and other such problems in the society. The primary protector of environment is the Constitution of India, which provides for various rights and duties on the citizens and the government agencies. But the sole credit must not be given to the articles as such, but the interpretation given to the articles given by the Indian Judiciary lead by the Supreme Court of India[6]. The role of the judiciary has been primarily proactive when it comes to protection of environment when various judgments of the Apex court has delivered and analysed various doctrines and principles of environmental protection in the nation[7]. The most important article when it comes to protection of environment has been Article 21 of the Constitution which

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1 Vinay Vansh, *Environment Laws in India,* MONDAQ, (Aug. 18th, 2020, 10:10 A.M), https://www.mondaq.com/india/waste-management/624836/environment-laws-in-india.

2 Sangetha Mugunthan, *An Appraisal of Environmental Law: Birth of The Right to Environment in India,* LEGAL SERVICES INDIA, (Aug 20th, 2020, 4:30 P.M), http://www.legalserviceindia.com/articles/evn.htm.

3 Shibani Ghosh, *Indian Environmental Law: Key Concepts and Principles,* CENTRE FOR POLICY RESEARCH, (Aug 20th, 2020, 5:00 P.M), https://www.cprindia.org/news/indian-environmental-law-key-concepts-and-principles.

4 Geentanjoy Sahou, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 LAW ENVIRONMENT AND DEVELOPMENT JOUNAL 3, 6 (2019).

5 Iqbal Ali Khan and Mirza Juned Beg, "*Climate Change: Problems and Prospects*" 7 LEGAL JOURNAL QUEST FOR JUSTICE 10, 22 (2015).

6 Sandra D Benisheck, *Clean Air in Indian Country: Regulation and Environmental Justice,*12 VILLANOVA ENVIRONMENTAL LAW JOURNAl 211, 221 (2001).

7 Prabash Ranjan, *Bilateral Investment Treaties and the Indian Judiciary,* 46 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 809, 833 (2014).

provides for right to life and personal liberty and the scope of the same has been extremely widened to include various concepts such as right to clean and healthy environment, right to clean air and neat surroundings[8]. The next article under the constitution has been Article 14 of the Constitution and with it comes the concept of inter and intra-generational equity[9]. Along with these fundamental rights, comes the directive principles of state policy under which Article 48A provide a duty upon the state to protect and preserve and protect the environment and forest resources in order to ensure that the same isn't depleted in any manner as such[10]. The last article is Article 32 of the Constitution which provides for right to enforce fundamental rights through the means of various writ petitions which has been utilized quite frequently as the aspect of *locus standi* has been eliminated and any concerned citizen looking forward to protecting the welfare of the country can file a petition to preserve and protect the environment[11].

Analysis of the Clash between Economic Interest and Preservation of the Environment.

The aspect of development of an economy is extremely important to a country like India as it has attained independence relatively later than most developed countries that has attained Independence compared to India and this leads to a duty vested in the makers of modern India to ensure that there is a rapid development in the economic conditions of the country and the same has to led to a drastic increase or onus being placed in industrialisation primarily, development of medium and large scale industries in the country with the various five year plans that has been implemented throughout the decades which focused primarily on infrastructure development coupled with rise in GDP with the rate increasing from 5% since the Second Five Year Plan.[12] Along with that, there has been an increase in the number of foreign investments where there foreign companies have been actively investing in the development of various indigenous projects and the same has been actively promoted by the Indian Government as well[13]. In the society as well, a number of infrastructural projects has been undertaken including the construction of roads, highways, expressways, railway lines, airports, metro, public industries and other such projects which have an impact on developing the economy of the nation as well[14].

The number of developmental projects has been ranging from private projects undertaken by various private companies which includes environmentally sensitive activities such as construction, mining and other such activities. The other set of activities includes Government projects that are given to various private parties on a contractual basis or Governmental projects that is undertaken in partnership with various private parties as well and these are the broad headings of the projects which comes under the concept of economic developments within the country[15]. These projects are very massive in nature and the same take up lot of space as well as resources to develop and upgrade after a few years of usage as well and that creates a problem when it comes to preservation of environment as well. With the influx of COVID 19 pandemic, there has been a slowdown on the various economic interests and as time passes by, the number of economic activities will drastically increase and the same puts pressure on the environment as well as developmental activities will end up creating problems in terms of preservation and protection of environment as well[16]. This shows a history of clash between various economic and environmental interests and various inference or trends can be inferred from the analysis of

8 Subash Kumar v. State of Bihar, AIR 1991 SC 420.

9 State of Himachal Products v. Ganesh Wood Products, AIR 1996 SC 149.

10 T. Damodhar Rao And Ors. v. The Special Officer, Municipal Corporation, Hyderabad, AIR 1987 And 171.

11 Chhetriya Pradushan Mukti Sangharsh Samiti v. State of U.P. & Others, AIR 1990 SC 2060.

12 Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice,* 44 ECOLOGY LAW QUARTERLY 89, 94 (2017).

13 Alexander Eckstein, *Planning and Economic Development in India*, 11 WORLD POLITICS 128, 131 (1958).

14 Wilfred Malenbaum, *Some Political Aspects of Economic Development in India,* 10 WORLD POLITICS 378, 382 (1858).

15 Atul Kholi, *Democracy, Economic Growth, and Inequality in India's Development*, 100 GEORGETOWN LAW JOURNAL 571, 560, (2012).

16 Dhamini S.S, *Rural Development in India*, 69 INTERNATIONAL LABOUR LAW REVIEW 452, 465 (1973).

the judicial decisions as well. There are various judicial decisions that highlight the nature of the clash between these two interests and the results of the same. This serves as a chilling reminder that the Supreme Court has ruled in the favour of various private parties when it comes to the aspect of preservation and protection of environment. In the case of *N.D Jayal and Anr v. Union of India*, 2004, the Apex Court held that right to development is no longer a misnomer for "construction activities" only and the same includes a broad range of rights as a whole including civil, cultural, economic and political in nature[17]. There are various cases that have been given in the favour of various infrastructural projects as well and the same has been dealt out very rarely when there has been proper evidence on behalf of various economic groups regarding compliance with various procedures[18].

These cases demonstrate various rare instances when the rights of the various economic interests of the society has been upheld over the rights of various other environmental interests and they demonstrate that whenever it is absolutely necessary, the court ruled in the favour of private parties and upheld their claims. However, the Courts have historically favoured environmental interests over private party claims. A license to construct a motel was revoked and the same was held to be valid by the Supreme Court as the motel had encroached on forest land and diverted the course of a river and the motel was subjected to fines and punishments[19]. A construction demolishing a public park was held to be a breach of Right to Clean Air and Environment under Article 21 of the Constitution and an injunction was issued against the construction as the courts recognised the citizen's right to clean and healthy air[20]. The numerous decisions ruled in favour of the parties fighting for the Environment has led to various inferences being drawn about the nature of decisions and the impact or the consequences on the Indian economy and the various trends that have been highlighted down as follows—

1. In numerous judgments, the Supreme Court has ruled in favour of various parties that fight for the cause of the environment thereby setting a precedent or a stance of the court strongly in favour of environmental protection even at the cost of economic development and there has been no form of balance brought between the two divergent forces of protection of environment and ensuring economic development calling upon a new form of method or new form of analysis of the problem situation to arrive at a better and much more balanced conclusion which favours both the parties
2. The nature of economic development is severely affected as the number of PILs filed for any project which has a significant environmental impact reduces the time period for construction of the project and delays the subsequent income or revenue that could be generated from the same as the necessity of the project is not given due consideration when deciding the outcome of the project[21].
3. The nature of uncertainty in deciding the outcome of the project leads to reduction in the number of investments because the investors are unsure of the consequence of the project and the same has an impact on FDI and other such sources as well and this is extremely bad for economic development as investors and entrepreneurs are unsure of the nature and consequence of the project due to several procedural problems and subsequently leads to an increase in procedural improprieties and a significant rise in the nature of corruption and bribery to find a "loophole" around the various laws[22].
4. When it comes to projects being upheld by the Court, the Court upholds Governmental Projects or Private projects that is being constructed for the benefit of the public in general and the court favours private projects a little less due to the motive of the project

17 N.D Jayal and Anr v. Union of India, (2004) 9 S.C.C. 362.

18 Rhuks Temitope, *The Judicial Recognition and Enforcement of the Right to Environment:Differing Perspectives from Nigeria and India*, 3 NUJS LAW REVIEW 423, 426 (2010).

19 M.C Mehta v. Kamal Nath, (1997)1 SCC 388.

20 T. Damodhar Rao And Ors. v. The Special Officer, Municipal Corporation, Hyderabad, AIR 1987 And 171.

21 Uday Shankar and Saurabh Bindal, *Right to Environment and Right to Development: A Judicial Conundrum*, 1 CHRIST UNIVERSITY LAW JOURNAL 49, 52 (2012).

22 *Id.*

being for the purpose of private gains. Even with that reasoning, there is no guarantee that the Court will approve of any form of project just for the mere reason of public benefit as the courts will give precedence to the parties fighting for the cause of the environment rather than providing green light to the projects that have a significant economic development[23].

5. From the decade of 1970's to 2010, in any case of significant environmental clash with infrastructural projects, there has been an increased percentage of the case being ruled in favour of the parties fighting for the cause of the environment and the percentage has gradually decreased over the next decade or so as the courts begin viewing the situation in a manner so as to not cause an adverse effect on significant economic activities and the same could be attributed to various number of factors given the economic growth, political influence, the nature of the Government, the type of project itself, the composition of the Court, principles and doctrines that have been evolved over the years and the influence of various international agreements and treaties to which India has been a signatory[24].

Principles of Environmental Economics as a Possible Solution

A good solution in order to balance the clash of two divergent interest of economics and environment is to allow a new and upcoming subject to help in balancing the clash by providing a new perspective on the clash and the same can be done through the means of environmental economics as such. Environmental Economics is an upcoming and developing subject that applies various economic principles and tools to various environmental harmful scenarios or situations in order to arrive at a mutually possible solution by providing a new perspective on the solution[25]. The primary goal of environmental economics is to increase the wealth in the society and that could be through the means of improving economic efficiency and preserving and protecting environment at the same time as well[26]. Environmental Economics does not recognise the aspect of Pareto Superiority in the solution and only recognises the aspect of Pareto Optimality where a balance between the solutions can be brought out and the solution brought out does not lead to an increase in the position of either parties as such and environmental decisions have to be looked in at those manner where either party should not be favoured more than the other party[27]. Another form of efficiency that is proposed here is the Hicks Kaldor efficiency wherein there has to be a form of net gain to the society as a whole and the party that gains the most of the resources available must compensate the other party for the loss of those resources and the same should end up causing a net benefit to various individuals of the society rather than a net loss. [28] A prominent Supreme Court case rests upon the same parameter wherein the Supreme Court lifted the suspension on the grant of environmental clearance for the construction of a new airport in Goa with several conditions that the same must done in accordance with the costs imposed upon it by NEERI and should comply with all the directions in order to ensure effective rehabilitation of the environment as well and the same is a good example of the Court ensuring Hicks -Kaldor efficiency in the society as such[29]. One of the most important economic principle is internalizing the social cost of pollution on the person causing the pollution and efficient risk allocation between parties wherein various principles of precautionary and prevention principles and polluters pay principles which deals with these two concepts of internalizing the cost and allocating risk between the two parties wherein a net gain is caused to the society as a whole[30].

23 *Supra* note 21 at 55.

24 Shalini Iyengar, *Selectively Assertive: Interventions of India's Supreme Court to Enforce Environmental Laws,* 11 MDPI JOURNAL ON SUSTAINIBILITY 21, 32 (2019).

25 *Id.*

26 Robert F Rooney, *Environmental Economics*,1 UCLA JOURNAL OF ENVIRONMENTAL LAW AND POLICY 47, 56 (1980).

27 *Id.*

28 Honourable Justice Brian J. Preston, *The Role of the Judiciary in Promoting Sustainable Development*: The Experience of Asia and the Pacific, A Paper Presented to the Kenya National Judicial Colloquium on Environmental Law Mombasa, Kenya, 90 (2006).

29 Hanuman Laxman Aroskar v. Union of India, (2019) 2 SCC 441.

30 Ronald Coase, *The Problems of Social Cost,* 1 JOURNAL OF LAW AND ECONOMICS 1, 26 (1960).

Over here, the economic activity is allowed and not stopped and the cost is placed on the party causing pollution to provide for compensation in order to ensure that there is no significant harm is caused to nature and one main important principle here is that the cost imposed on the party causing the pollution should not exceed the production cost otherwise, there will be a loss of incentive on behalf of the party to pay for the pollution caused[31]. A recent judgment of the court in the case of *Saloni Ailawadi and Ors. v. Union of India and Ors*. (2019) or the Volkswagen Emissions scandal explains this form of scenario in a proper manner wherein the Court charged the automobile conglomerate with a mere fine only therefore, reversing the order of the National Green Tribunal given in 2017 and ordering that coercive action should not be taken in any manner against the company as a whole which falls squarely within the definition of "environmental costs" that are imposed in order to internalize the cost of production and not cause any form of severe economic repercussions upon the company's actions and the same could be stated as a Pareto Optimal Outcome[32]. The second aspect to understand is the form of ADR mechanism of law wherein a Coasian form of bargaining takes place where, in the absence of any form of property rights, the parties will come at the most beneficial solution and the same must be analysed as a possible outcome in a number of judicial decisions as well and the same must be picked up in various environmental disputes as presence of the same has been virtually non-existent as such.[33] The theorem was further analysed in the case of *Shivshakthi Sugar Ltd v. Shree Renuka Sagar Ltd and Ors* wherein the court looked into various aspects of law and economics as such and established a need for a Coasian form of bargaining wherein the two parties will try to arrive at a mutually beneficial solution out of the situation and the court advocated for more mutually beneficial solutions to be arrived upon in the same manner[34]. These are the various forms of principles and tools that could be utilized by the Supreme Court in order to try and bring a balance between the two divergent interests, thus reinstating the fact that Environmental Economics could serve as a viable tool in deciding the outcome of the cases.

Conclusion

When two divergent interests clash, there is an ultimate favourite that is given priority to and parties representing the environment has been given priority over the few decades since the inception of judicial interpretation over the protection of environment under the various articles of the constitution. The nature of these judicial decisions has to be kept in due consideration and the consequences and effects of the same has to be placed at the forefront in order to ensure that economic development in the country is not impacted in a severe manner as a whole. It can be conceded that courts have to be given primary consideration to various environmental interests because of the nature of risk that is there when it comes to the aspect of harmful environmental activities taking place. There are various arbitrary actions of the Government as well which significantly harms various private parties and the same has been declared as invalid by the court of law. But, at the same time, in order to administer due justice, the court should not significantly reject the claims of the various economic parties and the due concession should be given to the private parties or Governmental projects seeking to have a large scale economic development for the general development of the public. Environmental Economics serves as a valuable tool in order to resolve the clashes in an effective manner in the society and as and when the time progresses, the nature of these clashes is going to deeply intensify and the same should be resolved in the quickest possible manner as such. The various principles of economic analysis must be applied in various environmental scenarios in order to arrive at the best possible outcome in the various cases in order to bring about a proper balance between the two divergent forces .

31 ADMINISTRATIVE STAFF COLLEGE OF INDIA, ANALYSIS OF EXISTING ENVIRONMENTAL INTERESTS IN INDIA 46 – 47, (1 ed, United Nations Development Programme 2009).

32 Veera Mahuli, *Will the Supreme Court set a Precedent in the Volkswagen Emissions Scandal?,* THE WIRE, (Sept 19th, 2020, 1:10 P.M), https://thewire.in/environment/will-the-supreme-court-set-a-precedent-in-the-volkswagen-emissions-scandal.

33 *Supra* note 26 at 30.

34 Shivshakthi Sugar Ltd v. Shree Renuka Sagar Ltd and Ors, (2017) 7 SCC 729.

BOOK REVIEW

SOCIO-LEGAL IMPACTS OF COVID-19: COMPARATIVE CRITIQUE OF LAWS IN INDIA AND NEPAL

*by Alok Kumar Yadav & JiveshJha**

-Vikas Gahlot**

The outbreak of nCOVID-19 will go down in history as one of the pivotal moments of the twenty first century. The pandemic has caused millions of deaths and affected almost all spheres of human activity. It has not only impacted the daily lives of the individuals but has also tested the pandemic-preparedness of the established world order. Democracies, monarchies, dictatorships etc. alike have struggled to contain the rapidly spreading deadly virus. Several countries across the globe have been forced to take drastic measures and place restrictions on fundamental rights ranging from social distancing to complete economic lockdown. As the COVID-19 saga continues to unfold, a critical discourse on the legal dimensions of the impositions of the restrictions and other governmental responses to tackle the pandemic becomes pertinent.

In this regard, the book *Socio-Legal Impacts of COVID-19: Comparative Critique of Laws in India and Nepal* by Alok Kumar Yadav and Jivesh Jha is an informative, thought-provoking and timely exposition of comparative legal research. Accompanied with a lucid foreword by Dr. Bipin Adhikari, the book canvases the legal dimensions of the lockdown observed in both India and Nepal till the month of May, 2020. The book not only narrates how the Indian and Nepalese Governments responded to the pandemic, and what legal instruments were utilized for the same, but it also analyses these governmental actions critically from a jurisprudential and comparative perspective.

The core text of the book is structured across eight chapters including introduction and conclusion. A short introductory note by Prof. (Dr.) A. K. Pandey sets the tone for the discussion on conformity of governmental action with the law of the land in a country governed by the principle of rule of law. It mentions how both India and Nepal have tried to achieve this balance between rule of law and governmental action during a pandemic with India implementing a 123-year old colonial legislation (supplemented by Disaster Management Act, 2005) while Nepal enacting and implementing the Infectious Disease Act, 2020. It provides a thought-provoking launch pad to the discussions that follow later in the book.

The second chapter titled Historical Background of Epidemic/Pandemic firstly sheds light on the meaning and underlying difference between pandemic, epidemic, and an outbreak with the purpose of determining when a disease turns into a public health concern. It discusses other pandemics that the world has witnessed/observed such as: influenza virus, H5N9, H1N1, Spanish Flu, Ebola, Polio, Malaria, Cyprian Plague, Justinian's Plague, Black Death, The great plague of London, Cholera, Fijin Measles, Russian flu, Asian Flu, AIDS, SARS etc. Put succinctly, the authors convey the message that the COVID-19 outbreak is not the world's first pandemic nor will it be the last. They also stress that pandemics can accentuate political stress and tension in counties with weak institutions and legacies of political instability. Drawing attention to the rich-poor dynamics of accessibility to medical care and treatment, the authors have called for reforming the existing regime by establishing a 'medical democracy' where medical facilitates will be accessible for all without any distinction based on their economic capacity.

In the next chapter, the authors have canvassed the factual scenarios of the lockdowns observed

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* Alok Kumar Yadav & JiveshJha, Socio-Legal Impacts of COVID-19: Comparative Critique of Laws in India and Nepal (Rajmangal Publishers 2020).

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both in India and Nepal stressing the uphill battle that both these nations (along with the rest of the world) have to face to contain the rate of transmission of the deadly virus. They have justified the imposition of the lockdown through the lens of Duguit's social solidarity theory. They have linked favorable public opinion to the lockdown with expression of social solidarity which validates the imposition of lockdown. Further, the authors in this chapter have called for the development of 'pandemic jurisprudence' that would not only lay down strong and vibrant legislative leadership; co-ordination and co-operation between center and provinces; proactive policy to authorize the government to revive economy, education, and healthcare sectors.

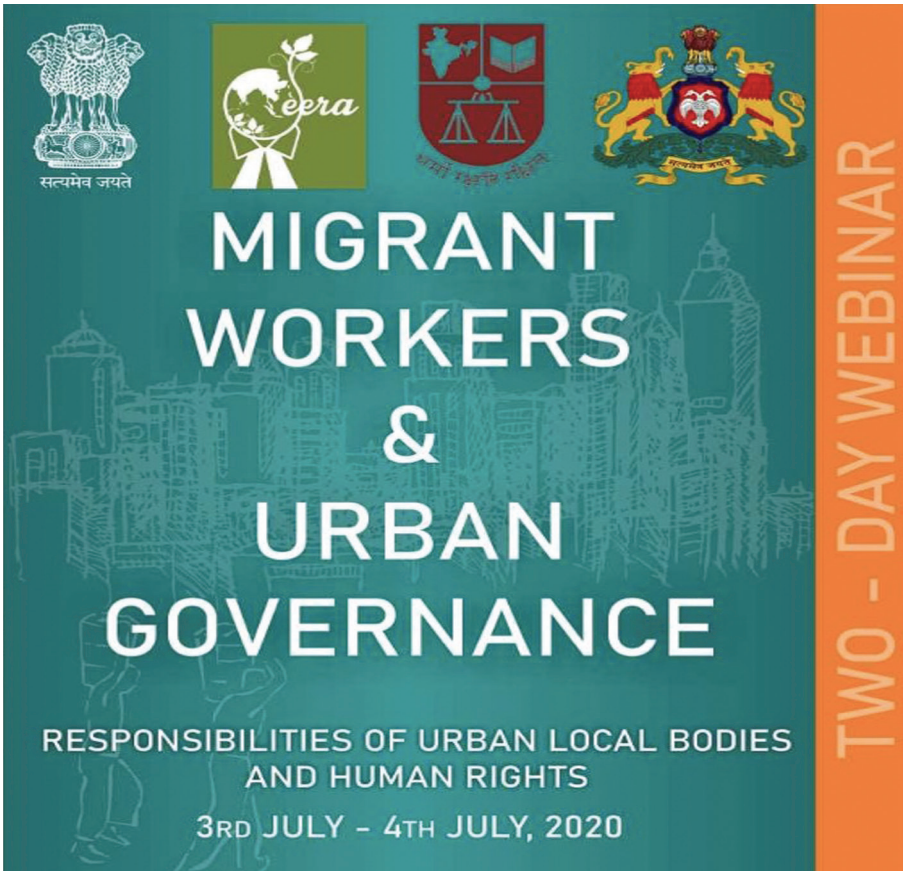
The next two chapters are the 'heart and soul' of this illuminative work and provide a treat of intellectual stimulation to both legal and jurisprudential minds. In chapter four the authors have discussed the various legislative provisions and enactments that were adopted and implemented by India and Nepal to battle the public health emergency posed by corona virus including the Epidemic Diseases Act, 1897; Indian Penal Code, 1860; Criminal Procedure Code, 1973; Disaster Management Act, 2005; Infectious Disease Act, 1964 (Nepal) and other disaster management laws. They have also stressed upon the important role of the courts during COVID-19 outbreak. The authors have particularly paid attention to the issue of balancing constitutional guarantees and liberties with the extraordinary powers granted to the government to battle public health emergencies. After canvassing the various legislative provisions, in chapter 5, the authors have delved into the jurisprudential aspects of the lockdown. They have looked at the lockdown from the lenses offered by Bentham's Unitarianism, Austin's Command Theory, Rousseau's General Will Theory, Leon Duguit's Social Solidarity Theory, Social Contract Theory of Hobbes, Locke and Rousseau. The analysis offered by the authors in these two chapters will be of particular interest and relevance to anyone intending to learn the legal and jurisprudential sides of battling with pandemics.

In their next two chapters, the authors have delved into the arena of Human Rights and Role of Non-Governmental Organizations. They have highlighted both the positive and negative impact of COVID-19 lockdown on human rights. They have also deliberated the role played by NGO's such as Youth Feed India Program (SAFA); Sano Paila etc. in helping the vulnerable section of the society after the imposition of lockdown by the government.

There is a dearth of legal literature that explains the various legal issues involved in the extraordinary restrictions imposed by the Governments during the pandemic. Thus, throughout their illuminating and timely exposition the authors have not only contributed to the repository of legal knowledge but have also provided a source of intellectual simulation by the call of development of 'pandemic jurisprudence'. The book will surely serve as a starting point for the readers to delve into the larger legal issues involved in pandemic management .

WEBINARS PREVIOUSLY HOSTED

3RD AND 4TH JULY, 2020, TWO DAY WEBINAR ON 'MIGRANT WORKERS & URBAN GOVERNANCE'

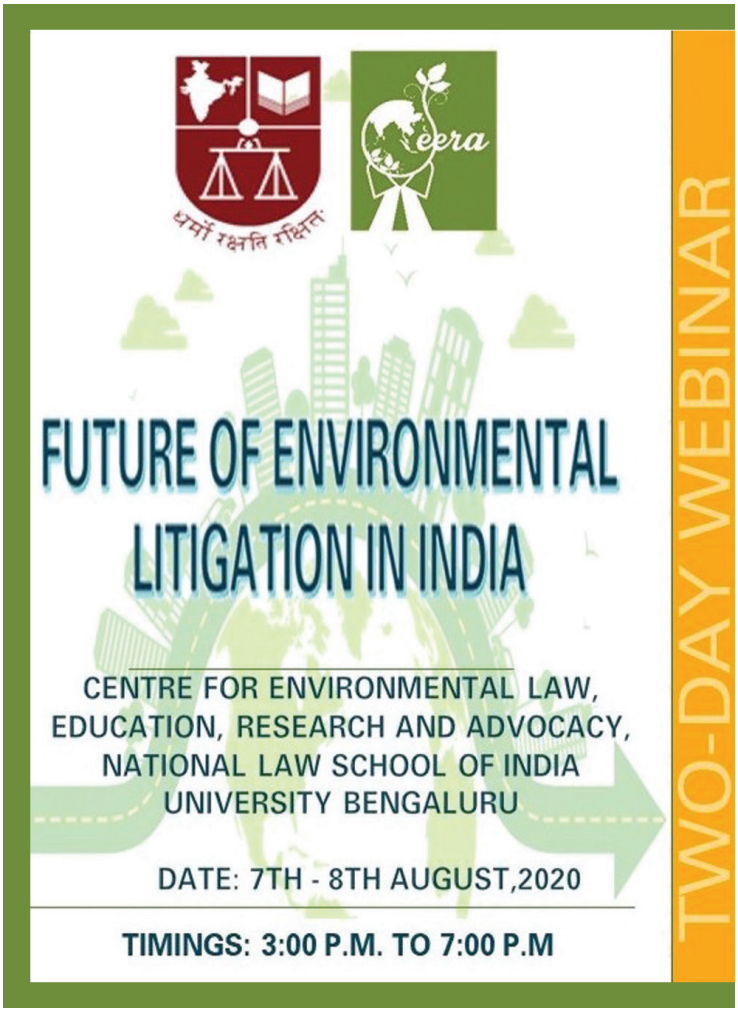


CEERA- NLSIU in Association with Department of Municipal Administration, Government of Karnataka, hosted a two day webinar on 'Migrant Workers & Urban Governance' on 3rd and 4th July, 2020. The webinar had 40 paper presentations along with different sessions on responsibilities of Urban Local Bodies, Constitution and Protection of Migrant Workers; Executive Functions of Municipality and their Role in Transportation and Health of Migrant Workers, Judicial Responses to Migrant Workers Crisis, with discussions on Labour Laws and Smart Cities.

5TH AUGUST, 2020, WEBINAR ON 'RIGHT TO INFORMATION: PRACTICE AND PROCEDURE'

CEERA-NLSIU hosted a webinar on 'Right to Information: Practice and Procedure' on 5th August 2020. The topics that were discussed during the webinar include a critical evaluation of performance of CIC in India; information that are exempted, available and denied; challenges in interpreting the RTI Act; role of PIOs under the Act; and a Sri Lankan experience with right to information.

7TH AND 8TH AUGUST, 2020, TWO DAY WEBINAR ON 'FUTURE OF ENVIRONMENTAL LITIGATION IN INDIA'



CEERA-NLSIU hosted a Two Day Webinar on 'Future of Environmental Litigation in India' on the 7th and 8th August 2020. The webinar had several experts and prominent academicians who have worked and contributed extensively in the field of environment and environmental laws. Topics deliberated included environmental and animal rights litigation; regulatory and adjudicatory challenges of environmental litigation; quasi-judicial action and environment etc.

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The National Law School of India University: Book Series

- Contracts, Agreements and Public Policy in India (Edited by Dr. Sairam Bhat) (Currently out of stock)
- Energy Law and Policy in India (Edited by Dr. Sairam Bhat)
- Right to Information and Good Governance (Edited by Dr. Sairam Bhat)
- A Primer on Legal Practice (Edited by Dr. N.R. Madhava Menon)
- Public Private Partnership in India (Edited by Dr. Sairam Bhat)

Journals:

- Journal on Environmental Law Policy and Development (JELPD) (Annual Journal) – 2014 - 2020 (Vol. I-VI, Forthcoming Vol. VII)
- Journal of Law and Public Policy (JLPP) (Annual Journal) - 2014 – 2020 (Vol. I-VI)

Magazines:

- IN Law Magazine (Quarterly Magazine) – 2015 - 2020 (Vol. I-V, Forthcoming Vol. VI)
- CEERA March of the Environmental Law – (Annual Magazine) – 2014 – 2020 (Issue. I-V)

Handbooks:

- A Primer on Biological Diversity and Access and Benefit Sharing.
- Handbook on Biodiversity Laws, Access and Benefit Sharing.
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