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ASSESSING THE MERITS AND DEMERITS OF PARTICIPATORY RIGHTS OF PUBLIC WITH REGARDS TO EIA AND THE AARHUS CONVENTION

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ABSTRACT

One of the main purposes of establishing law is to set standards in a specific jurisdiction on which it evolves through time. As per the World Bank, “the proposed EIA draft is out of sync with state practices, international law.” The very ecosystem we live in is being disregarded from the times of renaissance industrial revolution.² This research paper aims to analyze the nuances of the participatory rights of public, its merits and demerits with regards to Environmental Impact Assessment under the Environment Protection Act, 1986, its gradual evolution and its stand today while comparing the same with the ‘Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’, usually known as the ‘Aarhus Convention’ in light of the most recent environmental hazards due to changes in the law and its scalability in the local ecosystem of those areas. Apart from providing a legal solution by finding the most ideal if not the perfect balance between economic development and protection of environment i.e., two ends of the same spectrum; this is also an attempt to understand the general perception of people as to whether or not implementing stringent laws as before would hamper growth or recent amends is an attempt to boost local and foreign investment (industrialists) for politically motivated reasons at the cost of environment. A questionnaire-based survey was carried out for the study and secondary data is collected from various journals and articles. The sample size for the study was 406 respondents from varied backgrounds. It was found out that there is still scope to revert the nation’s stand to generally accepted international standards as the severity of the consequences in the foreseeable future cannot be neglected but the main hindrance being lack of interest, awareness and subsequently

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² Tiasa Adhya, The Govt is Trying to Make it Easier for Industries to Avoid Environmental Accountability, The Wire (August 11, 2020), <https://thewire.in/government/environment-impact-assessment>

knowledge of commoners as well as many scholars, students or their lack of action in this subject area.

Keywords: Environmental Impact Assessment, Sustainable Development, Aarhus Convention, Participatory rights of public, Government Initiatives

INTRODUCTION

Definition

United Nations Environment Programme (UNEP) is a leading authority in subject of environment in the United Nations system which has defined Environmental Impact Assessment (EIA) as a tool used to identify the environmental, social and economic impacts of a project prior to decision making.³ ‘Environmental Impact Association’(EIA) is a process by which the sustainability of any new project is evaluated before its commencement. In India, EIA is statutorily backed by the Environment (Protection) Act, 1986 under which the first EIA norms emerged in 1994. Here, mitigation activities are regulated and seeking environmental clearance was mandatory before commencing any project.

Objectives and Outreach

The main objective of the implementation of the EIA is to predict the environmental impacts at an early stage in project planning and design and find ways to reduce the adverse impacts. Generally, EIA covers projects such as mining of coal or other minerals, infrastructure development, thermal power plants, nuclear and hydro power projects, real estate and other industrial project.⁴

Decentralization

The initial dilution of granting EIA clearance took place in 2002 and further in August and September 2003 where public hearing rules were loosened; in July 2005 temporary working permit for 2 years without environmental clearance was introduced.

³ Hussein abaza, Ron bisset, Barry sadler, *report on Environmental Impact Assessment and Strategic Environmental assessment: towards an Integrated Approach*, UNEP, June 2004 at 56-57

⁴ Yadav, Dr. Vikrant, *Environmental Impact Assessment: A Critique on Indian Law and Practices*, 5; Issue 1, IJMRD; Page No. 01-05, January 2018

EIA notification 2006 decentralized environmental clearance programme where category B2 proposals did not require an EIA clearance which exempted many projects harming the ecology. The draft EIA notification 2020 was put in public domain on March 12th by the Ministry of Environment, Forest & Climate Change (MoEFCC). The draft includes some further diluted clauses allowing actions such as project commencements without legitimate clearance, longer list of projects exempted from public consultation, inefficiencies in EC monitoring system, etc.

The Aarhus Convention

The United Nation's Economic Commission for Europe (UNECE) introduced the 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' also known as the Aarhus Convention. The UNECE is one of the five regional bodies under the jurisdiction of United Nations Economic and Social Council. The convention was signed in the Danish city of Aarhus and came into force in the year 2001; having 46 European/ Central Asian states as a member and European Union till date.⁵

The trans boundary nature

When it comes to environmental issues which have an impact on the flora and fauna of the very ecosystem humans exist in, there necessarily implies a global dimension and a trans boundary nature. Environmental human rights protection like right to breathe clean air, right to live in healthy environment cannot be reduced by states alone and thus states are obliged to fulfill their duties towards the same and disregard the jurisdictional limits only on the basis of territorial boundaries (internal state regulations)⁶.

The three pillars

The core of the Aarhus convention lies in granting three rights (three pillars) which are as follows -

1. The right to access environmental information is the first 'pillar' mentioned under the Articles 4 and 5 of the convention differentiating active and passive rights respectively. Active rights can be conferred upon any individual whose member state is a signatory to the convention

⁵ Beder, Sharon, *Global Spin: The Corporate Assault on Environmentalism*, 62-65 (2002)

⁶ Počuča, Milan & Mladenov, Marijana & Mirković, Predrag, *The analysis of the Aarhus convention in the context of good environmental governance*, 65, EOA 1615, 1618-1620 (2018)

without any legitimate interest provided that the project is state owned or built by the state itself, while passive rights are discretionary and grants member states power to withhold information as it involves an element of confidentiality regarding an individual or a private company.

2. The right to public participation in decision making is the most important rights which is protected by the Articles 6, 7 and 8 of the convention. It compels the states to inform the public in advance regarding the time, place of holding, possible outcomes and that the decisions to be taken should manifest the results of such public participation.

The Rio Declaration

Granting this right is being inspired from the principle 10 of the Rio Declaration on Environment and Development put forth by UNEP which was adopted in 1992. It states that, “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. States shall facilitate and encourage public awareness and participation by making information widely available.” India is one of the 178 signatories to the Rio Declaration, although not formally binding but it does have a strong moral impact on the states to follow it in its truest sense.⁷

‘Access to justice’ is one of the major components of the development of environmental governance and the law of sustainable development on domestic and international levels which is the third pillar. Article 9 of the convention assures the access to administrative and judicial procedures and review matters.

LITERATURE REVIEW

- (P. Ritu, 2006): There have been several instances of false EIA experiments in which incorrect evidence has been used, the same facts have been used for two completely separate locations, and so on. One of the most serious questions about the environmental clearance process is the accuracy of the EIA reports that are being completed. Frequently, information on the feasibility and execution of preventive strategies is withheld. Emergency preparedness strategies aren't addressed in enough depth, and awareness isn't disseminated to the public.
- (G. Anantkrishnan, 2020): The rules in India, including the drafts of Environmental Impact Assessment of 2006 and 2020, are often found to privilege the interests of the promoter of a

⁷ Secretariat on Convention of Biological Diversity, The Rio Declaration on Environment and Development, UN conference on Environment and Development (November.13.2006), <https://www.cbd.int/doc/ref/rio-declaration.shtml>

project by cutting down public consultations, accepting flawed and faulty EIA reports resulting from various loopholes which are exploited to their full extent including external influences, and ignoring the sustainable development goals. Notification 2020 deepens the negative effects of the previous legislation greatly⁸.

- (N. Mokhtar, 2016): Analyzed the participatory rights of public in Environmental Impact Assessment in the European Union compared it with Malaysia depicting weaker implementation of international guidelines leading to much lesser public participation than in the European Union. The author seeks out ways and methods for developing countries to improve their EIA rules and regulations and involving public participation in all major projects having the potential to affect the daily lives of people by analyzing the legislation of Malaysia and comparing it to that of various EU member states, while setting a guiding light to seek out for EU laws on the same and those developing countries should set an example and work towards the same to maintain inter-generational equity.⁹

RESEARCH METHODOLOGY

Objectives of the Study

1. To analyze and understand the current laws and pointing out lacunae in EIA 2006 mentioned under the Environment Protection Act, 1986.
2. Analyzing and forecasting the possible impacts/ consequences on the local ecosystem if draft EIA 2020 is passed based on the recent hazards which occurred due to lack of public participation/ absence of environmental clearances.
3. Comparing our environmental performance with other developing nations and deriving possible steps for the state leading to improvisation.
4. Analyzing possible international environmental law/principle violations according to the current state of environmental laws and the foreseeable future with regards to the Rio Declaration on Environment and Development and the Aarhus Convention.

⁸ Anantkrishnan, G., What are the key changes in the Environmental Impact Assessment Notification 2020?, The Hindu, (May 8, 2022, 12:01 pm), <https://www.thehindu.com/sci-tech/energy-andenvironment/the-hindu-explains-what-are-the-key-changes-in-the-environment-impactassessment-notification-2020/article32249807.ece>

⁹ Margherita Poto, *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective*, 205, DHIR, 3, 7-9 (2015)

Research Method

Sample, Source of Data Collection & Statistical Tool: The main aim is to examine from the point of view of EIA and its evolution, mechanisms for public participation in the less sought out field of environmental governance. The research is based on both Secondary as well as Primary Data. Primary data was collected from a sample of 406 people from several cities across India through a questionnaire survey. Varied analytical methods were used to identify the interrelation between the basic postulates in the Environmental Impact Assessment and some main principles of good governance in environmental matters for better understanding of leading a way towards sustainable development. The respondents for the research were people aged above 15 years. The general age lies between 15-23 years with 41.2%. There were 182 male respondents while 224 were female respondents and their percentages are 44.8% and 55.2% respectively. Data was gathered through questionnaires. To get a wide variety of responses cities like Mangalore, Chandigarh, Bhubaneswar, Delhi, Pune, Mumbai and various other cities. Google docs were used along with Microsoft Excel. Opinions of all age groups were taken into account. Primary data was collected by the researcher himself by means of an online questionnaire and secondary data was collected from journals, internet sources, databases etc. The results obtained have been analyzed manually using various statistical tools involving the use of Pie Charts, Bar Graphs and Tables.

FINDINGS AND DISCUSSIONS

SECONDARY

The major issue till date is the fact that the whole process was severely decentralized in 2006 and due to this several state government officials have categorized projects as B2 which do not require EIA clearance which has paved way too many illegal projects coming up which required mandatory EIA clearance in the first place. Another major issue is that bypassing EIA is now possible according to the 2020 draft if the government deems any project as 'strategic' which sounds most appealing to business giants having political ties and there will be no account of mitigation measures which should have been taken to reduce adverse effects of the project on human life, forest cover, biological and eco sensitive flora and fauna etc. Regularization of ex post clearances which leads to commencement of public consultation after the project has been developed can lead to incidents like styrene gas leak, Baghjan oil well blowout and many others. The biggest challenge posed is for the human race to find the right balance between ecology

and economy, if done right it would lead to implementation of sustainable development in its truest sense¹⁰.

There are many major projects in India where in the state or private parties have exploited the environmental laws through many existing loopholes.

Char Dham Project (Char Dham Mahamarg Vikas Pariyojana)

The purpose of this project was to convert the single lane roads to double-lane connecting the four major pilgrimage sites in Uttarakhand, which led to major construction activities and rise in landslides, forests land has also been cleared and many other hazards are foreseeable and yet to come. The major issue is the project came into action without the Environmental Clearance.¹¹ The project was depicted as many different projects in the court of law and not as one single project to escape from the clutches of compulsory Environmental Clearance.

Dehradun Airport

The Dehradun airport expansion project is only one of several infrastructure and building schemes in India that seek to circumvent existing environment. Despite the necessary Environmental clearance rule, nearly 80% of Phase-I development has been completed without the Environmental Clearance. The Uttarakhand government sought National Wildlife Boards' approval to transfer 243 acres of forest land to Airports Authority of India. Major area of expansion falls within the notified areas of Shivalik Elephant Reserve which was denotified as an Elephant Reserve by the state government; the lacunae in the law being that 'the legal status of what is an elephant reserve is not defined' which was exploited by the state authorities which paved the way to cut off more than 10,000 trees. The denotification was stayed due to the PIL filed by activist Reenu Paul in the Uttarakhand High Court.

¹⁰ Jamir, O., *India's Environment Impact Assessment Draft 2020: Issues and Challenges*. Manohar Parrikar Institute for Defence Studies and Analyses (May 26th, 2021, 4:35 pm), <https://idsa.in/issuebrief/indias-environment-impactassessment-ojamir-080221>.

¹¹ Agarwal, K., *Char Dham highway project should've undergone impact assessment: V.K.Saraswat*. The Wire. (August 10, 2018, 8:21 pm), <https://m.thewire.in/article/environment/char-dhamhighway-project-shouldve-undergone-impact-assessment-v-k-saraswat/amp>.

Styrene Gas Leak

A toxic gas leaked from the storage unit of a plant in Visakhapatnam owned by LG Polymers¹². Post the incident investigations were conducted and it was found out in LG polymers India pvt. Ltd. V. Andhra Pradesh pollution control board¹³, that the plants did not have the necessary environmental clearance as required by the EIA 2006.

There are many other several major projects on which questions were raised and settled in the court of law. Some of them being the Central Vista Redevelopment project¹⁴ depriving people of open and green spaces in one of the most polluted city; New Delhi, Goel Ganga Developers Pvt ltd.¹⁵ wherein a park was built, leading question being that constructed structures like pathways, fountains etc should be included in the built up area or not; the consequence of either would have led to requiring an Environmental Clearance or not, Lafarge Umium mining¹⁶ which built up a 100 hectare belt for mining limestone without public participation, Electrotherm India Ltd.¹⁷ was granted post facto approval of the project without public participation for the first time violating the EIA rules¹⁸, Natural Gas of India Ltd. Plant in eastern Tinsukia district had a blowout and caught fire which led to severe damage to livelihood in a region with rich biodiversity, and many others.

Environmental Performance Index

The EPI index is developed by the Yale and Columbia University in collaboration with the World Economic Forum and the European Commission's Joint Research Centre. This index measures the performance and ranks 180 countries on the basis of Ecosystem vitality and Environmental Health which are weighted at 60% and 40% respectively¹⁹.

¹² S. Varadarajan, *Vizag gas leak: LG Polymers operated without appropriate environmental clearance*, The Wire (June 3, 2020, 9:10 am), <https://thewire.in/law/vizag-gas-leak-lg-polymers-ngt>

¹³ Lg Polymers India Private Limited v. Andhra Pradesh Pollution Control Board & Ors. (2020) 6 SCC 619, India

¹⁴ Debayan Roy, Supreme Court comments on the Central Vista project, Bar and Bench (Nov. 23, 2021, 11:03 am), <https://www.barandbench.com/topic/central-vista>

¹⁵ Goel Ganga Developers India vs. Union of India CA/10854 (2016), India

¹⁶ The Union of India and Ors. vs. M/S Lafarge Umiam Mining Pvt Ltd (2011) 7 SCC 338, India

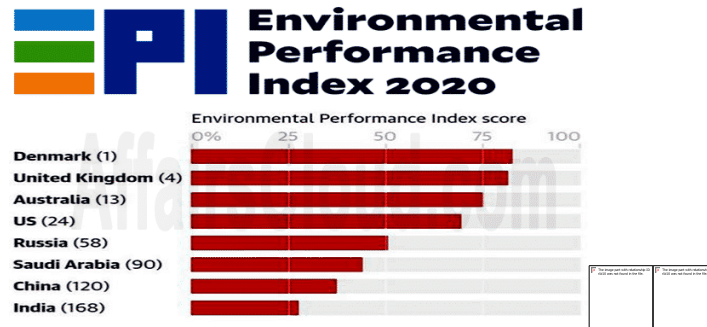
¹⁷ In Electrotherm (India) Limited vs. Patel Vipulkumar Ramjibhai (2016) 9 SCC 300, India

¹⁸ Francis, Y., *Whether Post-facto environmental clearance under Draft EIA notification 2020 legally permissible?* Legal Services India. (Feb 5, 2020, 2:30 pm), <https://www.legalserviceindia.com/legal/article-3532-whether-post-facto-environmental-clearance-under-draft-eia-notification-2020-legally-permissible-.html>

¹⁹ Environmental Performance Index, YALE (2020)

<https://epi.yale.edu/epi-results/2020/component/epi>

The Environmental Sustainability Index published around 1999 and 2005 was succeeded by the Environmental Performance Index because the EPI is shifted to using outcome- oriented indicators which is used as a benchmark around the world. India was ranked 168th out of 180 countries in the EPI 2020.



PRIMARY

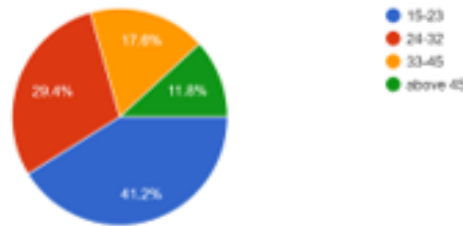


Figure 1

Age group (advised not to fill if you are below 15 due to lack of reasonable conscience)



Figure 2

Are you aware of the draft EIA 2020 and the changes which it seeks to bring in the current system?

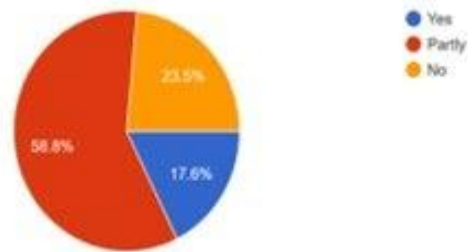


Figure 3

Are you aware of the ill effects on environment due to some of the major projects in India (like Styrene gas leak, Chardham project, Dehradun airport expansion project) which will/have come into effect?

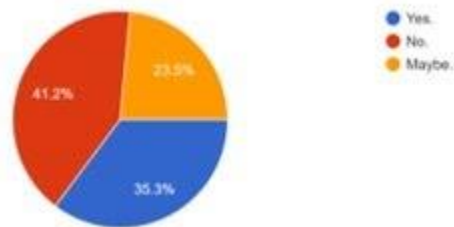


Figure 4

Have you heard of the terms, Environmental impact assessment mentioned under the Environment Protection Act and/or the Aarhus regulation which addresses the "three pillars" of the Aarhus Convention - access to information, public participation in decision making and access to justice in environmental matters put forth by UN's economic and social council.



Figure 5

The role of public participation in environmental decision-making process is to get support and guidance from the public. Increased public participation builds a more engaged citizenry, increases the legitimacy of decisions, and helps ensure that policy-makers have valuable local knowledge as Governments cannot reach environmental protection goals alone. So, have you participated in any such initiative?

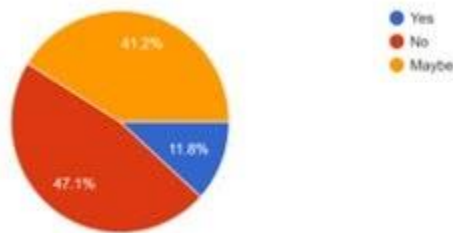


Figure 6

Do you think that the current dilution in the provisions regarding participatory rights of public mentioned under the Environmental Protection Act (one of which also provides for partial/fully bypassing public participation) beneficial while comparing environmental concerns and economic development?

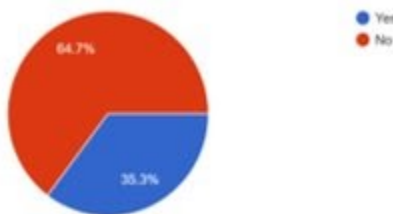


Figure 7

As an environmentalist, researcher, law student, responsible and self-aware citizen, have you taken any steps towards sustainable development?

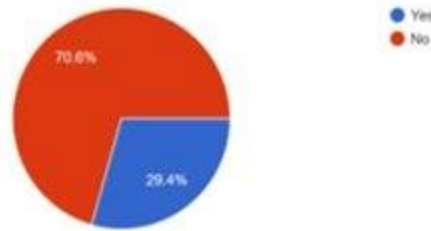


Figure 8

Have you heard of the Chardham road project which is depicted by the government as multiple projects to escape from the clutches of environmental clearances or Dehradun Airport Expansion project for which the government has denotified the Shivalik Elephant Reserve which paved the way to cut off more than 10,000 trees or the styrene gas leak case (also known as Vizag gas leak), after a few weeks of the incident it came to light that those plants were illegal (functioning without environmental clearances).

Data Analysis and Interpretation

Figure 1 depicts that 41.2% of the sample belonged to the age group of 15-23 with decreasing number of respondents in the higher age category which was a result of random sampling method.

Figure 2, 3 and 4 seeks out to acquire the limits of existing knowledge about EIA, Aarhus convention and recent incidents which had severe impacts on the ecosystem. The data reveals that more than half of the respondents are either unaware or partly aware of such happenings.

Figure 6 depicts that do the respondents feel that the EIA 2020 is beneficial to the environment, wherein to the contrary of the above figures about half of the respondents are aware about that it is not beneficial which maybe a result of news and social media platforms.

Further the data depicts that majority of the respondents are aware about the grievances raised by various people on central vista and the Chardham project; about half of the percent of which have taken some or the other step towards sustainable development, under which the majority of respondents belonged to the 15-23 age group.

SUGGESTIONS

Future Scope

- There have been several more instances where projects are/were functioning without environmental clearances which could be explored in detail.
- Environmentalists, activists, state authorities, industrialists could be personally interviewed to gain a better insight on finding the right balance between ecology and economy by scrutinizing our legislative policies with that of developed nations.
- Thorough research can be carried out on nations like Denmark, Luxembourg (leading nations in matters of environmental protection) and their legislation to develop better eco-friendly solutions where both the ends of the spectrum can co-exist leading to sustainable development.

Limitations

- Small sample size of about 400 people in which data was collected from the natives of the erstwhile state and five different cities from other states.
- Survey was limited only to the online mode, as due to the prevalent Covid-19 situation, on field research work couldn't be conducted.
- Differences in understanding and interpretation.

CONCLUSION

It can be concluded from the primary research that majority of the people are unaware or least bothered about the changes in environmental law and its impact on the ecosystem, the majority of such people belonged to the age 23 and above which depicts that the youth is generally more aware about the current happenings and some of the evolutions which have taken place. Raising self-awareness is the need of the hour which could bring in a majority whenever a project could lead to environmental haphazard and the same will have a strong moral binding on the legislative to introduce laws which are more centralized and stringent in matters of breach of such laws.

Also, it is to be noted that the current law (EIA 2006) is required to be more exhaustive covering all aspects so as to prevent private and state entities from misusing the loopholes in the system; achieving which could lead to good environmental governance.

The draft EIA 202 should be repealed; the fact being there have been more than 700 major illegal projects (violating EIA, 2006) which is when the laws are already being diluted and decentralized which happened in the year 2002.

The public participation which was a requirement is now no longer a compulsion thereby remaining existent only in its name which puts India having the least stringent laws also violating Aarhus convention and the Rio Declaration on Environment and Development.

Minimum set standards on environmental law should be set on the international arena to be followed and implemented in the form of legislation in its own jurisdiction by all the states and the one violating should be grey listed and few of the economic benefits like extending line of credit should be mitigated by other member states thereby compelling the nations to follow a minimum set standard in matters specific to public participation in the Environment Impact Assessment.