PUBLIC PARTICIPATION IN ENVIRONMENTAL CLEARANCES IN INDIA: PROSPECTS FOR DEMOCRATIC DECISION-MAKING

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Abstract

This paper seeks to identify avenues for improvement in Indian environmental law with respect to a specific aspect of environmental regulation. Grant of environmental clearances is a key step in the statutory framework to balance ecological concerns about the natural environment, concerns of neighboring communities about the quality of their immediate surroundings, including issues of sustainable access of poor and marginal communities to common property resource for their everyday subsistence, and of providing access of natural resources to the industry in the name of seeking socio-economic development through facilitating intensive exploitation of nature for industrialization. Given the limitations of a monopolistic reliance of techno-scientific expert that may be dominated by the concerns of the industry, as well as the epistemic and legitimational need for having public consultation and participation in environmental clearances demonstrated in sociological literature, this paper investigates the existing room for public participation in this decision-making process in India. It identifies the environmental impact assessment (EIA) process as central to the grant of environmental clearances in India. The paper describes and analyses the extremely limited space for public participation in the existing EIA regime, despite formal requirements for public participation and hearing. It argues for a broad based EIA that has public consultation at multiple stages right from screening, scoping and appraisal during EIAs, through post-clearance monitoring as well as compliance of clearance conditions.

I Introduction

IN LATE August 2014, the Ministry of Environment and Forest (MoEF) constituted a high level committee to review the working of a number of environmental laws that are administered by the ministry.[1] The general approach in environmental regulation in India is in consonance with the worldwide emphasis on the principles of 'polluter pays', a combination of the precautionary principle and the preventive

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1 MoEF, Office order No. 22-15/2014-IA.III, dated Aug. 29, 2014, *available at*: http://www.moef.nic.in/sites/default/files/OM-dtd-25.08.14.pdf (last visited on Oct. 30, 2014). The legislations concerned are the Air (Prevention of Control of Pollution) Act, 1981(Act 14 of 1981); Water (Prevention of Control of Pollution) Act, 1974 (Act 6 of 1974); Forest Act, 1927 (Act 16 of 1927); Forest (Conservation) Act, 1980 (Act 69 of 1980); Environment (Protection) Act, 1986 (Act 29 of 1986) and Wildlife Protection Act, 1972 (Act 53 of 1972). The committee submitted its report to the minister on Nov. 18, 2014; however, the contents of the reports have not been made public by MoEF till date.

approach as well as emphasis on inter-generational and intra-generational equity towards the goal to democratically achieve sustainable development.[2] As per the conventional wisdom within the bar, bench and academy, while the architecture of India's environmental law is strong and evolved (be it in the realms of regulating air pollution, water pollution, or in the protection of forests, wildlife, coasts, marine and aquatic life etc.), what is mostly ailing the environmental legal framework in India is the shoddy implementation of the generally sound legislations.[3] It is notable that the aforementioned high level committee has organized a series of public hearings to elicit public opinion regarding the nature of necessary changes in the current laws. Quite apart from debating the veracity of the substance and necessity of such a large scale review by a committee, this paper focuses on a related issue *viz.*, to identify the existing room for public information, consultation and participation in the decision-making that precedes an environmental clearance for economic activities in India, and evaluate the adequacy of the same.

The central focus of environmental regulatory regimes in most parts of the world has been to balance ecological concerns about the natural environment as well as human and animal health with other variegated ideas of socio-economic development, based on developmental models that are often rooted in technological pathways of industrialization and intensive exploitation of natural resources.[4] Various kinds of regulatory permissions has been employed to find the appropriate balance between, on the one hand, attempts to generate employment, wealth and profit by exploiting natural resources, and, on the other hand, the concerns about the practical and ethical limits of such intensive exploitation to the health of ecology, survival of other species and subsistence of poor communities dependant on these resources for their every day sustenance. Seeking of such a balance becomes even more crucial in

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2 See generally, S. Divan and A. Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (OUP, New Delhi, 2002).

3 This is notwithstanding ample criticisms about the reality of abject failures in general environmental conditions, be it in air standards in many urban areas, regulation of hazardous wastes, most rivers being transformed into mass drains for human feces, pesticide and industrial effluents, and a plethora of urban and rural issues of environmental unfriendly agricultural practices, construction practices etc. See generally, Anil Agarwal, Sunita Narain *et. al*, *The Citizen's Fifth Report* (Centre for Science and Environment, New Delhi, 1999); Sunita Narain, Chandra Bhushan *et. al*, *Food as Toxin* (Centre for Science and Environment, New Delhi, 2012); S. Sen and R. Bose, *Agenda Unlimited* (Society for Environmental Communications, New Delhi, 2005).

4 See for instance, J. Ramesh, "The Two Cultures Revisited: The Environment-Development Debate in India" 35 *EPW* 13 (2010). However, a host of sociological and economic literature criticises the trajectory of growth intensive economic transformation as the appropriate pathway to human and social development. See for instance, K. Willis, *Theories and Practices of Development* ch. 6, 'Environment and Development Theory' (Routledge, London, 2005).

relation to the survival of human societies and species if one takes the contemporary discourses of climate change seriously.[5] The statutory framework that provides for environmental regulation in India stipulates different kinds of authorizations, *viz.*, first, a pollution permit from the State Pollution Control Board certifying that the pollution impacts of the proposed project are within permissible limits; second, a general permission called environmental clearance that is mandatory for the initiation of any economic activity, stating that all other environmental laws are complied with; and third, forest clearances- authorizations that involve permissions from specific public agencies under MoEF (including the Forest Advisory Committee, Central Empowered Committee and the National Board for Wildlife) for activities that are specifically held in forest areas, and may include an additional procedure for wildlife sanctuaries and national parks.[6] This paper exclusively examines the current legal structure for the second kind of authorizations *viz.*, environmental clearance; though it may be added that an environmental clearance is not obtainable without pollution clearance, and also a forest clearance, if the land in question is categorized as forest land.[7]

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5 See for instance, the IPCC reports; Christopher Field, Vicente Barros, *et. al*, *Climate Change 2014: Impacts, Adaptation and Vulnerability* (Cambridge University Press, New York, 2014), *available at*: http://ipcc-wg2.gov/AR5/report/ (last visited on Nov. 4, 2014).

6 The legal framework for forest clearance in India is provided under s. 2 of the Forest Conservation Act, 1980 (Act 69 of 1980), and the Forest Conservation Rules, 2003. The Supreme Court, in a series of orders through a continuous mandamus process in *T.N Godavarman Tirumalpad* v. *State of Tamil Nadu* has laid down detailed guidelines on granting forest clearances, and has also fostered various institutional actors like the centrally empowered committee (CEC) and compensatory afforestation fund management and planning authority (CAMPA) to oversee the grant of permission for diversion of forest lands for non-forest purposes. See for more details on this process, Naveen Thayyil, "Judicial Fiats and Contemporary Enclosures" 7 *Conservation and Society* 268-282 (2009). See also, ss. 26A (3), 28, 29 and 35 of the Wildlife (Protection) Act, 1972 (Act 53 of 1972). See for more on forest clearances that involve Protected areas, Manju Menon and Kanchi Kohli, "Environmental Decision-making in India: A Critique" in Ramaswamy Iyer (ed.), *Water and the Laws in India* 359, 371-372 (Sage, New Delhi, 2009). Over and above these requirements, the consent of local communities is required for granting forest clearances in certain designated areas for certain designated developmental projects, evidenced through a resolution of the gram sabha, s. 3(2) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act 2 of 2007).

7 *Lafarge Umiam Mining Pvt. Ltd., T.N. Godavarman Thirumulpad* v. *Union of India* (2011) 7 SCC 338, paras 22-23: 'There are three main sets of permissions that are required to be obtained: (i) The first set of permissions is at the State level. This set of permissions primarily has to do with pollution. In each State or a group of States, a Pollution Control Board issues consent/ permit. These consents or permits are granted from a pollution perspective. The scope of enquiry is limited to pollution impacts. Obtaining such consents and permits are essential but they are not a substitute for compliance with other environmental laws. (ii) The second set of permissions…is with regard to environmental clearance. The scope of environmental clearance is wider than a pollution control clearance. The authority granting environmental clearance

Given the centrality of contemporary environmental crisis to the survival of human society, reliance on a wide base of information and knowledge to inform environmental clearances appears to be absolutely necessary. Though technical institutional spaces were generally considered as a sole repository of deciding the nature, ambit and the social value related to the environmental clearance, such an assumption has come under consistent and legitimate attack. There is an increasing recognition that science alone cannot provide us with all the answers in the regulation of health and environment since the traditional scientific establishment may not be able to arrive at, or even frame the right questions; a situation further examined in the next section. In such a situation, fostering participation of general publics[8] in environmental decision-making including through ensuring access to relevant

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will look at broader impacts beyond pollution and will examine the effect of the project on the community, forests, wild life, ground water, etc. which are beyond the scope of Pollution Control Board examination. The exercise of granting environmental clearance with regard to a limestone mining project of the present magnitude requires MoEF clearance. (iii) A clearance for diversion of forest under the 1980 Act which is granted by MoEF on the recommendation of the FAC should logically precede the grant of environmental clearance as the environmental clearance is broader in scope and deals with all aspects, one of which may be forest diversion.' See also, MoEF, Memorandum dated Apr. 26, 2011, 'Procedure for consideration of proposals for grant of environmental clearance under the EIA notification, 2006, which involve forests', No. J- 11013/42/2006-IA.II(I), *available at:* http://www.moef.nic.in/downloads/public-information/EC-forest-26-04-2011.pdf (last visited on Nov. 4, 2014).

8 The term 'publics' is used at various points in the paper, as opposed to 'the public', in cognizance of a central debate in public sphere theorization regarding multiplicities of publics in society. The 'public sphere' is understood as a public zone of mediation between the state and individuals or groups to arrive at critical reasoning. According to Habermas, such critical reasoning constitutes an effective steering force in both society and polity, and is arrived at in the public sphere through rational critical communicative discourse. See J. Habermas, *The Structural Transformation of the Public Sphere* (Polity, London, 1989). Widely recognized as the primary reference point in public sphere theory, this work centrally assumes that "a single, comprehensive public sphere is always preferable to a nexus of multiple publics". M.E. Gardiner, "Wild publics and grotesque symposiums: Habermas and Bakhtin on dialogue, everyday life and public sphere" in N. Crossley and J.M. Roberts (eds.), *After Habermas: New Perspectives on the Public Sphere* (Blackwell, London, 2004). Subsequently Habermas has been widely criticized for ignoring the coercive and power driven attributes of sectionalism, exclusiveness and repression, and thereby ignoring and legitimizing such coercion; J. Siltanen and M. Stanworth, "The politics of private woman and public man" in J. Siltanen and M. Stanworth (eds), *Women and the Public Sphere: A Critique of Sociology and Politics* (Hutchinson , London, 1984). It is in this context that the term "multiple publics" or publics is recognized as more appropriate as it involves the recognition of the legitimate discursive claims of those residing in "alternative public spheres" that are "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses". Frazer points to the fallacy in the idea that inequalities between participants can be bracketed during discursive deliberation, when in fact it only 'conceals real inequalities' including access to resources, which can have 'drastic consequences for the outcome of debate and discussion'. A theoretical recognition of multiple publics permits "subordinated groups

information and consultation is increasingly accepted as crucial. It is within this rubric, that this paper seeks to examine the mechanisms for granting environmental clearance for economic activities in India to identify the formal room for wider public consultation and participation before such decisions are taken. This is an exploratory study towards understanding the implications of the formal contours and existing legal stipulations for public participation and for deepening of democratization of environmental governance in India.[9]

The discussion on the importance of recognizing regulatory spaces for public information, consultation and participation is continued in the next section. Effective access to relevant information is seen to be crucial for making any attempts at public consultation and participation that may inform environmental decision-making. The third section seeks to cursorily identify the existing framework for citizens to access information in relation to environmental decisions in India. The fourth section charts out, cursorily, the emergence of EIA as a central facet of environmental clearance mechanism in India. The fifth section identifies the key requirements in the current EIA procedure, and identifies the formal requirement for public consultation within it. The sixth section identifies the various lacunae in the existing EIA mechanism in India. It seeks to identify the nature and extent of the impediments to public participation arising from these lacunae. The seventh section examines the level of public scrutiny of environmental clearances that is possible and is happening through judicial spaces in India. Given the limited scope of such judicial interventions, and the public policy requirements that such scrutiny ought to be done before a decision to grant clearance is taken, and not post-facto by judicial bodies, who are in any case burdened with overload, in the concluding eighth section, the paper seeks to identify steps necessary towards realizing a more meaningful public participation in grant of environmental clearance.

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to formulate oppositional interpretations of their identities, interests and needs". Therefore a participatory parity in the public sphere requires "the elimination of systematic social inequalities", and not merely its bracketing, and in situations where such inequality persists it is preferable to construe a "multiplicity of mutually contestatory publics" as opposed to a "single modern public sphere oriented solely to deliberation"; N. Fraser, "Politics, culture, and the public sphere: Toward a postmodern conception" in L.J. Nicholson and S. Seidman (eds.), *Social Postmodernism: Beyond Identity Politics* 291, 295 (Cambridge University Press, Cambridge, 1995). Also see, C. Calhoun, "The public sphere in the field of power" 34 *Social Science History* 30 (2010). It is within this milieu that the term publics is used in this paper.

9 But for an early contribution to the endeavour of identifying public participation in Indian environmental law see, S. Dubey and D. Newnes, *Green Democracy: Peoples' Participation in Environmental Decision Making* (Environmental Justice Initiative, New Delhi, 2003).

II The case for public participation in environmental decision-making

Public participation in regulatory decision-making is increasingly recognized as crucial in making environmental governance more robust and better informed in the liberal regulatory theory. 'Participatory' mechanisms in environmental governance are advocated for a variety of reasons, including an implied emphasis on participation as furthering justice and equity,[10] ambitions to make participative or deliberative measures as supplements or alternatives to representative democracy,[11] and enhancement of legitimacy of controversial environmental decisions that are frequently delegated to unelected experts.[12] Organization of public hearing has been argued as a check on arbitrary exercise of powers, especially since it seeks to hear those who could be affected by an industrial activity and thereby, embodies the fundamental rule of fair procedure of *audi alteram partem*.[13]

The normative advantages for representative democratic systems accruing from these participatory policies are well established in democratic literature by now, since they appear to improve transparency, accountability and implementabilty of public decision-making, and prompt a wider range of democratic deliberation.[14] The involvement of the lay publics through public interest litigation in India, in instances like the *Taj Trapezium zone* case, the *Kanpur Tanneries* case, *Delhi Vehicular Pollution* case, and *Vellore Citizen's Forum* case, demonstrates the desirability of the involvement of lay citizens regarding grant of environmental clearances.[15] Arguments in favor of such participatory mechanisms also highlight a cognitive improvement of decisions due to inputs from a plurality of perspectives, including through a widening of the

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10 See for instance, World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

11 S. Chambers, "Deliberative democratic theory" 6 *Annual Review of Political Science* 307, 308 (2003).

12 M. Lee and C. Abbot, "The usual suspects? Public participation under the Aarhus Convention" 66 *Modern Law Review* 80, 83 (2003).

13 Justice A. R. Lakshmanan, "Thoughts on Environmental Public Hearings" 17 *Student Bar Review* 1, 3 (2005). See also, *M.P. Industries* v. *Union of India*, AIR 1975 SC 865, *North Bihar Agency* v *State of Bihar*, AIR 1982 SC 1758.

14 J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press, Cambridge, 1998); J. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, Oxford, 2002); J. Dryzek and S. Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, Oxford, 2010). See also, Valerie A Brown, Ingle Smith *et. al*, *Risks and Opportunities: Managing Environmental Conflict and Change* (Earthscan, London, 1995).

15 *M.C. Mehta* v. *Union of India*, AIR 1997 SC 734 (*Taj Trapezium Zone* case); *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037 (*Kanpur Tanneries* case); *M.C. Mehta* v. *Union of India*, AIR 1998 SC 617 (*Vehicular Pollution* case); *Vellore Citizen's Welfare Forum* v. *Union of India,* AIR 1996 SC 2715.

technical and scientific bases for public decisions.[16] The large-scale industrialization of science for industrial, economic and social application, and the accompanying involvement of concerns of profit in corporate investment are seen to affect research agendas of the scientific enterprise. The Dutch Council for government policy refers to the fading distinctions between doing science and doing business as implicating the position of expert advice in regulation.[17] Public participation is often mooted as an important avenue for augmenting issues that are left out in technical and scientific advices in environmental and health regulation, due to the possible difficulties arising out of the aforementioned changes in the scientific enterprise.[18]

Within this participatory paradigm, a number of international legal instruments underline the general importance of public participation and the specific need to institutionalize a regulatory framework that allows effective participation in public decision-making regarding the protection of environment and appropriate use of natural resources. Principle 10 of the Rio Declaration calls for the conferring of appropriate access to information, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings for environmental issues towards realization of sustainable development through better connections between the governed and those who govern.[19] The Aarhus Convention stipulates parties to ensure provisions for public participation in decisions on specific environmental activities; in plans, programmes and policies relating to the environment;

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16 J. Steele, "Participation and deliberation in environmental law: Exploring a problem-solving approach" 21 *Oxford Journal of Legal Studies* 415 (2001).

17 WRR (The Dutch Scientific Council for Government Policy), *Uncertain Safety: Allocating Responsibilities for Safety* 88 (Amsterdam University Press, Amsterdam, 2008).

18 See generally, R. Hagendijk, "The public understanding of science and public participation in regulated worlds" 42 *Minerva* 41 (2004); J. Ziman, "Is science losing its objectivity?" 382 *Nature* 751 (1996); John Ziman, *Real Science: What It Is, and What It Means* (Cambridge University Press, Cambridge, 2000); John Turnpenny, Mavis Jones *et. al.*, "Where now for post-normal science? A critical review of its development, definitions, and uses" 36 *Science, Technology and Human Values* 287, 295 (2011); J. Ravetz, "Usable knowledge, usable ignorance: Incomplete science with policy implications" in William C. Clark and Robert Munn (eds.), *Sustainable Development of the Biosphere* 415, 422 (Cambridge University Press, Cambridge, 1986). See also, S. Funtowicz and J. Ravetz, "Science for the post-normal age" 25 *Futures* 735 (1993); Arthur Petersen, Albert Cath *et. al.*, "Post-normal Science in practice at the Netherlands Environmental Assessment Agency" 36 *Science, Technology and Human Values* 362, 367 (2011); S. Funtowicz and J. Ravetz, "Post-normal science: An insight now maturing" 31 *Futures* 641 (1999); Helga Nowotny, Peter Scott *et. al.*, *Rethinking Science: Knowledge and the Public in an Age of Uncertainty* (Polity Press, London, 2001); Michael Gibbons, Camille Limoges, *et. al.*, *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies* (Sage, London, 1994).

19 Rio Declaration on Environment and Development 1992, Principle 10, 31 *International Legal Materials* 874 (1992).

as well as in preparation of executive regulation and generally applicable legally binding normative instruments.[20] Further, in an elaboration of these general requirements in the Aarhus Convention, the Almaty amendment to the Aarhus Convention specifically requires members to introduce an additional regime for public participation in decisions on the deliberate release into the environment and placing on the market of GMOs.[21] This amendment requires early and effective public participatory measures, which are prior to making specific decisions on the release of GMOs, and stipulated that 'due account is taken of the outcome of the public participation procedure'.[22]

Thus, it is apparent that arguments for making policy-prescriptions as proximate to wider public epistemic sources as possible, and asking for mechanisms that allow the public to meaningfully influence environmental decision-making are well-recognized as desirable in the liberal regulatory scholarship, as well as in a host of international instruments.[23] There is ample literature that examines legal and administrative provisions for public participation in environment related public decision-making in different parts of the world.[24] It is in this context that this paper seeks to contribute to the growing literature in India through the examination of formal requirements for public

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20 "The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter" 38 *International Legal Materials* 3, 517 (1999). See arts. 6, 7 and 8 of Aarhus Convention. Art. 6 (8) requires members to take due account of the outcome of the public participation in decisions on specific activities. Art. 7 mandates parties to provide opportunities for public participation in the preparation of policies relating to the environment, to the extent appropriate. Art. 8 requires parties to strive for promoting effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. It stipulates members to take the result of the public participation into account, as far as possible.

21 Decision II/1 on genetically modified organisms, amendment to the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25–27 May 2005, UN ECOSOCECE/MP.PP/2005/2/ Add.2 20 June 2005.

22 *Id.*, annex. I bis (7).

23 There is an important danger that both Lee and Mouffe flag here, *viz.*, the possibility of public participation mechanisms being used as hollow legitimational exercises by closed expert systems, where such exercises are seen to purely legitimate decisions already taken. Hence, how to make such participatory exercises as not just formal but genuinely participatory is part of the debate. See M. Lee, "Beyond Safety? The broadening scope of risk regulation" 62 *Current Legal Problems* 242 (2009) and C. Mouffe, *On the Political* (Routledge, London, 2005). See for the criticism about the way public hearings have been organized under EIA in India, *infra s*ection VI.

24 See for instance, J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press, Cambridge, 1998); J. Dryzek and S. Niemeyer, *Foundations and Frontiers of Deliberative Democracy* (Oxford University Press, Oxford, 2010).

participation leading to a public decision to grant clearance for economic and industrial activities under Indian environmental law.

III Provisions for publics' access to information

Seeking legal spaces that facilitate consultation and participation of those citizens who are not usually involved in environmental clearances, for instance as proponents of a project, could help verify (or challenge) the assumptions or the information upon which environmental clearances are granted by public authorities. Such involvement, which can improve the technical and scientific bases upon which decisions are taken, is important not only because such decisions can lead to potentially irreversible or highly damaging outcomes to the environment, but also since the decisions typically impinge on a resource base upon which millions of marginal sections in India are dependent. A necessary foundation for such public consultation and participation in environmental decision-making includes ensuring meaningful access to relevant information so as to facilitate communities and citizens to arrive at positions that are reasonably informed.

Reputedly, India has one of the best legal regimes facilitating right to information in the world, one that recognizes the citizen's right to access a reasonably large cache of relevant information, including through the institution of bureaucratic organizations and hierarchy of tribunals to gain access to such information. This regime was arrived at through concerted public actions by civil society actors,[25] a series of remarkable judgments from the higher judiciary in the 1980s and 1990s that recognized this right as a facet of the freedom of speech and expression contained in article 19 (1)(a) of the Constitution,[26] a number of state legislations in the late 1990s and early 2000s,[27] as well as the principles and institutions subsequently brought to fore by the Right to Information Act of 2005 (RTI Act).[28]

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25 See S. Singh, "The Genesis and Evolution of the Right to Information Regime in India" in *Transparent Governance in South Asia* (Indian Institute of Public Administration, New Delhi, 2011).

26 *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149; *State of Uttar Pradesh* v. *Raj Narain* (1975) 4 SCC 428; *Dinesh Trivedi* v. *Union of India* (1997) 4 SCC 306; *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294.

27 These include the Assam Right to Information Act, 2001 (Act 9 of 2002), The Goa Right to Information Act, 1997 (Act 28 of 1997), The Jammu and Kashmir Right to Information Act, 2004 (Act 1 of 2004), The Madhya Pradesh Jankari Ki Swatantrata Adhiniyam, 2002 (Act 3 of 2003) and The Rajasthan Right to Information Act (Act 13 of 2000).

28 Act 22 of 2005. The Act replaced the existing Freedom of Information Act, 2002 (Act 5 of 2003). See S. Naib, *The Right to Information Act 2005: A Handbook* (Oxford University Press, New Delhi, 2011).

Commendable *test litigations* have helped in successfully clarifying the ambit of the statutory right in regard to the documents connected to the grant of environmental clearances. Thus, under the RTI Act, the Central Information Commission has held that documents like pre-feasibility reports which project proponents are required to submit during an application for environmental clearance are 'crucial to ensure transparency and accountability in institutions', and hence, are expected to be uploaded on the ministry website as *suo moto* disclosures.[29] Consequently, the 'relevant authorities' are expected to upload these reports on the official website.[30] There are also a number of formal stipulations under the EIA notification of 2006, to ensure access of important documents and to provide notice for the general public provided which is discussed in detail in a subsequent section. At a formal level, thus, the legal system facilitates accessing of information upon which a decision to grant or deny clearance is made, thereby helping the citizens in evaluating the desirability of a grant of an environmental clearance, widening the possibilities of a subsequent challenge of the decision with respect to the basis of granting such a clearance, as well as ascertaining the compliance with requirements for implementation and post clearance monitoring.

IV The emergence of EIA as a central facet of environmental clearance mechanism

At present any decision to grant environment clearance by a competent authority is firmly based on a favourable environmental impact assessment report, based on a technical-administrative process that guides the empowered public agency granting environmental clearances. The EIA procedure is currently the central arena of public decision-making in granting environmental clearances in India, and the procedure for conducting EIAs is provided through various executive notifications under the Environment Protection Act, 1986 (EPA). The regulatory approach that emphasizes this central role for EIA is evident in a number of UN Conventions, and is also stipulated in the 1992 Earth summit held at Rio de Janero.[31] Principle 17 of the Rio declaration declares:[32]

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29 See *Shibani Ghosh* v. *Ministry of Environment and Forests*, Decision No.CIC/ SG/C/2011/001398/ 16936, order of the Central Information Commission, January 18, 2012, *available at*: http:// www.rti.india.gov.in/cic_decisions/CIC_SG_C_2011_001398_16936_T_74418.pdf (last visited on Nov. 3, 2014).

30 MoEF, order dated Mar. 20, 2012 in No. J-11013/19/2012-IA. II (I) (2012), Mar. 20, 2012, *available at:* http://moef.nic.in/downloads/public-information/order-20032012-a.pdf (last visited on Nov. 3, 2014). The relevant authorities specified in the order are the member secretaries of EAC and SEACs; see text around *infra* notes 52- 59, for more on these authorities.

31 See U.N. Convention on the Law of the Sea**,** 1982 (UNCLOS) 21 *ILM* 1261 *(1982),* art. 206 requires holding an EIA before permission to allow any activity that is likely to cause pollution to the sea is granted. Further, U.N. Convention on Environmental Impact Assessment in a Trans-boundary context, 1991 (Espoo Convention) 30 *ILM* 802 (1991), art. 206 stipulates the

> EIA as a national instrument shall be undertaken for the proposed activities that are likely to have significant adverse impact on the environment and are subject to a decision of a competent national authority.

The centrality of a formal EIA procedure in the grant of environmental clearances in India is notwithstanding an absence of any specific provisions stipulating that an EIA be carried out before the grant of an environmental clearance to any project, in the EPA or EP rules. By 1994, permissions from public agencies were already required under a number of statutes to regulate air pollution,[33] water pollution,[34] siting of factories that are using hazardous processes,[35] handling of hazardous chemicals or wastes,[36] de-notification of a wildlife sanctuary or national park,[37] as well as diversion of forests for non-forest purposes.[38] The executive EIA notification of 1994 stipulated that new projects (or even expansion or modernization of projects already in operation in 1994) shall not be undertaken unless environmental clearance is granted in accordance with the procedure specified in the EIA notification.[39] However, there is no explicit requirement to conduct EIAs in the aforementioned statutes or rules – including the Air Act, Water Act or Hazardous Waste Rules and the EPA. Notwithstanding this doubt about the *vires* of the notification, the insistence of basing the decision of granting an environmental clearance on a favourable EIA is firmly set in India by now, given a lack of constitutional challenge from any quarters upon this ground. [40]

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carrying out of EIA prior to any decision to authorize a proposed activity that is likely to cause a significant adverse trans-boundary impact. See more on Espoo Convention, C. M. Kersten, "Rethinking Transboundary Environmental Impact Assessment" 34 *Yale Journal of International Law* 173 (2009). The Convention on the Law of Non-navigational uses of International Watercourses, 36 *ILM* 700 (1997) refers to the significance of environmental impact assessment as a tool of decision making for decisions on development of international water courses.

32 *Supra* note 19, principle 17.

33 The Air (Prevention and Control of Pollution) Act, 1981, s. 21.

34 The Water (Prevention and Control of Pollution) Act, 1974, s. 25.

35 The Factories Act, 1948 (Act 63 of 1948), s. 41 A and schedule I,

36 The Coastal Regulation Zone Notification, Notification no. S.O. 114 (E) dated 19 Feb. 1991, *Gazette of India*, Extraordinary, Pt. II, sect. 3 (ii) dated Feb. 20, 1991, s. 3(2). Hazardous Wastes Rules, 1989; the Hazardous Chemical Rules, 1989; Rules for Hazardous Microorganisms and Genetically Engineered Organisms, 1989.

37 *Supra* note 6.

38 *Ibid.*

39 Notification No. SO 60 (E), Jan. 27, 1994, s. 1. see also, schedule I of this notification.

40 O.V. Nandimath, *Handbook of Environmental Decision Making in India: An EIA Model* 69-70 (Oxford University Press, New Delhi, 2009): "for all practical purpose the Central Government has vires under EPA to have these regulation in place."

The evaluation of a proposed project through an EIA is generally seen to involve four key steps *viz.*, screening (the administrative act of deciding whether formal EIA studies are statutorily required before a decision of granting environmental clearance for the project, taking into account the nature of the impact and location of the project or activity),[41] scoping (involves the framing of detailed and comprehensive terms of reference by specific technical-administrative bodies and processes leading to the preparation of the EIA report),[42] public consultation (the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained, with a view to identifying all relevant concerns in the design of the project or activity)[43] and appraisal (an evaluation and detailed scrutiny of concerns identified in all the documents, including the proceedings of public consultations leading to a sound assessment of the proposed project or activity).[44] Through these steps in the EIA procedure, a primary responsibility is emphasized on the proponent of a project to identify possible adverse impacts from the *subject* of their action; as a corollary also a responsibility to minimize these adverse impacts – say through employing the best available technology, or initiating the project at a site where there is minimal social and environmental cost.

Originally introduced in 1994 as an executive notification under the EPA, the EIA procedure for projects has undergone considerable changes in the twenty years of its formal existence in India.[45] Prior to this, environmental clearances for big projects like infrastructure, dams, irrigation and mining were obtained after an environmental appraisal by ministerial committees. Such clearance process included an identification and evaluation of the potential benefits and adverse effects in many important fields, steered by guidelines issued by different public authorities. For instance, the Central Water Commission issued guidelines in 1975 for investigation and careful evaluation of the impact of major irrigation and hydro-electric projects for fish culture, wildlife,

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41 Notification S.O. 1533, Sep. 14, 2006 (EIA Notification, 2006), s. 7(i)(1). See also, T. Rajaram and A. Das, "Screening for EIA in India: Enhancing Effectiveness through Ecological Carrying Capacity Approach" 92 *Journal of Environmental Management* 140 -148 (2011).

42 EIA Notification, 2006, 7(i)(II)(i).

43 *Id.*, 7(i)(III)(i).

44 See *Utkarsh Mandal* v. *Union of India*, MANU/DE/3070/2009, where the court held that appraisal is "in essence a delegate of the MoEF performing an "outsourced" task of evaluation. The decision of the EAC may not necessarily be binding on the MoEF but is certainly an input into the decision making process. Considering that it constitutes the view of the expert body, its advice would be a valuable input."

45 *Supra* note 40 (ch 4 and 7 for an overview of all the amendments to the EIA notification till 2009).

and the over-all ecology of the affected region.[46] In the 1980s, the Department of Environment and Forests (a predecessor of the MoEF) also issued guidelines for the environmental assessment of river valley projects. These guidelines required conduct of various studies related to the construction of the project *vis-à-vis* the potential for water-logging, water-related diseases, seismicity, impact on forests and wildlife in the submergence zone as well as impact on upstream and downstream aquatic ecosystem and fisheries.

It is the EIA notification of 1994 that formally brought to fore the necessity for focused regulatory action towards assessing social and ecological impact of a project before permission to proceed is granted to it by public agencies, bringing together existing dispersed administrative requirements. The responsibility on MoEF as an impact assessment agency was institutionalized through this notification, where the project proponent was required to file an impact assessment report, an environment management plan and a project report before the MoEF, while an application for grant of environmental clearance is sought. The decision to grant clearance was expected to be taken only after an assessment of the impact to the environment, taking into consideration the aforementioned documents and importantly (for the current enquiry) a mandatory public hearing.[47]

Within the EIA framework, arguably, there is an implicit recognition of the necessity that a decision on environmental clearance be informed by wider public inputs, which are not merely limited to the formal bodies and the proponents of the project. The administrative process of EIA that precedes a possible clearance is expected to collate all available information on the project to characterize the risks and benefits accruing from the project. The public consultation mechanism that is stipulated in the EIA procedure is purportedly intended to facilitate the identification of hazards, as well as the identification of concerns of local communities and wider publics, through which information from multiple sources that are outside of dominant regulatory communities is sought to be fed into the assessment and appraisal of the impact.

However, the mandatory requirements under the EIA procedure have been considerably fickle, given the series of amendments to it within a short span of fifteen years which have been facilitated by the ease with which the executive notifications can be amended by the ministry, including through explanatory notes. Many of the requirements stipulated for assessment, within each of the four aforementioned steps (of screening, scoping, public hearing and appraisal) were diluted; curiously even

46 Menon and Kohli, *supra* note 6 at 361.

47 Notification No. SO 60 (E), Jan. 27, 1994.

reintroduced in some occasions. For instance, the nature and extent of the impact to be assessed and the public's right to access these documents were changed within months of the original notification of 1994, through an explanatory note from the ministry.[48] Soon after, another amendment to the notification required proponents of projects to allow access to copies of the EIA report to the public.[49] Two years later, a fresh amendment to the notification in 1997 prescribed fresh procedure for EIA which also required the holding of public hearings within procedure provided under the notification.[50] A new procedure was put in place in a fresh notification in 2006, which included a new set of requirements for public consultations, described in the next section.

V Current EIA procedure: Key requirements and possible room for public engagement

The current legal framework that stipulates the way EIAs are carried out is based on a fresh notification under the EPA and was considered extremely controversial when it was notified in 2006.[51] The notification reiterated that work for any scheduled project can commence only after a clearance from the concerned impact assessment agency through a favourable EIA is obtained; though the initiation of the land acquisition is allowed before the grant of such a clearance.[52] While applying for a green clearance, the applicants have to approach either the MoEF or the state level environmental impact assessment authority (SEIAA) for an EIA, depending upon the classification of project as either category A (under the MoEF) or category B (under SEIAA). This categorization depends upon a matrix involving the scope of the proposed activity based on the capacity, product mix, location and area of the site, as well as the nature of certain enumerated activities like mining, oil and gas exploration, industries, infrastructure and construction project, thermal, hydro and nuclear powers.[53]

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48 Notification No. SO 356 (E), May 4, 1994.

49 Notification No. SO 632 (E), June 13, 1994.

50 Notification No. SO 318 (E), April 10, 1997.

51 Padmaparna Ghosh, "Draft EIA notification favours Industry over Environment" *Down to Earth,* Sep.30, 2006; Staff Reporter, "Greens allege dilution of Key notification on Environment" *The Hindu,* Aug. 30, 2006; Leo Saldanha, Abhayraj Naik *et. al*, *Green Tapism: A Review of the EIA Notification, 2006* (Environment Support Group, Bangalore, 2007); Manju Menon and Kanchi Kohli, "Environmental decision-making: Whose Agenda?" 42 *EPW* 2490-2494 (2007).

52 MoEF, "Activities Which Can Be Undertaken Without Prior Environmental Clearance–Regarding", Office Memorandum dated Aug. 19, 2010 in No. J-11013/41/2006/-IA.II (1), *available at:* http://www.moef.nic.in/downloads/public-information/Act-prior-EC.pdf (last visited on Nov. 3, 2014).

53 S. 2 of the 2006 notification, and schedule I. But see the applicable general conditions in the scoping of different projects, to determine the agency who would be responsible for the EIA

The expert appraisal committees (EACs) play a key role in clearances at both the central and state levels (SEACs). The seven different EACs for coal, thermal power, non-coal mining, industrial projects, infrastructure, CRZ, nuclear and hydro projects, are involved in the screening, scoping and appraisal of EIA studies in their respective areas. These committees advise the MoEF or SEIAA regarding the clearance of projects seeking permission, and are constituted for a term of three years. The committees are expected to be composed of experts from fields related to the impact assessment, and usually have an official from the MoEF (or the concerned state administration, as the case may be) appointed as the member secretary.[54]

The SEAC plays a crucial role in the screening of category B applications since during the scrutiny of the application, the 2006 notification exempts some kinds of projects from the requirement of public consultations,[55] and some others from undertaking EIA studies itself, based on the "nature and location specificity" of the project.[56] Subsequent to the screening, EACs/ SEACs issue detailed terms of reference, based on which the project proponent is expected to undertake assessment studies, and prepare a draft EIA report. These committees are also expected to conduct an appraisal at a subsequent stage, ideally basing such an appraisal on a host of important documents including the terms of reference, the various EIA studies, draft EIA report, the proceedings of the public consultation, as well as (possibly) a final EIA report or a supplementary report to the draft EIA report. Such appraisals are expected to lead to a recommendation by the EACs/SEACs to MoEF/ SEIAA respectively, regarding the grant of clearance, along with any accompanying conditions or safeguards for a clearance.

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irrespective of the scale of some kinds of projects, say like a nuclear power project will always be assessed by the MoEF, while the EIA for a common effluent treatment plant will always be conducted by the state agencies; and the specific conditions. For a useful description and detailed analysis of the 2006 notification see *supra* note 29.

54 Appendix VI, 2006 notification.

55 An instance of projects exempted from public consultation is the exemption for individual units in the notified national investment and manufacturing zones from conducting public hearings, as long a public hearing has been held for the entire zone. See also, MoEF, Office Memorandum dated Feb. 14, 2012 in No. J-11013/41/2006-IA.1I (I): National Manufacturing Policy - Measures for Implementation Pertaining to Ministry of Environment and Forests (2012), Feb. 14, 2012, *c.f.*, *supra* note 29.

56 S. 7 (i) (1) of 2006 notification. See also, MoEF, Office Memorandum dated December 24, 2013 in No. J-13012/12/2013-IA-II(I): Guidelines for Consideration of Proposals for Grant of Environmental Clearance Environmental Impact Assessment (EIA) Notification, 2006 and its Amendments- Regarding Categorization of Category 'B' Projects/ Activities into Category 'B1' & 'B2', Dec. 24, 2013, *available at*: http://moef.nic.in/sites/default/files/ia-24122013.pdf (last visited on Nov. 3, 2014).

The public consultation process is the principle formal mechanism through which members of the affected community voice their concerns and grievances about a proposed project. Under the current procedure, consultation is envisaged to be held at a stage subsequent to the completion of the EIA studies by the EACs and SEACs (scoping). The state pollution control boards are responsible for facilitation and conduct of the public consultations for all applicable categories of projects. The National Green Tribunal (NGT) has directed that the officers of the state pollution control board should not have any of its members as part of the SEIAAs, in the interest of independent assessment of the projects at the SEIAA level.[57] The notification gives significant powers to the EACs and SEACs in exempting the requirement of public consultation for expansion and modernization projects if the projects have an "insignificant pollution load". The ministry has noted the indiscriminate practice of granting exemption from the mandatory requirement of public consultation "without giving detailed justification".[58] Given the considerable impact on environmental integrity due to the additional pollution load and use of natural resources from these expansions and modernization, the ministry has directed concerned officials to apply the exemption judiciously and has emphasized that the reasons for such exemption be explicitly recorded in the minutes of the concerned EAC/SEAC meeting. [59]

The public consultation requirement itself is envisaged in two stages *viz.*, public hearing, and written responses, where the former is limited to elicit concerns and responses of the "local affected persons", while "written responses" can be forwarded by "other concerned persons having a plausible stake in environmental aspects of the project or activity" to the appropriate regulatory agency.[60] Such a distinction of entitlement during public consultations between these two classes of persons, *viz.*, "local affected persons" and "other concerned person" has been papered over by the Delhi High Court through its observation: [61]

> From the terms of the Notification dated 14th September, 2006 it seems, prima facie, that so far as a public hearing is concerned, its scope is limited and confined to those locally affected persons residing in the close proximity

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57 See *Rayons-Enlighting Humanity* v. *Union of India,* Application No. 86, 99 and 100 of 2013, National Green Tribunal, July 18, 2013, *available at*: http://www.greentribunal.gov.in/judgment/862013(App)_ 18July2013_final_order.pdf (last visited on Nov. 3, 2014).

58 MoEF, Consideration of Projects under Clause 7(ii) of the EIA Notification, 2006 - Exemption of Public Hearing -Instructions Regarding (2009), June 3, 2009, *available at*: http://moef.nic.in/divisions/iass/offc_memo_instruction. pdf (last visited on Nov. 3, 2014).

59 *Ibid.*

60 Ss. 7 (i) (III) (ii) (a) and 7 (i) (III) (ii) (b) of 2006 notification.

61 *Samarth Trust* v. *Union of India* (2010) 117 DRJ 113 (Del).

> of the project site. However, in our opinion, the Notification does not preclude or prohibit persons not living in the close proximity of the project site from participating in the public hearing- they too are permitted to participate and express their views for or against the project.

Detailed requirements towards the conduct of the hearing are provided under the notification, including upload of the summary of the draft EIA report and application on the project proponent's website, requiring the proponents to specifically seek responses from concerned persons on their website, and also to provide notice through other necessary means of wide publicity.[62] Public access to the draft EIA reports and other relevant documents are also sought to be ensured by the insistence that the project proponent should forward the draft report and the summary report to the MoEF and other 'designated offices'. Any citizen is entitled to access these documents from such offices under the RTI Act, as described in section II of this paper. These offices are also required to widely publicize the draft EIA report in their respective jurisdictions, and to request people to send their comments to the appropriate agency during the publication of such notices.[63]

Reasonable access to the public hearing is also sought to be ensured through detailed guidelines on the location of the hearing, suggested as either at the project site or in 'close proximity' thereto. The requisite notice of the information of the public hearing is of thirty days through a major national daily newspaper, one regional vernacular/official state language daily, and through beating of drums, radio and television, in locations where newspapers are not available.[64] The content of the notice should specify the time and venue of the public hearing as well as the locations where the draft EIA reports can be accessed from.[65]

Any public hearing has to be supervised by district magistrate/district collector/ deputy commissioner or their representative, who is not below the rank of an additional district magistrate. The state pollution control board is required to arrange for a video recording of the entire proceedings, which is required to be forwarded to the appropriate agency, along with the written record and attendance sheet.[66] The presiding

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62 Appendix IV 2.3, s. 7 (i) (III) (vi).

63 The offices of the district magistrate/ district collector/ deputy commissioner, the zila parishad or the municipal corporation or the panchayat union, the district industries office, urban local bodies, PRIs, development authorities and the concerned regional office of the MoEF.

64 Appendix IV 3.1 of the 2006 notification, and *Utkarsh Mandal* v. *Union of India*, MANU/DE/ 3070/2009.

65 *Ibid.*

66 Appendix IV and ss. 5.1 and 6.1 of the 2006 notification.

panel of the hearing is expected to prepare a summary of the proceedings, a statement of issues raised by the public, and the minutes of the proceedings that 'accurately reflect all the views and concerns' expressed in the hearing. The summary of the public hearing has to be read over to the audience in the local language before it is finalized.[67] The proceeding of the public hearing is required to be displayed on the website of the SPCB, and also conspicuously displayed in the 'designated offices'. The proponent of the project is required to address the concerns raised in the hearing and consultation, either in the final EIA report or through a supplementary report to the draft EIA report.[68] While the higher judiciary has not examined whether the veracity and gist of the proceedings in public hearings are appropriately recorded, or whether concerns articulated in the public hearing are subsequently taken into account in the appraisal, the Kerala High Court had quashed an environmental clearance granted to a hydro-electric project, directing such clearance to be reconsidered, on the ground that the mandatory public hearing itself was not conducted.[69]

The EAC/SEACs is expected to make an appraisal of the environmental impact of a project, based on all the relevant documents including the terms of reference (ToR), draft EIA, supplementary report, a final EIA, proceedings of the public hearings and written responses. Ministry guidelines explicitly bar seeking of additional studies outside the purview of the original ToR, during the stage of appraisal.[70] It discourages any query outside of the original ToR demanding a comprehensive scoping exercise, only allowing additional studies in exceptional cases where new facts come to the notice of the EAC/SEAC, to be conducted in a time-bound manner. They are also expected to recommend the grant/rejection of environmental clearance to the MoEF/ SEIAA with the reasons and conditions specified therein. Effectively this requirement reflects the presumption within the regulatory scheme that each and every issue that may emerge in a public consultation can be anticipated and incorporated in the ToR, during the stage of scoping. It sees no real value in eliciting areas where further studies may be needed from the public, through public consultations.

The appropriate regulator MoEF/ SEIAA takes the decision on the grant of environmental clearance based on the recommendation of the EAC/SEAC. However

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67 Appendix IV and ss. 6.4 and 6.5 of the 2006 notification.

68 Appendix IV and s. 7.2 of the 2006 notification.

69 *Ravi SP and S Unnikrishnan* v. *State of Kerala* (OP 1774/2001, OP 3581/2001 and OP 7713/ 2001) cited from *supra* note 40, fn. 30.

70 MoEF, "Circular 'Seeking additional studies by EACs/ SEACs during appraisal of project beyond the Terms of Reference (ToRs) prescribed under EIA Notification, 2006'", dated 7 Oct. 2014 in F. No. 22-A3/ 2O14-IA-III, *available at*: http://moef.gov.in/sites/default/files/ OM_EAC_SEAC_07_10_2014.pdf (last visited on Nov. 4, 2014).

EAC's recommendation is not binding on the MoEF/ SEIAA, though its advice is a valuable input and the appropriate regulator has to provide reasons for disagreements with recommendations of the EAC/SEAC.[71] In an eventuality of a grant of an environmental clearance for a project, the information about the grant is to be disseminated among the public, by the permanent display of the EC on the official website of the project proponent, on an appropriate government portal, and in local newspapers; an additional requirement also stipulates the project proponent to forward the clearance letter to local NGOs who may have send suggestions and representations during the process of EC.[72] Half-yearly reports are expected to be filed by the project proponent to the appropriate regulator regarding the compliance with the conditions and safeguards specified in the clearance, and have to be made available to the public.[73]

VI Various lacunae in the EIA mechanisms and impediments to public engagement

A quick survey of sociological literature reveals the breadth of drawbacks in the design and implementation of EIAs in India, drawbacks which also cadaverise the spirit of public participation that is necessary to make a realistic assessment of environmental impacts of project. In a balanced assessment, Diwan discusses the tremendous variations in the effectiveness of the public hearing process in India: from the repressive forms in some mining projects where the affected communities have been physically prevented from participating in the hearings through the deployment of the state police, a frequent undermining of the object of public hearings through inadequate provision of notice of the meeting, refusal to allow access of essential information to the public, inaccurate communications of what transpired at the hearing to the MoEF, to a number of creative initiatives by NGOs and some government officials enabling affecting communities to genuinely understand the nature of the project and formulate responses about the potential impact.[74] More broadly, civil society groups have pointed to the complete absence of an enabling atmosphere for the views of the general public to be heard, taken seriously and incorporated into the final decision towards grant of environment clearance, during the public hearings.[75] These descriptions also focus attention on the considerable subversion and abject nature of public hearings in the two decades of EIA notifications, including the jealous

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71 See s. 8 of the 2006 notification. See also, *Utkarsh Mandal Supra* note 44.

72 S. 10 of 2006 notification.

73 *Ibid.*

74 S. Divan, "The Contours of EIA in India" in R. Iyer, *Water and the Laws in India* 399 (Sage, New Delhi, 2009).

75 *Ibid.*

guarding of important documents and exclusion of already marginalized groups.[76] In this picture, the impact of formal guidelines on public participation in EIA can appear to be minimal, notwithstanding the detailed provisions for public hearings and consultations in the notification and MoEF circulars. This brings to the fore familiar anxieties about the gap between written rules and administrative practices pertaining to the lack of implementation of well drafted legislations, often termed as lack of political will in legal scholarship.

The difficulties of implementing the public participation provisions during an assessment of environmental impacts are also connected with serious procedural lacunae in the EIA regime, recognizable in the two decades of its formal operationalization. The preparation of EIA reports have been beset with the fundamental problems of the poor quality of EIA studies, including widely noted incidents of plagiarism and inaccurate impact assessment, the lack of accountability of EIA consultants and the vexed issue of the consultants being paid for by the project proponents.[77] These issues point towards a crucial range of concerns about the independence, integrity and credibility of the EIA studies and documents central to the EIA process. The inadequacies of the assessment report can also be evidenced in a widespread preference for rapid EIAs allowed by the notification, a practice that has every probability of producing inadequate environmental impact assessments.[78] The Supreme Court brought to focus the concerns about the indiscriminate use of rapid EIA, suggesting that the MoEF prepare a panel of accredited institutions, "from which alone the project proponent should obtain a rapid EIA, and that too on the terms of reference …formulated by the MoEF."[79]

A number of other substantial issues connected with the abject manner in which EIAs are carried out in India are also identified in different studies and cases. First among these issues is connected to the composition of the EACs, during its functions of scoping and appraisal. Having appropriate and relevant expertise in the appraisal

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76 Leo Saldanha, Abhayraj Naik, *supra* note 51; K. Khokli and M. Menon, *Eleven Years of the Environmetn Impact Assessment Notification, 1994: How effective has it been?* (Kalpavriksh, New Delhi, 2005); M. Menon and K. Kohli, "From Impact Assessment to Clearance Manufacture" 44 *EPW* 20 (2009).

77 R. Paliwal, "EIA practice in India and its evaluation using SWOT analysis" 26 *Environmental Impact Assessment Review* 492, 501-51 (2006); J. K. Panigrahi and S. Amirapu, "An Assessment of EIA System in India" 35 *Environmental Impact Assessment Review* 23, 29-30 (2012); *supra* note 29 at 463-65, 468-71.

78 See also, *Him Pravesh Environmental Protection Society* v. *State of Himachal Pradesh*, 2012 SCC Online HP 269.

79 *Lafarge Umiam, supra* note 7.

committees, ensuring that these experts are independent, that they have no 'revolving door interests' in clearances, and even getting experts to head these EACS have all been matters of grave concern.[80] Second, the absence of a requirement to cumulatively assess impacts of projects and processes, given that pollution subsists over territory and time has undermined the reliability of impact assessments, strikes an important blow for an aspiration for accurate assessment in a significant number of cases. The current approach of assessing impacts of individual projects, thus, becomes erroneous, and the reason that there might be a number of other projects within a locality is only the beginning of this grave error. The effect of the aggregate pollution from all the projects would be different and far graver than the sum of its parts. Further, the effect of the subsistence of pollution over time may need fresh inputs of assessments and this is inadequately dealt with in the current system. The NGT has directed different projects to be reexamined from this angle, and the MoEF itself has acknowledged this lacuna, commissioning cumulative impact assessment for hydroelectric projects on certain river basins.[81] Such concerns raise serious questions about the efficacy of the whole EIA regime. Though these issues may be seen as having general applicability, the fundamental nature of these lacunae makes them intrinsically connected with issues of public engagement as well.

Third, even within the limited imagination in the existing framework of public consultations as one time exercises, studies note that very often public concerns expressed in hearings and written consultation are not addressed in the appraisal, or even acknowledged in the record of proceedings. The higher judiciary's track record of deference to technical studies, refusing to look into the accuracy and veracity of the substantial/scientific claims in the EIA, is discussed in the next section. In a similar vein, the higher judiciary has also generally avoided an examination whether the concerns expressed in the public hearings have been documented or recorded accurately, and whether these concerns have been addressed or engaged with during

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80 The National Green Tribunal in its judgment on July 17, 2014 in *Kalpvriksh & others* v. *Union of India* (Application no. 116 (THC) of 2013), *available at:* http://www.ercindia.org/index.php/latest-updates/latest-ngt/1172-ngt-directs-moef-to-appoint-members-chairperson-of-eac-seac-persons-who-are-related-to-the-field (last visited on Nov. 26, 2011) has held it illegal to hire the services of retired bureaucrats as chairs of the EACs. See also, Sreshta Banerjee, "Experts without expertise" *Down To Earth,* Aug. 2014.

81 *Supra* note 29, *T. Mohana Rao* v. *Ministry of Environment and Forests* Appeal No. 23/2011 (NEAA Appeal No. 1/2010), *available at*: http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7955/T-Murugandam-and-Others-Vs-Ministry-of-Environment-and-Forest-and-Others (last visited on Nov. 4, 2014).

the appraisals for the subsequent EIA report.[82] While these are questions of fact in some ways, such issues go to the heart of the central function of public consultation, namely to provide a formal space to challenge assumptions emanating from proponents of a project, which may be uncritically accepted by the assessors due to these lacunae. The effects of these aforementioned criticisms about the regulatory employment of public hearings in the EIA process is considerable, even when consultation is envisaged in such a limited fashion as a one-time exercise sandwiched between scoping and appraisal.

Importantly, the late stage at which public consultation is envisaged within the EIA architecture negates the promise of both normative and epistemic superiority offered by genuine public participatory mechanisms outlined in section II of this paper. The serious limitations to the use of public consultations as envisaged in the EIA procedure are aptly brought together by Paliwal:[83]

> Public hearings are conducted to incorporate concerns of locals in decision-making. Unlike USA and (the) Netherlands, where public involvement is must at various stages of EIA i.e., screening, scoping, report preparation and decision-making (Wood, 1995; MHSPE, 2000), in India public hearing is conducted just before making decisions. Though it is understood that mechanism of public participation prevailing in developed countries may not be feasible in India because of societal and economic reasons. But even one time public interaction is not very apt because of insufficient information on the role of people in the process as well as lack of awareness on environmental matters (Sinclair and Diduck, 2000). Above that, people feel betrayed, as points raised in public hearing are rarely involved in planning and decision-making.

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82 In *Centre for Social Justice (Janvikas)* v. *Union of India*, AIR 2001 Guj. 71, the Gujarat High Court had given guidelines on the way public hearings ought to be conducted: the venue of the hearing should preferably be at the *taluka* headquarters rather than the district headquarters for convenience of the local people, publication and intimation should have wide circulation in the area, and also to send public notices to the Gram Panchayat concerned to bring the attention of people who are semi-literate or may not read newspapers, in addition to related requirement make an executive summary of the EIA report available to interested parties in lieu of nominal charges, and the minimum quorum, nomination of person, minutes of the public hearing should be drawn keeping in mind the spirit and objective of the public hearing, and the public is intimated about the grant of environmental clearance. Most of these guidelines have been incorporated into the notification in the past three years (see text around *supra* notes 60- 66), though it needs further investigation to see if these guidelines have made a difference in the way EIAs are now conducted.

83 *Supra* note 77 at 502.

Public consultation is currently envisaged as a separate component at a very late stage between screening, scoping and the preparation of a draft EIA report, on the one hand, and the appraisal, on the other. There are other models of public involvement during the grant of clearance of development in India. For instance, during the grant of forest clearances, in certain limited scheduled areas the involvement and written consent of the communities is intrinsic to the grant of a forest clearance, through the Forest Rights Act, 2006 and the Panchayat Extension to Scheduled Areas Act, 1996. These Acts vest a right to recommend the grant of certain licenses and concession with the local community, to be exercised through a written resolution of the gram sabha.[84] By late 1990s, ministry guidelines also stipulated that 'whenever any proposal for diversion of forest land is submitted, it should be accompanied by a resolution of the 'Aam Sabha' of gram panchayat/ local body of the area endorsing the proposal that the project is in the interest of people living and around the proposed forest land' in other forest areas.[85] The general scheme of these provisions is to vest the neighbouring communities with a general power and voice in the protection of its immediate environment. The central rationale for such a trust is that these natural resources are vital to the immediate survival of these communities, and hence they ought to be recognized as important custodians who ensure the sustainability of projects. Thus, one can see a general requirement during the forest clearance processes that borders on eliciting consent from neighboring communities; a model that is a useful emulation in the environmental clearance process as well.

It is submitted that the need of the hour to ensure an effective and legitimate environmental clearance is to have public participation at the core of the clearance process, for reasons identified in section II of this paper. Involvement and participation of the local communities provides a qualitative change in the way in which EIA scoping, framing of studies, and appraisal can be done. Ideally, formalization of public consultation and participation is required to make each of these aforementioned stages more effective and legitimate.[86] Such public involvement can augment the inadequate application of mind by EACs during the phase of screening and scoping. Currently, in contrast, the screening and scoping are done by official bodies which have serious limitations of time, personnel, expertise as mentioned earlier. Further, ministry

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84 The Panchayat Extension into Scheduled Areas Act, 1996 (Act 40 of 1996), ss. 4 (i) (j) (k) (l); The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forests Rights) Act, 2006 (Act 2 0f 2007), ss. 3 (1) (c) (d) (i) (l).

85 MoEF, "Diversion of forest land for non-forest purpose" Feb 29, 1999 No. 11-30/96-FC (pt.) dated Feb. 26, 1999.

86 See also, J. K. Panigrahi and S. Amirapu, "An Assessment of EIA System in India" 35 *Environmental Impact Assessment Review* 23-36 (2012).

guidelines bar the EAC/SEAC from calling for new or further EIA studies during the stage of appraisal, which are outside of the original ToR.[87] While this can be seen as an ostensible measure to check arbitrariness, it reveals the erroneous regulatory mentality that all potential concerns can necessarily be identified by a closed door deliberation by technical bodies like EACs. Thus, it renders any serious concerns emerging from public consultation that may not have been envisaged during scoping, inconsequential to the EC process; howsoever serious, the concern may be.

Public involvement at the appraisal stage can augment measures to minimize its current weaknesses, including about the limited nature of information that may be available to the EAC during appraisals, a public check regarding gaps between a draft EIA report and a final EIA report, and whether public concerns have been recorded and adequately responded to.[88] The public concerns raised in the consultations may be stipulated as conditions whose compliance is central to the continuation of an environmental clearance.[89] In such situations the general publics' role in monitoring of compliances may become crucial, given the abject nature of monitoring and compliance mechanisms of EC conditions, where such public involvement can significantly benefit from developing monitoring mechanisms.[90] As opposed to (for instance) having affected publics approach courts for directing project proponents to rectify (any) eventual non-compliances, having regulatory mechanisms that formally place public involvement in the heart of monitoring and compliance mechanisms can make it more vibrant and effective. Public involvement can also be a check on the poor quality of EIA report, and ensure that various concerns that were raised by the public during the various stages of the EIA are addressed during the stage of appraisal.

Even within the limited ambit within which public participation is currently envisaged, *viz.*, as a one-time consultation at a stage between scoping and appraisal, this section discussed the acute problems with the way public engagement has been effectuated. For instance, Ghosh surveys the significant ways in which the public

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87 *Supra* note 70.

88 See also, *supra* note 29 at 475- 477. MoEF has itself noted that ensuring an effective compliance to the stipulated conditions and safeguards is a cause of concern, MoEF, Report of the Committee Constituted to Examine the Issues Relating to monitoring of Projects, March 11, 2011*, available at*: http://www. indiaenvironmentportal.org.in/files/monitoring-rept-11-03-2011.pdf (last visited on Nov. 3, 2014).

89 MoEF, "Categorization of environment clearance conditions in the environment clearance document for different phases of implementation of projects", circular dated Oct. 7, 2014 in F. No. 22-78/2014-IA.III, *available at*: http://moef.gov.in/sites/default/files/OM_phases_IA_Projects_07-10-2014.pdf (last visited on Nov. 4, 2014).

90 K. Kohli and M. Menon, *Calling the Bluff: Revealing the State of Monitoring and Compliance of Environmental Clearance Conditions* (Kalpavriksh, New Delhi, 2009) and *supra* note 29.

consultation process has been undermined including provisions of blanket exemption from public consultation, non-adherence of the notice requirements–in both letter and spirit, lack of adequate safeguards to ensure effective consultation of local communities and the undue discretion given to the project proponent in responding to concerns of local communities.[91] Again, one of the steps necessary to bring such undermining is to widen the space for public consultation and participation to multiple stages, from scoping to appraisal. If public consultation and participation is important to make assessment and clearance more robust, based on multiple epistemic sources, and subject to public challenge, it is well possible that such participation could happen outside the EIA process, albeit after the clearance is granted. Thus, it is important to enquire if such a window exists through judicial bodies. The next section examines the possibilities and permissible extents of such participation in judicial spaces, in relation to environmental clearances in India.

VII The partial promise of public participation in judicial spaces

The constitutional courts have generally played a seminal role in the setting up of a legal regime for environmental protection in India. Over and above the general reputation as a non-conservative supporter of socio-economic rights of the unprivileged and marginalized, including through liberal notions of *locus standi*, non-traditional reliefs, and processes,[92] the Supreme Court has time and again recognized and elaborated the necessity of having an effective environmental regime in the country.[93] These instances of judicial activism have included elaborations on the principles of polluter pays, strict and absolute liability, precautionary principle and the goal of sustainable development.[94]

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91 *Supra* note 29 at 71-74.

92 This included entertainment of letters as writ petitions under an epistolary jurisdiction. For instance, in the celebrated case of *Sunil Batra* v. *Delhi Administration,* AIR 1980 SC 1579, where a letter scribbled by a prison inmate drawing attention to the unbearable physical torture by prison authorities of a fellow prisoner and smuggled to a sitting judge was treated as a writ petition; as also *suo moto* public interest action in *Dr. Upendra Baxi* v. *State of Uttar Pradesh*, 1981 (3) SCALE 1137 and *Sheela Barse* v. *Union of India*, AIR 1983 SC 378. The constitutional bench decision in *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149, postulated the principle that "any member of the public having sufficient interest may move the Court for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty etc."

93 *M. C. Mehta* v. *Union of India*, AIR 1988 SC 1037; *Virendra Gaur* v. *State of Haryana* (1995) 2 SCC 577; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *Dahanu Taluka Environment Protection Group* v. *Bombay SESC Ltd.*, (1991) 2 SCC 539 and *M.C.Mehta* v. *Union of India* (1991) 2 SCC 353. See also, *Indian Council for Enviro-Legal Action* v. *Union of India*, 1996 AIR SCW 1069; *M.C. Mehta* v. *Union of India* (1998) 6 SCC 63; *Satish Chander Shukla (Dr.)* v. *State of U.P.* (1992) Supp (2) SCC 94 and *C.E.R.C.* v. *Union of India*, A.I.R. 1995 SC 922.

94 *AP Pollution Control Board* v. *Prof. MV Nayudu,* AIR 1999 SC 812; *M.C. Mehta* v. *Union of India* (1992) 3 SCC 256; *M. C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388; *Rural Litigation and Entitlement*

Notwithstanding this catena of cases, the higher judiciary has traditionally adopted a policy of deference in the realm of adjudicating environmental clearances, including challenges to the epistemic basis and scientific validity of decisions to allow a project through an environmental clearance.[95] This is evident in a host of cases where the apex court has shown deference to the decisions of official techno-scientific bodies, be it in the *Narmada* case,[96] the *Tehri* cases,[97] the *Mullaperiyar* cases,[98] or in *Research Foundation for Science, Technology and Natural Resource Policy* v. *Union of India*.[99] Various high courts have also followed this trend,[100] and this was also famously discernable more recently in the Kudankulam judgments.[101] However, there are also some decisions in which the Supreme Court had appointed committees of experts to examine technical issues and guide the court. For instance, in *Aruna Rodriguez* v. *Union of India*, the Supreme Court appointed experts to examine environmental clearances on activities that citizens strongly felt entail grievous environmental harms, requiring these experts to bring to the court information and rationale that are independent of the government and the industry.[102] Notwithstanding such inordinate exceptions, the general consensus is that the apex court has by and large refused any substantive examination of environmental issues that are ignored by technical regulators.[103] The importance to have a wider base of information from which environmental impacts are assessed, and to have the administrative decision of granting clearance as public as possible, including in EIA studies, becomes even more apparent when one takes into account the limited opportunity for the general public to substantially challenge information on which the clearances are based in the writ jurisdictions.

Kendra v. *State of UP,* AIR 1988 SC 2187; *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420; *Virender Gaur* v. *State of Haryana* (1995) 2 SCC 577 and *M. C. Mehta* v. *Union of India* (1998) 4 SCC 589.

95 See V. Upadhyay, "Changing Judicial Power" 34 *EPW* 3789-92 (2000).

96 *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

97 *N.D. Jayal* v. *Union of India* (2004) 9 SCC 362; *Tehri Bandh Virodhi Sangharsh Samiti* v. *State of U. P.* (1992) Supp (1) SCC 44.

98 *Mullaperiyar Environmental Protection Forum* v. *Union of India* (2006) 3 SCC 643; *State of Tamil Nadu* v. *State of Kerala*, JT 2014 (6) SC 260.

99 (2007) 11 SCALE 75.

100 *Forum for a Better Hyderabad* {*Confederation of Voluntary Organizations of Hyderabad*} v. *Government of A.P.*, 2004 (1) ALT 500; *Indian Council for Enviro-Legal Action* v. *Union of India*, ILR 1997 KAR 2956.

101 G. *Sundarrajan* v. *Union of India* (2013) 6 SCC 620; G. *Sundarrajan* v. *Union of India*, (2014**)** 6 SCC 776**.**

102 *Aruna Rodrigues* v. *Union of India* (2012) 5 SCC 331.

103 This trend is termed as agency deference by Shyam Divan, *supra* note 74 at 402.

However, avenues for judicial oversight over administrative actions regarding environmental clearances exist through other tribunals like the National Green Tribunal. Earlier, the National Environment Appellate Authority Act (NEAA)[104] provided for appeals to be entertained before the authority from any aggrieved person with respect to orders granting environmental clearances,[105] and precluded civil courts or other authorities from entertaining any appeal with respect to such decisions.[106] Aggrieved persons could approach the tribunal against a decision related to the grant of clearance, including questions about the impact assessment in the impugned orders; the tribunal having both judicial members and experts with technical knowledge. The National Green Tribunal Act of 2010 repealed the NEAAA and simultaneously constituted the National Green Tribunal, a judicial body chaired by a retired Supreme judge. Comprising of both judicial members and expert members with benches operating across the country in Kolkata, Pune, Bhopal and Delhi, the NGT is currently the only tribunal before which first challenges to environmental and forest clearances can be made.[107] The substantive jurisdiction of NGT allows considerable amount of independent scrutiny over grant of environmental clearances based on factors identifiable in impact assessment reports, public hearing, as well as post-clearance compliance and monitoring. The NGT has provided a salutary space through which the public has participated in the environmental clearance process, albeit post facto, and sometimes in revoking grants.[108] On several occasions the tribunal has identified

104 Constituted under the National Environment Appellate Authority Act, 1997 (Act 22 of 1997).

105 National Environment Appellate Authority Act, 1997, s. 11(1).

106 *Id.*, s. 15. See Law Commission of India, 186th Report on Proposal to Constitute Environment Courts [Ch. 6 for the criticisms of the functioning (or the lack thereof) of the NEAA].

107 The National Green Tribunal Act (NGTA), 2010, s. 14(1). The orders of the NGT can only be appealed before the Supreme Court, though it is well conceivable that the high court would exercise its jurisdiction under art. 226 for a writ to protect a petitioner's right to life, for instance.

108 *The Sarpanch Grampanchayat* v. *Ministry of Environment Forests*, Appeal No. 3 of 2011, *available at*: http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7740/The-Sarpanch-Grampanchayat-and-Others-Vs-Ministry-of-Environment-and-Forest (last visited on Nov. 4, 2014); *Krishi Vigyan Arogya Sanstha* v. *The Ministry of Environment and Forests*, Appeal No. 7 of 2011 (T), *available at*: http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7761/Krishi-Vigyan-Arogya-Sanstha-and-Others-Vs-Ministry-of-Environment-and-Forest and-Others (last visited on Nov. 4, 2014); *Prafulla Samantray* v. *Union of India*, Application No. 8/2011, *available at*: http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7945/Praffula-Samantra-Vs-Union-of-India-and-Others (last visited on Nov. 4, 2014); *T. Mohana Rao* v. *Ministry of Environment and Forests,* Application No. 23/2011 (NEAA Appeal No. 1/2010), *available at:* http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7954/T-Mohana-Rao-and-Others-Vs-Ministry-of-Environment-and-Forest-and-Others (last visited on Nov. 4, 2014); *Ossie Fernandes Coastal Action Network* v. *Ministry of Environment and Forest,* Application No. 12/

lapses of public authorities including non-application of mind in identifying serious issues of the environment, and sometimes requiring a re-appraisal or suspension of an EC.[109]

However, as the Supreme Court rightly reminds us in the *Lafarge Umiam Mining* decision, "the court / tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a pro-active body with the power conferred upon it to frame statutory Rules and Regulations. The Regulatory mechanism warrants open discussion (including) public participation."[110] As important as avenues for wider publics to participate and challenge decisions that have already granted environmental clearance are, it is even more important to have avenues of consultation and participation at stages that lead to the taking of the environmental decision.[111] This is so, because once the implementation/ or deployment of the infrastructure project is already put in place, a subsequent judicial decision to revoke an environmental clearance becomes impractical, and even illogical, notwithstanding situations where the activities engender grievous or irreversible social/environmental harm. Further, public policy considerations would demand that concerns are addressed right at the incipient stages of a project, since there is every chance that these can lead to later litigation flooding the tribunals with challenges of clearances, as well as slowing down economic activities; a concern often underlined by MoEF officials.[112] It is in this context the imperative to argue for public consultation and participatory spaces becomes doubly important.

VIII Towards more meaningful participation in grant of environmental clearance

Environmental decision-making in India has often been seen as the exclusive domain of experts, despite the distinct recognition that expert opinions on environmental values and environmental impacts can be substantially different from the way citizens experience the state of their living environment.[113] If public issues are not addressed during a regulatory process, then those issues can subsequently

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2011, *available at*: http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/case_summaries/?7959/Ossie-Fernandes-and-Others-Vs-The-Ministry-of-Environment-and-Forest-and-Others (last visited on Nov. 4, 2014).

109 *Ibid.*

110 *Lafarge Umiam, supra* note 7 at para 23.

111 See also, K. Kohli and M. Menon, "The Nature of Green Justice" 47 *EPW* 19 (2012).

112 M. Menon and K. Kohli, "From Impact Assessment to Clearance Manufacture" 44 *EPW* 20, 23 (2009).

113 R. Chaturvedi, "Environmental Hearings: Participatory Forums or a Mere Procedure?" 39 *EPW* 4616 (2004).

swamp the judicial spaces substantially increasing the workload of the judiciary and affecting the rule of law. This can only multiply the load on an already hard-pressed higher judiciary, of judicial oversight. The legacy of the green benches of the 1990s appears to be of a constitutional court that has acted as a norm setter, standard setter, implementer, monitor, creator of institutions like CAMPA and the CEC, and a super regulator. While banking on such judicial oversight might not always be viable and healthy for a democratic polity, there is also a necessity to have effective public oversight over environmental clearance, a process which is often dominated by the industry, its perspectives and concerns, all over the world.

Public oversight is required to ensure that concerns identified in spaces, outside of the applicant/developer and the techno-scientific establishment, are taken seriously, investigated and appraised during impact assessment. There is a need to have wider epistemic sources informing environmental impact assessments, and it is through such public involvement that subsequent environmental clearances can be legitimated, and become acceptable for affected publics. It is also crucial for arriving at an accurate and broad based technical finding, given the inadequacies of solely relying on techno-scientific bodies for risk analysis; inadequacies and conceptual fallacies that are identified in a plethora of sociological literature mentioned earlier. Notwithstanding concerns that public involvement and engagement may slow down decisions to grant clearances such public oversight is absolutely necessary to arrive at the right balance.

It is submitted that the current structure of public consultation in the EIA process is deeply inadequate, and the systematic incorporation of participatory mechanisms at the various stages of scoping, screening, appraisal, monitoring and compliance is absolutely essential to make EIAs and grant of environmental clearances effective, efficient and legitimate. There are a number of serious drawbacks in the current EIA process - both in its design and implementation- that strike at the heart of the process. Various commentators have identified the poor quality of EIA studies and connected issues of reliability, competence, integrity and accountability of EIA consultants, lack of cumulative assessment, consultations designed as one-time exercises at a late stage of the assessment, as well as absence of compliance mechanisms to monitor post-clearance conditions, as factors that seriously impinge upon the credible use of EIAs as an effective way of arriving at decisions on environmental clearances. Such shortcomings underline the importance of genuine public participation and oversight over technical analysis. Further, this acute undermining of existing provisions for public consultation exists through provisions of blanket exemptions from public consultation, non-adherence of the notice requirements, inaccurate communications of what transpired at the public hearing to the MoEF and even physical prevention from participating in the hearings through deployment of the state police.

It needs little emphasis that introduction of formal rules is a necessary but insufficient condition to attain an enabling atmosphere for the views of general public to be heard and taken seriously; systemic reflexivity and public pressure remain crucial to the process. However, formal rules to broad base public consultation in ways that are far more than the late one-time consultation, which is currently envisaged, can help move towards this enabling atmosphere. It is absolutely essential to provide for public consultations and hearings at multiple stages right from screening, scoping and appraisal during EIAs, through post-clearance monitoring as well as compliance of clearance conditions. Even if one can imagine the current EIA process as devoid of all the lacunae that the commentators identify, given weak monitoring and compliance mechanisms, public participation becomes crucial. If we take the discourse of an impending environmental catastrophe facing human societies seriously, the need of the hour is to have public participation in a more meaningful manner throughout the environmental clearance process, in ways that are more broadly framed.