

DILUTING THE NOTIONS OF ENVIRONMENTAL DEMOCRACY IN INDIA-COMPARISON WITH AUSTRALIA

Dr. Asha. J*

Abstract

Environmental Democracy is the capability of people freely access information on policies, projects, quality and problems of environment and capacity to participate meaningfully in environmental decision making. It is associated to a country's improvement in enacting national laws that endorse transparency, accountability and citizen engagement in environmental decision making. The perception of environmental democracy sets a standard for how decisions should be made. It incorporates three mutually reinforcing rights. They are information, participation, and justice. It is deep-rooted in the idea that communicative participation by public is critical to ensuring that lands, water, and natural resources decisions satisfactorily and equitably address citizen's interest. Environmental decisions should made only by applying principle of environmental democracy. In India, environmental legislations are very much criticised for lack of public participation in decision making. The latest Environment Impact Assessment Notification, 2020 and Coastal Regulation Zone Notification, 2019 received huge public disagreement for their non participatory approach towards the common people. National laws should accommodate international standards to promote transparent, inclusive and accountable decision making because the environment and human beings are linked together. So, they should be given opportunity to challenge decisions which are against their human rights or harming eco systems. India should apply International environmental law over the development of domestic environmental laws. Instruments such as the Rio Declaration and the Aarhus Convention are widely accepted by stakeholders as providing international standards of best practice for environmental governance. With this in mind, Indian domestic environmental laws at the national level should be harmonised with international standards of best practice for access to information, public participation and access to justice in areas related to the environment as reflected in the UNEP Bali Guidelines. So, this paper will attempt to analyse how environmental democracy principles are applied in India in recent environmental legislations such as Coastal Regulation Zone Notification, 2019 and

* Assistant Professor, NSS Law College, Kottiyam, Kollam, Kerala

Environmental Impact Assessment 2020 etc. Across the world, there is growing requirement for public access to environmental decision making and enforcement of laws. In India, marginalised people lack important rights related to environmental governance because of the reason that they are powerless and poorly shaped. Further this paper will compare the concept of environmental governance in Australia and India. Australia has shown a significant interest in implementing international principles in the developments of their domestic environmental law. Anyhow, India as well as Australia are not included in the list of top ten countries of Environmental Democracy Index which is a platform to study environment regimes of various countries. But the countries all over the world should advance good governance and transparent environmental rights to ordinary citizens for conserving environmental democracy and this paper also attempts to analyse the strategies of various countries especially India and Australia.

KEY WORDS: environmental democracy, Rio declaration, Aarhus declaration, UNEP Bali guidelines, Indian environmental legislations CRZ 2019, EIA 2020, Human rights, Australian laws.

INTRODUCTION

The concept of environmental democracy rises from societal struggles on environmental prerogatives, and it includes the burden of pollution, the sharing of indefinite environmental risks and the maltreatment of access to natural resources and other environmental amenities. The contemporary versions of environmental justice are the consequence of persuasive environmental claims from people or countries and therefore the concept of environmental democracy is accelerating its significance in environmental jurisprudence day-by-day. Furthermore, the concept of environmental democracy creates a challenge in between public's engagement with governments and other stakeholders. Environmental policy makers deprive the rights of poor and marginalised people of the democratic country by ignoring their democratic rights. It is explained that environmental democracy is critical to existing liberal democratic institutions and key proponents of ecological democracy states that for ensuring the interest of non -humans and future generations the ideas of environmental democracy which resonates the green liberalism is necessary¹. It assumes meeting with a broader object of human needs and experience of ecological "commons". The environmental commons encompass of environment, public ecological systems like forests, coasts, water bodies and natural common resources and products. The natural resources include air, sea, water, biodiversity, landscapes, soil and subsoil resources, space, and culture. Democratic environmental governance over these resources should be done through public participation, whether directly or through State by accompanying democratic rules and norms. However environmental governance is not only

based on public participation. More than this the public is not still expressively engaged in decisions that could distress their health, livelihoods, and culture and not properly aware of it also. In that situation the concept of environmental democracy gains its basics from following three key components. They are access to information, participation, and justice and it is also known as "access rights" as reflected in Principle 10 of the Rio Declaration on Environment and Development. They are at the heart of environmental democracy, embodying the procedural dimensions of the right to a healthy environment.

FOUNDATIONS OF ENVIRONMENTAL DEMOCRACY

As John H Knox, the UN Special Rapporteur on Human Rights and the Environment has emphasised that, environmental democracy requires just access to, and protection of, the ecosystems upon which communities depend for survival and vitality². The natural resources including biodiversity, air, water and food, coasts and protection against climate change, protection of land, and the ecosystem services etc are indispensable for current and future generations to relish and they should be able to use fully their democratic rights for a sustainable future also. Therefore, Environmental democracy requires access to lawful means for participating effectively in political, social, and economic prospects of environmental facets, including environmental decision making. Democratic processes always demand transparency, integrity, and accessibility in decision making. The extraordinary surroundings and dependence of common peoples to land and resources require environmental laws to give effect to principles of free, prior, and informed consent by local communities in matters and actions that affect them. Environmental democracy aims to enhance

¹Jonathan Pickering, Karan Backstrand and David Schlosberg, "Between environmental and ecological democracy: Theory and practice at the democracy- Environmental nexus", 22 *Journal of Environmental policy and planning*, 1-15(2020).

² Manish Bapana, John Knox, "Environmental Democracy: An essential Right for the 21st century", *World Resource Institute*,(26 May 2015) available at www.wri.org(last visited on 20 January 2021)

the role and nature of legal or institutional frameworks that alter the focus of law for the implementation of environmental rights. Environmental democracy intends to create institutions which perform in favour of public integrity, answerability, monitoring, and transparency in environmental decision-making and encourage innovation and learning-by-doing. Principles developed in environmental law tend to encourage public participation in decision making through systems of “participatory” or “deliberative democracy”³. Fundamentally, it is said that the pressure in the environmental law is budding day-by-day and should be explicitly acknowledged and addressed within discussion in future discussions regarding environmental decision-making.

Environmental democracy means three reciprocally supporting rights that is ability of people to freely access information on environmental quality and problems to participate meaningfully in decision making process. It is rooted in the idea that meaningful participation by public is critical to ensuring that land and natural resource decisions adequately and equitably address citizen’s rights and interest. Environmental democracy includes three pillars of rights. They are

- The right of access to information,
- Public participation
- Access to justice in environmental matters

These three rights have prolonged the universality of informed, accountable decision making and citizen empowerment. They were first recognized as Principle 10 in the Rio Declaration on Environment and Development, 1992⁴. There has also been noteworthy progress at the national level in India for the past two decades through the passage of right to-

information laws, environmental impact assessment (EIA) regulations, and expanded rights for civil society to seek justice etc. As India and Australia both are signatories to Rio declaration it has high impact on both countries. However, it is criticised that in India, the legal and institutional gaps persist in undermining information accessibility and quality, full participation of marginalized groups, and access to adequate remedies. From the recent environmental legislations such as Environment Impact Notification, 2020 and Coastal Regulation Notification, 2019 in India, it is evident that the decision makers giving importance to development needs without balancing solutions to urgent environmental problems. The state has to ensure that the public has a voice in decisions that impact their health and the environment, and it is an obligatory pace that is critical for sustainable development. The principles of environmental democracy and, justice and rights are regularly recognised in far-reaching terms at international mediums, but the qualities of these rights are less frequently communicated and implemented in detailed legal and institutional reports in India. Due to these reasons India is in 24th position in Global environmental democracy index⁵. Laws that integrate provisions that support good practice such as timely, affordable, and proactive information disclosure can create better enabling conditions for environmental democracy.⁶ In India, Policy making in environmental law repetitively deprives the rights of stakeholders. This smudges the image and sacredness of the concept of environmental democracy in India. This primarily materialises since they are incapable to join in the strategy constructions or in decision making. It has a great effect on the

³ibid

⁴ Rio Declaration on Environment and Development, 1992. It is a document produced at United Nations Conference on Environment and Development (UNCED) known as Earth Summit

⁵ Environmental Democracy Index, Available at environmentaldemocracyindex.org (last visited on 25 January 2021).

⁶ Worker, J. and Lalanath De Silva, “The Environmental Democracy Index.” Technical Note. Washington, D.C.: World Resources Institute (2015) Available online at: www.environmentaldemocracyindex.org. (last visited 25 January 2021)

lives of the underprivileged communities in India as they are repudiated the rudimentary competence of contribution in policies related to their life and livelihood. For this purpose, implementing environmental consensus is necessary which incorporates a just, equal, and inclusive global community and it gives a prospect to the interests of all. Environmental egalitarianism and environmental democracy have interred- twinning impacts with each other. Environmental democracy is about government being transparent, accountable, and involving people in decisions that affect their environment and it can safeguard only through egalitarianism. Therefore, environmental democracy involves policy decisions that affect the marginalised groups and their environment and those groups should have strength to reclaim their democratic rights as equal citizen and for this purpose affirmative action must be taken by state to prevent environmental tribulations upon them.

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⁷ Environmental Democracy Index, Available at environmentaldemocracyindex.org (last visited on 25 January 2021).

⁸ Worker, J. and Lalanath De Silva, "The Environmental Democracy Index." Technical Note. Washington, D.C.: World

Resources Institute (2015) Available online at: www.environmentaldemocracyindex.org.(last visited 25 January 2021)

egalitarianism and environmental democracy have inter- twinning impacts with each other. Environmental democracy is about government being transparent, accountable, and involving people in decisions that affect their environment and it can safeguard only through egalitarianism. Therefore, environmental democracy involves policy decisions that affect the marginalised groups and their environment and those groups should have strength to reclaim their democratic rights as equal citizen and for this purpose affirmative action must be taken by state to prevent environmental tribulations upon them.

RIGHT TO PUBLIC PARTICIPATION:

Public participation in environmental decision-making is increasingly recognized as decisive and it will brand environmental governance more robust and better informed in the liberal regulatory theory.⁹ 'Participatory' mechanisms in environmental governance are encouraged because through participation only justice and equity, representative democracy, and enhancement of legitimacy of controversial environmental decisions etc can be grasped to the public. In almost all branches of law, establishment of public hearing can be operated as a check on arbitrary exercise of power. For example, in the Taj Trapezium case¹⁰, the Kanpur Tanneries case¹¹, and Vellore Citizen's Forum case¹², the involvement of common citizens regarding grant of environmental protection and how it leads to environmental decision making is clearly depicted.

RIGHT TO ACCESS TO INFORMATION: -

Environmental democracy is enabled by the right and ability of the public to freely access relevant and timely information, provide input and

scrutiny into decision making, and to challenge decisions made by public or private actors which may harm the environment or violate their rights before an accessible, independent, and fair legal authority. These rights are also referred to as procedural rights provide a legal basis to enable transparency of environmental information, open and inclusive decision making, and the ability to challenge decisions or seek justice through fair and affordable legal mechanisms. So, these rights should be supported by willing and capable state institutions and exercised by civil society and then only they promote more informed, inclusive, and accountable decision making for a better democratic approach in India. The right to know is especially crucial in environmental matters. Responsible governments should widely publicize its all-development plans and ought to be receptive to public feedback¹³. The citizen obviously has a right to information regarding the matter that they are going to be displaced by a new project and going to deprive their lifestyles and livelihood. Government is under a duty to inform them about these displacements and these obligations increases when that society is a large segment of illiterate marginalised population and they are unaware of their legal rights. Information about the dangerous industries which directly affect the lives and health of neighbouring communities is decisive¹⁴. The Bhopal Gas Leak disaster illustrates the consequences of pervasive ignorance to the ill effects of a chemical factory and its resultant tragedy in India. Recently in state of Assam also, a massive oil blowout was happened, and it resulted in several killings and around 7000 displacement of local inhabitants and they were also unaware about the dangerous aspects of industry working in their neighbourhood. In *Reliance Petro Chemical Ltd v. Proprietors of Indian Express News Papers Bombay Private*

⁹ Naveen Thayyil, "Public participation in environmental clearances in India: prospects for democratic decision-making", 56 *Journal of the Indian Law Institute*, 463-492 (2014).
¹⁰ (1997) 2 SCC 353.

¹¹ AIR 1987 4 SCC 463.

¹² AIR 1996 SC 2715.

¹³ Shyam Divan and Armin Rosencranz, *Environmental law, and policy in India 161* (Oxford university Press, 2014)

¹⁴ *ibid*

*Ltd*¹⁵, Court already recognised right to know as a fundamental right under Art.21 of Constitution and court also reiterated that the people at large have a right to know to take part in a participatory development in the industrial life and democracy. The right to know and Art. 21 has a strong link in environmental matters because secret governmental decisions may affect health, life, and livelihood.

ACCESS TO ENVIRONMENTAL JUSTICE ROLE OF NGT IN INDIA IN ENSURING ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL DEMOCRACY IN INDIA

An essential characteristic of successful environmental courts is the facilitation of access to environmental justice. An environmental court may facilitate access to justice both by its substantive decisions and its practice and procedures. NGT does facilitate access to justice as it is a specialised court for hearing and disposing cases related to the environment. However, we can measure from the Act that “access to justice is denied by two means in NGT, firstly, by the provision of limitation period and secondly, by virtue of NGT being located in only big cities spread across India.¹⁶ Provision of limitation period is a statutory requirement in NGT Act, 2010. However, the second point, it becomes difficult for people from small cities to approach NGT regarding their issues. It is an expensive and burdensome matter for them and in most cases, people from small cities to approach court and this turns as an obstruction for access to justice.

The need of an alternative environmental adjudicatory system was first felt in *M.C. Mehta v. Union of India*¹⁷. It is also crucial that environmental lawsuits be heard by an

independent and impartial body. Environmental courts and tribunals, like the National Green Tribunal (NGT) in India, should hence be established with full jurisdiction over all environmental disputes. The effectiveness of Environmental Courts and Tribunals are especially important in comprehending the rights of poor and marginalized communities that suffer the harshest environmental harms. National Green Tribunal in India was a progressive step for fairly resourceful and strong alternative of environmental justice. Public Interest Litigations also played a huge role in ensuring environmental justice. *Almitra Patel v. Union of India*¹⁸ is which led to the creation of Municipal Solid Waste (Management and Handling) Rules and *M.C. Mehta ‘s PIL on Kanpur Tanneries*¹⁹ are the examples of our effective judicial mechanism but with a strong green court also our country is moving slowly to an environmental democracy.²⁰

Another fact is that the appropriate tracks to disentangle environmental injustice can only benefits citizens in shielding their constitutional rights. But the conventional green politics neglect the rights of the poor and marginalized and even the state institutions fail to effectively defend the people, particularly against corporations armed with considerable litigation power. For reinforcement and conservation of democracy the actualization of environmental impartiality is obligatory. Finally, an open and inclusive system of redress for environmental injustice must be implemented to ensure that all citizens enjoy the full set of constitutional rights when they have been harmed. Citizens should possess the unimpeded right to demand compensation, contest proposed policies or projects, and openly challenge violations of their environmental rights²¹. Particularly,

¹⁵AIR 1989 SC 190,202

¹⁶S.C. Tripathi, *Environmental Law*,574(Central Law Publications, 6th Edn,2015).

¹⁷ AIR 1987 SC 9650,982

¹⁸ (1998)2 SCC 416

¹⁹Supra no. 9

²⁰Sourya Reddy, “Of the people, By the People, but for Whom? Building Environmental Democracy in India”, *The Bastion*,13 March 2019, available at www.thebastion.co.in(last visited 20 January 2021).

²¹Sridhar Rangarajan et al., “National Green Tribunal of India-An observation from Environmental Judgments”, 25

environmental class-action lawsuits should be highly sponsored given the primacy of environmental rights in enabling and protecting the “basic capabilities” those egalitarian justice demands. Remedies must be swift given the typically pressing nature of environmental disputes. The public should also enjoy open access to past judicial and administrative decisions, complete with full right of appeal. The goal is to establish and enforce mechanisms that promote greater accountability by organizations and states to the people.

THE BARRIERS AFFECTING ENVIRONMENTAL DEMOCRACY

There are so many barriers before a state to ensure environmental democracy. They are as follows:

- 1. The inaccessibility of information obstructs active and evocative democratic decision-making-** The standing of free access to information is represented in Principle 10 of the 1992 Rio Declaration, which specifically identifies the right to environmental information for the purpose of effective public participation. Justice stresses an “environmental egalitarianism” wherein environmental rights are taken as erstwhile to the competences that constitute environmentalism and sustainability and environmentalism without egalitarianism is unjust. It has recognized that poor and marginalized communities are mostly disregarded by conventional environmentalism and ignores and alienate from their own natural environment and leads to an environmental oppression.

Environmental policy making in most of the times detrimentally impact the poor and marginalized communities and thereby reducing the worth of their democratic citizenship. And,

for the reason that they are not involving in policy decisions that makes enormous effects upon their lives, such citizens are also rejected the basic ability of political participation.²² Therefore, environmental egalitarianism, which requires a fair, equal, and inclusive universal community that does not privilege certain interests over others, requires “environmental democracy,” wherein the state is fully transparent and accountable to its constituents about policy decisions that affect them and their environment, as well as provides participatory opportunities for communities to determine land and resource use²³. Marginalized local communities must be allowed to reclaim their democratic rights as equal citizens, as well as counterattack the hassle of environmental harms upon them by states and organizations. Evocative participation in decisions making concerning the environmental rights should be impartially and equitably protected. However, measures are also necessary to safeguard environmental policymaking from the evils of unchecked democracy and over polarizations. The potential problem is that some countries including India and Australia may sometimes compelled to reject environmental equality because it compromises economic growth. For Example, India and Australia are Coastal countries and both want tourism development in their coasts for tourism development. In India, the coastal law is highly criticised now a days but for the sake of development and economic growth the interests of coastal community are ignored and they are not giving adequate opportunity to public participation and also, they have no access to policy making. Coastal community and tribal in India also complain that they have no access to information with regard to the development which is happening in their neighbourhood.

Environmental science and Pollution Research, 11313-11318(2018) <http://doi.org/10.1007/s 11356-018-1763-2>.

²²DCKH, “The need for environmental democracy, Equality and Democracy”, 7December 2017, available at

<http://equalitydemocracy.common.yale-nus.edu.sg/2017/12/7/the-need-for-environmental-democracy/>(last visited 26 January 2021)

²³ibid

So, this one is a recognised institutional barrier to environmental democracy which is the unavailability of information which precludes meaningful and effective democratic decision-making. The importance of free access to information is enshrined in international law also. Principle 10 of the 1992 Rio Declaration, to which 178 states are signatories, specifically recognizes the right to environmental information for the purpose of effective public participation. Yet, the basics of Environmental Democracy concept suggest that the right to environmental information is vital and states should ensure that citizens enjoy affordable and convenient access to said information. India in their national laws must include these international standards which is the fragment of so many developing countries including Australia.

2. The lack of consultation by policymakers with the local communities most obstructed by environmental policies further impedes meaningful public engagement. Worryingly, 79% of countries scored fairly or poorly for public participation in the EDI²⁴. The metrics for this rating includes the presence and enforcement of laws providing opportunities for the public to participate in environmental decision-making, laws obligating the state to proactively seek public participation, and laws requiring policymakers to integrate public input into policy decisions.²⁵ Even if information were freely available, democracy cannot obtain if states simply refuse to engage with their constituents.

3. The lack of environmental justice prevents citizens from defending their constitutional rights.

The Courts of Environment Democracy Indexed countries normally provide fair, timely, and

independent hearings of environmental cases, but a few supports with marginalized groups²⁶. Because the mainstream environmentalism disregards the rights of the poor and marginalized, even state institutions fail to adequately protect the citizenry, particularly against corporations armed with considerable litigation power. Reforms for strengthening environmental democracy are therefore necessary if we are to actualize environmental egalitarianism. The main criticism against environmental courts in India is that it is not equipped to address the environmental problems ranging from various fields and it requires expert knowledge. Countries like New Zealand and Australia which have specialised environmental courts, quite regularly reorganise administrative and financial sustenance for the court to upsurge efficiency and lessen costs. In contrast efforts in India have been directed towards diluting the roles and functions of NGT.²⁷ The main criticisms before NGT are its limited jurisdiction and limited regional benches and pending vacancies and administrative inadequacies and its obstruction towards development. So, India should take care of these insufficiencies seriously otherwise the citizen will deprive their access to justice in environmental issues.

4. Lack of Environmental Egalitarianism

Civil societies groups and others believe that legal procedures are bypassed for commercial gain at the immense cost to the environment and against public interest²⁸. Several stakeholders with several interests are not treated equally and this increases the number of projects affected persons. The reforms should be oriented towards an attempt to approximate environmental democracy in order to reify environmental egalitarianism and insofar as they enable full

²⁴Supra note 6

²⁵ Harshit Bhimrajka, "Environmental Democracy: The necessity for developing sustainable societies", *Blogpleaders* (20 October 2020) blog.ipleader.in/environmental-democracy-necessity-developing-sustainable-societies/ (last visited on 27 January 2020).

²⁶Supra note 20

²⁷Geetanjoy Sahu, "Whither the National Green Tribunal?", *Down to Earth* (23 September 2019) www.downtoearth.org (last visited on 20 January 2021).

²⁸ Shibani Ghosh, "Demystifying the environmental clearance process in India", *3NUJS Law Journal*, 434 (July- September 2013).

public participation, they should be regarded as genuinely democratic. Still, if all else fails, we must prioritize environmental egalitarianism over democratic participation, for without the former, and accordingly a healthy and intact planet, there would be no platform for democratic rights. Environmental egalitarianism must hold as the normative standard for policy decisions because utilitarian justice should always supersede the ideal of democratic deliberation. Therefore, environmental egalitarianism should super ordinate democracy and should commence to preserve environmental democracy.

INTERNATIONAL CONVENTIONS ENSURING ENVIRONMENTAL DEMOCRACY

RIO DECLARATION 1992: - In the 1992 Rio Declaration on Environment and Development, the international community recognized that sustainable development depends upon good governance. Principle 10 of the Declaration sets out the fundamental elements for good environmental governance in three “environmental democracy rights”: (1) Access to information, (2) Public participation, and (3) Access to justice. When implemented, these rights increase information flow between governments and the public, increase the legitimacy of decisions, and provide for downward accountability. Since 1992, progress toward creating rights out of these aspirations has been mixed.

AARHUS CONVENTION, 1998: -On one hand, the legally binding Aarhus Convention, established by the UN Economic Commission for Europe (UNECE) in 1998, now has 47 ratifying parties (46 countries and the European Union). The Art.1 of Aarhus convention says that in order to contribute to the protection of the right

of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention²⁹.

The Aarhus Convention defines minimum standards and obligates parties to the convention to implement these rights and it includes the three broad pillars of environmental democracy. It also creates a compliance mechanism that is accessible to citizens from the countries that are parties to the convention. The general features of this Convention include the right -based approach, definition of public authorities and the main thrust is the inclusion of governmental bodies at all levels and authorities performing public administrative functions. Aarhus convention included EU Authorities as public authorities³⁰. The Aarhus Convention also promotes the concept of any person right and prohibits discrimination on the basis of Citizenship, rationality or domicile against persons seeking to exercise their rights under the Convention³¹

UNEP BALI GUIDELINES: The UNEP Bali Guidelines, 2010 consist of 26 total guidelines and its purpose is to provide general guidelines upon request by states on promoting implementation of their commitments to principle 10 within the framework of their national legislation and processes³². The guidelines unpack Principle 10 with specific guidance drawing on a body of good practice and norms developed through the experience of the Aarhus Convention. Unlike the Aarhus Convention, the Bali Guidelines are voluntary. However, they represent the first time that several nations outside of the UNECE region have agreed upon specific guidelines on Principle 10 that deal with issues of cost,

²⁹Jeremy Wates, “The Aarhus Convention: a driving force for environmental democracy”, 2JEEPL 1-11(2005) doi: 10.1163/187601005X00561

³⁰ The Aarhus Convention, Art. 4 para 2 (d)

³¹ The Aarhus Convention, Art. 3 para 9

³²The Bali Guidelines were adopted by the governing Council of UN Environment Programme (UNEP) in its decision SS. XI/5, Part A of February 2006

timeliness, standing, the quality of public participation, and several other issues on which it can be more difficult to achieve government consensus. While the Bali Guidelines are concise and outline critical components of effective legislation, they often lack the specificity needed by policymakers and agencies that may be inexperienced in implementing reforms in procedural rights. This specificity matters because these reforms often require changing bureaucratic cultures and incentive structures to promote practices of information dissemination, power sharing in decision making, and the public's ability to appeal and challenge decisions.

DILUTING THE NOTIONS OF ENVIRONMENTAL DEMOCRACYPROCESS: CRITICISMS AGAINST RECENT ENVIRONMENTAL LEGISLATIONS IN INDIA

THE DRAFT ENVIRONMENTIMPACT ASSESSMENT NOTIFICATION 2020

India's natural resources and the inhabitants repeatedly recognised the prerequisite for economic growth and development. The neo liberal reforms in India and the efforts to re-emergence as a global power are flagging way to the disdain to environment and to its dependent communities. Environmental democracy is erected to resolve the above issue that land and natural resource decisions sufficiently and rightfully and impartially address citizens' interests. In the following back drop, the EIA, 2020 resulted in widespread public concern. A democratic country should work to ensure that communities have the right and ability to influence decisions about their future. EIA is a feature of good governance, a regulatory tool to improve decision making and when

accompanied by an efficacious public participation process and can also be serve as a means of deepen democracy and ensure community participation³³.

LACK OF ACCESS TO INFORMATION: - The draft EIA 2020 was only published in English and Hindi Languages only. A Writ Petition was filed before Delhi High court in *Vikrant Singh Tongad v. Union of India*³⁴, and it was held to translate the draft into other languages within 10 days and otherwise it has far-reaching effect on public consultation process. In *Tirupur Dyeing Factories Owners Association v. Noyyal River Ayacutdars Protection Association*³⁵, it was MOEF and other public authorities must provide equitable access to information over the impact of a project while recognising the right to information and community participation as a co-terminus process. *Research Foundation for Science Technology National Resources Policy v. Union of India*,³⁶ it was held that the state must aid in encouraging public awareness through wide and effective dissemination of information as well. It was also instructed by court that concerned people and local communities act as jury instead of being a mere audience for completing audience for completing procedural formality of consultations³⁷. So, the lack of consultation by policymakers with the local communities and the environmental policies which disrupts effective public engagement is regulated through various judicial decisions. The states are obliged for the enforcement of laws providing opportunities for the public to participate in environmental decision-making and laws requiring policymakers to integrate public input into policy decisions. It is thus crucial to test the draft EIA and its inclusive nature of public participation. Even if information were freely available, democracy cannot obtain if states simply refuse to engage with their citizens. EIA 2020 is a recent

³³Armin Rosencranz and Didon Missi, "Public hearing and democratic participation in Environment Impact Assessment", 6 *CEERAJELPD*, 1-12(2019).

³⁴ WP (C) 3747/2020

³⁵ (2009) 9 SCC 737

³⁶ (2005) 10 SCC 510

³⁷*Samarath Trust and Another v. Union of India*, Writ Petitions (civil) no.9317 of 2009, High Court of Delhi.

example for this. The dilution of environment standard through new notification of EIA 2020 need to evaluate in the back ground of robust environmental principles at national level, international level and through landmark judicial decisions in this regard. It is complained that the New EIA 2020 is violating the access rights under Art.10 of Rio Declaration and the provisions of Environmental Protection Act, 1986. Actually, in India these principles and environmental legislations are the core of Environmental democracy, embodying the procedural dimensions of the right to healthy environment.

Secondly the EIA 2020 allows post -facto clearances and this means that even if a project has come up without environment safeguards or without getting environment clearances, it could carry out operation without getting environmental clearances. This is disastrous because LG polymer Plant in Visakhapatnam where the styrene gas leak happened on May 7, 2020 and later it was revealed that the plant was running for over two decades without environmental clearances. So, states must proactively and pre emotively consult the stakeholders on policies, inform them of avenues for greater participation, and provide opportunities for general environmental education. These opportunities must also be heavily or fully supported such that citizens can participate without sustaining huge costs. This would enable and encourage citizens to engage with issues that concern their immediate environment. For instance, in response to widespread controversy over a proposed coastal road project in Mumbai that would run through the Coastal stretch of Mumbai ostensibly causing significant and irreversible coastal damage. In *Worly Koliwada Naksha Matsya Vyavasai Sahakari Society v. Municipal Corporation of Navi Mumbai*³⁸, also Supreme Court stopped the

coastal road project in Mumbai on the basis that it has not obtained environmental clearance from the authorities and it has adverse impact on coastal community. The Supreme Court of India ordered for an environmental impact assessment to this project. Consequently, previously ambivalent local residents including Koliwadās of Mumbai, now better informed and motivated to protect their environmental rights, are forming ad-hoc volunteer groups and strengthening local environmental groups for the protection of Mumbai's coastal Areas. India needs to strengthen environmental regulations by improving the quality of baseline surveys, introducing a stronger system of checks and balances, and making process more transparent and inclusive for different stakeholders³⁹. In *Adivasi Majdoor Kisan Sangathan v. MoEF*⁴⁰, case also NGT concluded that clearance to a project should be given after proper public hearing only. It is also imperative that the environmental legislations should ensure and comprehend myriad public access implications of environmental projects that affects Scheduled Areas and Regions with forest dwelling communities and other marginalised communities. Furthermore, State should made accessible to make them aware of the rights they possess. This will help to widen the scope of public consultation and ensure an anticipatory, participatory, and systematic inclusion of the communities and stakeholders to be a part of a process. It is also suggested that EIA processes should not be disconnected from affected community and it should re-evaluate the issues of environmental compliances and there should be fair efforts to address problems of affected community.

Coastal Regulation Zone Notification, 2019- Inadequate public participation in coastal policies: -

³⁸ WP(L) No. 560 of 2019 dated 16. 7.2019

³⁹ Anurag Misra, Neha MohanBabu, Krishna Anujan, "Draft EIA 2020 undercuts India's bio diversity and Climate Goals", *Down toEarth*, (30 SEP 2020)

⁴⁰M.A no. 36 of 2011(Appeal no. 3/2011)

The integrity of coastal zones is maintained in India through CRZ mechanisms. Undoubtedly need of development must be harmonized with the values of ecology. Sustainable management of the coastal and marine areas in India should be properly maintained for the benefit and wellbeing of coastal and island communities.⁴¹ But in reality, the upcoming legislations for developmental initiatives in coastal zones of India not bringing prosperity to the fragile coastal region instead brings miseries to coastal region and its inhabitants. Economic activities and recreational facilities in and around these zones have given rise to the idea of “coastal zone sustainability”⁴². Supreme Court in Vamika Island case⁴³ also recognized that there was serious question regarding coastal ecology and use of wetlands. The CRZ Notification is critical to the lives and livelihood of communities around 170 million people or 14% of Indian population living across 70 coastal districts, 66 main lands and four in island territories⁴⁴. Their future of marginalised communities, is directly linked to the health and disaster preparedness of coasts.

But the CRZ notification, 2019 violates the balance between ecosystem and development⁴⁵. The property rights and economic development in coastal zones were severely hampered with several unrealistic and unachievable restrictions when applied with a common yardstick throughout the country. Coastal community in India fears that CRZ, 2019 will be a shaded period for marginalised coastal communities like fisherman, toddy tappers and farmers. The essential characteristic of coastal populations is that they are primitive traits and stays in peculiar geographical location. They are economically

back ward which are having unique cultural identity and usually isolated with mainstream community. This weaker section of society who was separated over several parameters was always retained out of the main stream society and became ignorant towards their rights and means to redress their problems. They are now demanding that they should be preserved as indigenous community and special protection should be provided to them also. They are prone to social, economic and environmental challenges. But in India, a centrally structured financial strategy is still to be tailored into the legal system to back up a sound coastal management policy. This spontaneous and organic growth in civil society and public participation, facilitated by increased transparency, promotes the self-determination of the citizenry, which Iris Marion Young regards an important function of democracy because it prevents the unjust domination of basic liberties.⁴⁶ Thus, with early and open communication, citizens can better exercise democratic self-determination and self-development, deliberating and determining the content of their social life as equal and respected members of their community.

But in reality, the marginalised coastal community in India is discriminated and always kept away from coastal policy making and it is also evident in latest CRZ Notification, 2019 also. The coastal community remained silent spectators of development, but the obligation of environmental degradation is usually tie on them. The marginalised section of people is away from material benefits and from environmental decision making. Even the coastal zone management plans were not available to them

⁴¹ Bibliana Cian, “Sustainable Development and Integrated Coastal Management”, 12 *Ocean and coastal management*, 1-3 (1993), [http://doi.org/10.1016/0964-5691\(93\)90019-u](http://doi.org/10.1016/0964-5691(93)90019-u). (Last visited on Jan. 6, 2020).

⁴² Barbara Newman, Konrad ott, Richard Kensington, “Strong sustainability in coastal areas: a conceptual interpretation of SDG 14” 11 *Sustainability Science*, (March, 2019).

⁴³ (2013), 8 SCC 388.

⁴⁴ Meenakshi Kapoor, “Ignoring objections, India finalises New Coastal Laws”, *India Spend* (Mar. 21, 2020) available at www.indiaspend.org, art.14.com/post/ignoring-own-experts-fisherfolks-experts-india-finalises-new-coastal-law-investigation (last visited 20 December 2020)

⁴⁵ Vinod. K. Dhargalkar, “CRZ Notifications 2018- Disastrous to eco system functioning”, 6 *International Journal of ecology and economy solutions* 1, 10-15 (Mar. 2019).

⁴⁶ Supra note 17

which against the basic concept of environmental democracy in coastal planning. In *Kaloor Joseph v. State of Kerala*⁴⁷, court observed that the state cannot refuse the right of citizen's access to Coastal Management Plan. Right to information of Citizen is the right protected by our Constitution of India under Art.21. It is also said that any development project, conservation-based policy, or climate mitigation effort should respect the rights of indigenous peoples and local communities. The indigenous peoples and other local communities should get sustenance for their full and effective engagement in the coastal or forest-related developmental initiatives. Any development project, conservation-based policy or climate mitigation effort should respect the rights of indigenous peoples and local communities. Achieving this objective includes designing policies and promoting coherence among different international instruments related to climate, forests, and Human Rights.

COMPARISON WITH AUSTRALIA IN ACHIEVING ENVIRONMENTAL DEMOCRACY

Australia is in a better position in environmental democracy index ranking when compared to India and it has 13th rank for implementing the three basic conditions to ensure environmental democracy for its citizens. Australia is having 12th rank in the World for assuring food security and also have 13th rank in Environmental performance Index.⁴⁸ Australia operates under a federal political regime and environmental laws and policies are made at both state and federal levels. The Australia's overarching environmental duties derive from international agreements including both binding treaties and inspirational documents such as Rio declaration. Australia is a signatory to all major multilateral

environmental agreements and many regional and bilateral treaties. These all have significance over the development of domestic environment laws in Australia. Rio declaration and Aarhus Convention are widely accepted in Australia. Australian standards for public participation in Environment Impact assessment is similar to the standards in international instruments such as Aarhus Convention⁴⁹. The Environment protection and Bio diversity conservation (EPBC) Act, 1999 is Australia's central legislation for environmental protection. The law aims to conserve and protect environment, including threatened species, wetlands, world heritage sites other issues of national environmental significance. It is said that Australia's environment legislation is complex, but the attracting fact is that it undergoes amendment once in a decade. The Act is used to assess whether a species or eco system has declined to a point that it requires extra protection as an endangered or vulnerable species. The act also determines whether developments such as mines, urban expansion and agricultural clearing should process. The developers are required to refer a project for assessment if they think it will have a significant impact on matters of national environmental significance. The environment department determines if the projects require an assessment under federal law, with environment minister responsible for a final decision on whether a project is approved or deemed unacceptable. The Australian Government has incorporated some aspects of Rio Declaration and Aarhus convention and the UNEP Bali Guidelines in to common wealth laws that relate to environmental decision making and dispute resolution⁵⁰. So, in Australia also there going on the recommendations for an environmental law

⁴⁷ OP NO. 20278 of 1997, dated 2nd June 1998 (unreported)

⁴⁸ Environmental Performance Index is a joint project of Yale Center of Environmental Law and policy and the Center for International Earth Sciences. The EPI was recently released in 2020 and it included 180 countries all over the World.

⁴⁹ Bruce Lindsay, Hanna Jaireth, Nicola Rivers, Democracy and Environment, Australian Panel of Experts on Environmental Law, Technical Report, April 2017.

⁵⁰ Dwyer G J and Preston J A, "Striving for Best practice in Environmental governance and justice: Reporting on the inaugural Environmental Democracy index for Australia", *32 Environmental Planning and Law Journal* 3, 202 (2015).

reform which includes the proposal of a new legislation which includes access to environmental information, legislation to facilitate public participation and practices to improve environmental justice and they are using the techniques of alternative dispute resolution in the environmental law and sustainability spheres to solve the issues of common public. Along with the environmental and climate changes and developmental perspectives, Australia also striving hard to ensure environmental democracy to its citizens and to an extent they are successful too.

AUSTRALIAN ENVIRONMENTAL COURTS IN PROVIDING ACCESS TO JUSTICE - PERFECT MODEL FOR INDIA-

The establishment of environmental courts definitely played a strong role in implementing environmental justice and environmental democracy throughout the world. Establishments of environmental courts in Australia was also a very innovative attempt and Australia's Land and Environment Courts established in 1979 which is long before India's National Green Tribunal in 2010. Truly, India indebted to the idea of environmental courts to Australia. In Australia, the Land and Environment of New South Wales has operated since 1979, solving problems of sustainable development, fighting against the effects of climate change, and protecting the coastlines and national parks⁵¹. The magnetism of Australian courts is that it evolved from the longevity from 1980s to till date and that experience is making Australian Environmental courts as one among most innovative environmental courts in the World and it is following the concept of multi-door courthouse which offers different types of conflict resolution so all parties involved can reach an agreement that is not necessarily handed down from a judge. The UNEP Report attributes the success of this court to its judicial leadership, sufficient budget,

comprehensive jurisdiction, political support, and stakeholder overview⁵². Australian courts are a mixed model consists of judges and environmental experts and it is a court of record having jurisdiction that combines appeal, judicial review, and enforcement functions within specific field of environmental issues. The access to Australian Environment court is very easy and open to anyone complaining about violation of statutes or related to environmental issues. The Australian model is very relevant for the study of development of green justice and other environmental/ coastal issues facing in India. As NGT in India faces criticisms for not having the concept of multi door court system and environmental experts for proper implementation of environmental rights of its citizens.

The Land and Environment Court of New South Wales in Australia, established in 1980, could possibly be hailed as the model judiciary body for dealing with environmental disputes, its enabling act is the Land and Environment Court act 1979 (NSW), which vests power in the court to determine environmental, development, building and planning disputes. It is a superior court of record with six permanent judges and nine permanent commissioners who have expertise in one or more of the following areas such as administration and local government, environmental or town planning, science or EIAs, law, architecture or building, or natural resource management. Since the court also resolves the matters under Aboriginal commissioners to assist the court. Its jurisdiction combines appeal, judicial review, and enforcement functions. Some cases are heard by commissioners, some by judges and others by combination of two. The court adopts a flexible approach towards procedural matters and interestingly, it is not bound by the rules of evidence that significantly complicate most hearings in Australian courts. Such a composition is necessary and ideal in

⁵¹ Anna Catherine Brigida, "From Australia to El Salvador to Vietnam, the environment is finally getting its day in court",

Down to earth, (7 May 2018), Available at www.downtoearth.org.in (Last visited 24 January 2021).

⁵²ibid

environmental matters, as it integrates the necessary areas of specialization within a judicial framework, enabling disputes to be resolved as expeditiously as possible. It can be concluded that the environmental court of Australia, i.e. The Land and Environment Court of New South Wales can be taken as the epitome when it comes to successful environmental courts, all the characteristics that a successful environmental court ought to possess. Compared to that, NGT in India still has a long way to go.

CONCLUSION

For ensuring environmental democracy throughout the world, the potential solutions will be granting the common people including indigenous groups the right to participate and influence in environmental decision-making. It may theoretically and politically authorise those groups which are generally undersold in the institutional power structures and promote a reasonable management of environmental resources and externalities. Indigenous people around the World continue to rise up in the struggle for environmental justice and it has been critical in introducing human rights norms of self-determination into local law regimes.⁵³ The emphasis on the involvement of stakeholders and the public at large will advance the utilitarian value and outcome of environmental decisions and ultimately it will lead to the establishment of an environmentally democratised society. On the one hand, in favour of this rationale, it is recommended that consultation of the public and interest groups may undeniably increase the knowledge and expertise obtainable to environmental agencies and regulators including states, NGOs, Private Industrial groups and others to take more holistic and technically accurate decisions.

States must struggle to guarantee that a strong, robust standards and systems in place to accomplish their responsibility to respect and

protect environmental rights in all of their activities, while providing active access to remedies when environmental rights of common people are violated. Through promoting the principle of local participation in decision making, seeking stronger social, environmental and disclosure standards, and facilitating development and use of mechanisms to hold financial institutions accountable for their activities, seeks to promote a more sustainable and community-centred paradigm of development that allows communities to trail new development projects that posture a menace to human rights and the environment.

Therefore, Environmental democracy should be supported by a universal, broad rights-based framework and, it should include –

- The right to a safe and healthy environment
- The right to information,
- The right to public participation
- Right to informed consent
- Access to justice in environmental matters.

At present, the environment rights of the marginalised groups are not highlighted or recognised by mainstream environmentalism. They have been excluded from their environment which ultimately leads environmental oppression. Policy making in environmental law constantly deprives the marginalised sectors and local populations near industrial projects should be provided with participation and access to information rights of that projects otherwise they will face major repercussions for their livelihood and habitat. It will be highly undemocratic and this will tarnish the image and sanctity of the democratic state like India. To ensure environmental democracy, the environmental rights should be responsive, fair, and effective in environmental governance. If environmental democracy is to serve sustainable development, rights of access to information, participation, and justice on environmental matters need to be recognized and established by the laws of a

⁵³D. Kaupa Ala Sproat, “Indigenous People’s Right to self Determination: Native Hawaiians struggle against climate

change Devastation”, 35 *Stanford Environmental Law Journal*2, 158-183.

country. These could include requirements for timely information release, for public participation at the earliest stages of decision making rather than last moment consultation to ensure the public can encounter the efficacy of government agencies if execution of the law is lacking. The policies should be constructed with clear goals, target audience, and with indicators that are capable of measuring change through data collection, they can be effective tools to promote change. It is important to note that the impact of these rights depends on enabling factors, such as civil society capacity, state capacity, bureaucratic culture, and other factors. This is an area of continuing research and we cannot conclude that applying the pillars of environmental democracy is the only solution that solves all environmental problems. But articulating this concept with environmental protection will definitely result in a right -based approach to reduce ever growing environmental issues of the world.