**RESEARCH PAPER ON**

**ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION 2020 AND CONSTITUITIONAL LAW**

**By: -**

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***Abstract***

The Environment Impact Assessment notification, 2020 released by the government of India brings in various new changes to the earlier legislation. In the wake of recent ecologically damaging accidents like the Assam Baghjan oilfield fire or Vizag gas leak, the role of EIA comes to the forefront. It thus becomes important to analyze if the current notification is doing enough to prevent future industrial accidents. The research analyzes the legislation to check whether it is in consonance with constitutional law or not. For this, the provisions of the law are tested to see if they protect the fundamental right to clean and pollution-free environment, promote participatory democracy, uphold international treaty obligations and maintains the balance of federalism. The research finds that the legislations fails in all these regards and is skewed in favor of the project proponents to improve the ease of doing business. The author of this research feels that the government must realize the importance of balancing between environment and economy and not destroy one to save the other. The parliament must also improve the baseline surveys, make the process more inclusive, increase accountability and remove ex post facto legitimization of violations. The government should take one step forward instead of taking two backwards. Only then can our common environment be saved***.***

***Keywords***: Environment Impact Assessment 2020, Constitutional law, Fundamental rights, Participatory democracy, Ex post facto legitimization.

***Introduction***

Environment impact assessment provides for a scientific analysis of the potential harmful affects that developmental projects or policies may have on ecological resources. It also gives weight to public consultation and ordinary people can pitch in their views on projects which affect their lives directly.Any new construction work, modernization or expansion would require a prior environmental clearance certificate.It first commenced in the United States when their legislature approved the National Environment Policy Act 1969. Following in their footsteps, other countries like Australia, New Zealand and Canada also enacted their own legislations. In India, the procedure of EIA was initiated in 1994 under the National Environment Policy, 1986. Overtime, many amendments were made to it and new orders were released. This made the law very confusing and the government planned to materialize all the rules in one place. The current Environment Impact assessment notification 2020 thus aims to replace the 2006 notification of the government. The government claims that the new notification would make the process of impact assessment more transparent and expedient by using online systems, furthering delegations, rationalizing and standardizing the process[[1]](#footnote-1). Section 3 of the act empowers the union government to take measures to not only protect but also improve the environment. The question that arises is whether the EIA act, in reality, is pro-environment or not? Whether the promise of transparency that the government makes will be fulfilled by the provisions it has laid? Whether it is consonance with the rights conferred by the constitution? To answer the last question, we must scrutinize the legislation on four different parameters. Whether it secures citizen’s fundamental right to clean environment? Whether it encourages public discourse? Whether it honors the countries international obligations? Whether it maintains the delicate balance of federalism?

***Aim of the research***:

The research aims to analyze the Environment Impact Assessment notification, 2020.

Objectives of research:

* To critically analyze the EIA notification 2020 against the backdrop of constitutional law
* To check whether the act is pro-environment or not
* To suggest measures to improve the existing notification

***Research Methodology***:

The research methodology adopted to frame this research project is doctrinal approach. Primary and secondary sources available in the form of books and online sources have been deployed to compile the project.

***Fundamental right to clean environment:***

Initially, the constitution did not provide for many environmental laws. But India’s participation in the United Nations conference on human environment, also known as the Stockholm conference, in 1972 increased awareness about the environmental crisis that the world faced. This prompted the government to place the duty of environmental protection on both the state as well as the individual. The 42nd amendment act 1976 introduced two essential articles. The first being article 48A which stated that “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”[[2]](#footnote-2) and the second being article 51A which stated ““It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures”[[3]](#footnote-3). The supreme court, later in **Subhash Kumar v. State of Bihar**[[4]](#footnote-4) upheld right to clean and free environment to be a fundamental right within article 21 of the constitution. Article 21 provides the fundamental right to life. The court semiotically interpreted “life” and broadened its meaning to claim that this right could not be enjoyed in the absence of pollution free air and water.

Despite all these efforts, the county continues to perform poorly in environment protection in comparison to other nations. For instance, India ranked 168th out of 180 countries in the 2020 Environmental Performance Index (EPI), released by Yale University[[5]](#footnote-5). The EIA legislation would only make this worse.

The earlier notification classified industries into 3 groups – A, B1 and B2, with A receiving the maximum scrutiny. However, the new act recategorizes the industries from A to B1 or B2, thereby completely removing certain levels of essential scrutiny.

The B2 category industries, about forty of them, are also exempted from requiring a prior environmental clearance, which makes them a hazard in preparation. These include less than 5 hectares of mining lease arena, Dump mining, onshore and offshore oil, gas and shale exploration, up to 25 megawatts hydroelectric power generation, Small and Medium enterprises engaged in Mineral Beneficiation and Chemical processing of ores, Cement Plants, Manufacturing of most Acids[[6]](#footnote-6) and so on. Coal and non-coal mineral prospecting as well as solar photovoltaic projects did not require prior clearance. Only Plants which are modernising or expanding more than 25% of their production capacity require EIA while those doing more than 50% require to be open to public consultation. The government has also vaguely defined “strategic projects” and has exempted them from both clearance certificates and public consultations. All these liberal measures weaken the scope of EIA and increase the risk of ecological damage. The government must be reminded that the Vizag gas leak incident happened partly due to the LG Polymer plant not having any Environment impact clearance certificate[[7]](#footnote-7). The gas leak had led to the death of 11 people and had sickened over a 1000.

Under the garb of strategic projects, the government can pave the way for any project to be passed irrespective of how damaging it might be.The modern-day disasters can be only prevented by making EIC mandatory without any prejudice.

The legislation also aims to increase the validity period for environment clearance certificate for mining to fifty years, river valley projects to be fifteen years and other projects to be ten years[[8]](#footnote-8). This goes against the spirit of environment protection. It also provides for only one annual compliance in place of two. The CAG report of 2016 disclosed the dearth ofsemi-annual compliance reporting, which fluctuated between 48% and 78%, while failure to comply with conditions ranged from 5 to 57%[[9]](#footnote-9). This statistic shows that rules are rarely followed and hence regular inspection becomes essential. What is most disappointing is that even government industries do not follow compliance rules. For instance, the NGT declared the entire Baghjan oil field of Assam to be illegal. The fire accident in this Oil India limited run field happened in the absence of environment compliance certificates and caused damage to the nearby DibruSaikhowa National Park (DSNP).

The most controversial provision, however, remains the ex-post facto approval of ecological violations. According to this provision, industries and plants which have already started their business operations without getting a prior environmental clearance still have a way out. They can pay a small fine and continue with their operations. This legitimisation of violations is flawed because it does not hold them accountable for the ecological damage they caused and the lives they endangered in the meantime.In **Alembic Pharmaceuticals v. Rohit Prajapati**[[10]](#footnote-10)**, the supreme court disapproved the giving of environment clearance ex post facto when the law clearly required it prior to commencement of the project. The judges found it to be violative of the idea of sustainable development. In association for Environmental Protection vs State of Kerala, the court was of the view that starting operations of the business without prior environmental clearance certificate was violative of other people’s right to life wide article 21 of the constitution. The government had in the past to extended this benefit of ex post facto clearance to industries in 2017. A chance was given to the industries to comply with the rules, however, many of them chose otherwise. Three years later the same deal is again offered. This will continue like a vicious cycle with the government pardoning off whatever irreparable damage they do to our common environment. To bring the cycle to a close the government must bring the violators to books.**

**The above discussed provisions of EIA legislation would hurt the citizen’s fundamental right to clean and pollution free environment if not changed.**

***Public Discourse***

**The Chipko movement of the 1970’s, spearheaded by Chandi Prasad Bhatt, was successful not only in protecting their forests but also in bringing to the table the larger question of what role local communities played in decisions regarding the use of natural resources. It has been now accepted universally that locals must have a stake in decisions that affect their lives, homes and livelihoods.It has also been experienced that these locals know best about these native resources and can contribute in sustainable development. In most cases, private businesses do nothing more than extract every drop of benefit they can, destroy the forests in that process and when the land is rendered useless, shift somewhere else in search of more. The locals on the other hand, do not simply have the resources to indulge in such wasteful extravagance or greed. They rather make long term plans to keep the resources from depleting and make sustainable use of them. These locals mostly live together in the form of a closed-knit community and collectively worship nature’s resources. The constitution supports the institution of local self-help governments or panchayats under schedule XI of the constitution. Article 40 of the constitution also supports the establishment of panchayats as the third tier of government. The idea of public participation also formed the genesis of Right to Information Act 2005. However, the provisions of the EIA legislation undermine all of these.**

**The industries in B2 category are exempted from public consultation. It also brings an absurd rule according to which any ecological violations can only be taken cognizance of when the project proponent reports himself, or any government office, regulatory agency or appraisal committee does so**[[11]](#footnote-11)**. This Panglossian policy idea is clearly unsustainable. Who commits a crime and turns himself in? This rule does not allow common people to raise objections and file suits and curbs their constitutional rights. And even in the rare circumstance that an enterprise is found guilty of violations, the project proponent himself, and not any third party as traditionally happens,has to make a** report of assessment of ecological damage and make the remedial plan[[12]](#footnote-12). Although this has to be done according to the guidelines of the government, enough room is still left to evade accountability.

The act also employs other more circuitousways to restrict public participation. The time period for filling a response has been unreasonably reduced from 30 to 20 days. Even the hearing time period has been made 40 days, in place of 45.

**It is often said that a democracy has four pillars – legislature, executive, judiciary and media. But it actually had a fifth – people. Democracy as a form of governance is passionately protected by the constitution. And people form the essence of this democracy. In our representative democracy, people can express their views by voting for their leaders or/and by participating in the political discourse of the country.In fact, Article 19(1)**[[13]](#footnote-13) **provides all citizens with the fundamental right of freedom of speech and expression. People can thus voice their opinions without any fear. But when people protested against this legislation, the government banned their online sites (Fridays for future) and booked them under the Unlawful activities(prevention) act 1967, as if their blogs were prejudicial to the integrity and sovereignty of India**[[14]](#footnote-14)**. As the government tries to silence dissent, the silence itself speaks. And this noisy silence cannot be silenced.**

***International Treaty Obligations***

# **India has participated and submitted itself to various international treaties on environmental protection. The country participated in the Stockholm Conference in 1972 as well as the United Nations Framework Convention on Climate Change (UNFCCC), known as the Earth summit, held in Rio in 1992. The country ratified the Kyoto Protocol in 2002 and became a member of the Convention on Biological Diversity (CBD) in 1994. The country has now become a global leader in renewable energy. The International Solar alliance, initiated by India, aims to create a global market to give impetus to solar energy and encourage clean energy applications. In addition to these, the International Court of Justice in** Argentina v. Uruguay, also known as the Pulp Mills decision, held that environment impact assessment is an obligation that states have under general international law as any ecological risk that industrial processes cause is not limited to national boundaries but affects the whole world and our shared resources.**India has thus committed itself to ecological conservation. Article 51(c) of the constitution reaffirms that the country will respect the treaty obligations it makes. Article 253 of the constitution also confers the parliament to make laws to give effect to international treaties and obligations that India submits itself to.**

# **The provisions of the current EIA notification do not seem to be in concurrence with this.**

# **The notification dilutes environmental rules in border areas. There would be no requirement of public consultation in linear projects lik**e**** Extraction of Alkaloid from Opium[[15]](#footnote-15) and maintenance dredging.**India enjoys jurisdiction over territorial waters up to 12 nautical miles from its coast. However no public consultation is required for off-shore projects beyond these 12 Nautical miles**[[16]](#footnote-16)**, which puts at risk the common shared resources of the world. The weak EIA rules would also not be enough to fulfil the global commitments we made. Mere passing of a law does not mean that the objectives set out will be met.**

# *****Federalism*****

# **India has a three-tiered federal system of governance with power being divided between the central, state and local level governments. Article 246 of the constitution provides the union and state governments with power to make laws on subjects in their respective lists. Where the concerns of the union and the state overlapped, the subjects were placed in the concurrent list. Forest and environment are part of this list hence law can be made by both levels of the government, but in case of any conflict, the law made by the parliament would triumph. This however does not mean that state governments should not have any say in the matter. Since many projects now don’t require a prior environment clearance certificate and anything can be called strategic project, the state government might find that they don’t have much control over their own land, rivers and forests. The displacement of people for the construction of the projects would be just another conundrum.According to the EIA legislation, even state level appraisal committees would be appointed and regulated by the union government**[[17]](#footnote-17)**. In case of any accident or mishap, the local people would hold their state leaders to be accountable even if they don’t necessarily have the means to regulate anything.**

#  **This law thus appears to be skewed in favour of the central government on both accounts of power and accountability, and defeats the constitutional aspiration of a vertical balance of power.**

***Conclusion***

The government assured that The Environment Impact Assessment Notification 2020 was meant to only make the process more transparent and expedient. However, instead of taking one step forward, the government took two backwards. The legislation is violative of various constitutional laws. It fails to be pro-environment and is skewed in favour of the project proponent. The problem that the author of this research identifies is that the violation of environmental provisions is mistakenly seen as development. In these special circumstances, besieged by the pandemic and the sluggish economy, the government wants to boost business by increasing the ease of doing business. To achieve this, the environmental provisions have been made more liberal and freeway has been given to the industries to do as they see fit. The diluted laws violate constitutional rights by disregarding people’s fundamental right to clean and pollution free environment, by discouraging public participation in decision making, by dishonouring international treaties and disbalancing the structure of federalism as enshrined in the constitution.The ex-post facto legitimisation of violations has become de facto. It removes accountability for the damage already caused to the environment. The exemption of certain key industries from the requirements of an environment clearance certificate, the increase in validity period of these licenses and reducing the annual compliance to one time indicate the government’s lackadaisical attitude towards the citizen’s right to clean and pollution free environment. The law turns a nelson’s eye towards the ideal of participatory democracy by forbidding the common people from reporting violations. Even the remedial plan is placed under the aegis of the violator himself. This comes from a place of misguided expectation that the violator would report himself. It is equivalent to expecting a murder to turn himself in and then decide the damage he himself caused. Reducing the response time period from thirty to twenty days as well as shrinking the hearing period to only forty days come as more indirect ways of avoiding consultations. Those who protest, find themselves charged under UAPA. If the notification is enforced, the country would not be able to discharge its treaty obligations. Dilution of rules in border areas and dismissal of public consultations in projects beyond the 12 nautical mile territorial waters would prove to be future contentions with the international community. This would violate article 51 of the constitution which affirms the countries commitment to international promises. The notification also concentrates power in the hands of the central government and thus upsets the delicate balance of federalism. The appointment and regulation of the state appraisal committee by the union government and the vague classification of projects as strategic, to prevent public consultation, robs the state legislature of its capacity to protect its people. Thus, the current legislation is contra legem to constitutional laws.

One must see the bigger picture. Resources are non-renewable and watering down the laws for short-term gains would be counter-productive. Instead, steps should be taken to integrate environment and economy to develop the concept of sustainable development. The parliament must improve the standard and quality of baseline surveys, increase accountability of enterprises, and give impetus to technological innovations to abate possible damages.

Earth is our only home; nature is our only gift; we are its only protectors. It is our duty to give to our future generations what we inherited from our ancestors.

***Brief About Author:***

 Meenal Maheshwari is a first semester student at MNLU, Nagpur. She has a keen interest in criminal law and constitutional law.

1. Environment Impact Assessment Notification 2020 (draft bill, 2020)p. 1. [↑](#footnote-ref-1)
2. Constitution of India Article 48 A [↑](#footnote-ref-2)
3. Constitution of IndiaArticle 51(c) [↑](#footnote-ref-3)
4. Subhash Kumar v. State of Bihar [1991] AIR 420, 1991 SCR (1) 5.  [↑](#footnote-ref-4)
5. # National Herald Editor, ‘India ranks 168th on Environmental Performance Index’ (*National Herald*, 9 June 2020)  <https://www.nationalheraldindia.com/national/india-ranks-168th-on-environmental-performance-index> accessed on 11 December 2020.

 [↑](#footnote-ref-5)
6. Environment Impact Assessment Notification 2020 (draft bill, 2020), pp. 37-45. [↑](#footnote-ref-6)
7. G Ananthakrishnan, ‘What Are The Key Changes In The Environment Impact Assessment Notification 2020’ (*The Hindu*, 2 August 2020) <<https://www.thehindu.com/sci-tech/energy-and-environment/the-hindu-explains-what-are-the-key-changes-in-the-environment-impact-assessment-notification-2020/article32249807.ece>> accessed on 10 December 2020. [↑](#footnote-ref-7)
8. Environment Impact Assessment Notification 2020 (draft bill, 2020) p. 26. [↑](#footnote-ref-8)
9. G Ananthakrishnan, ‘What Are The Key Changes In The Environment Impact Assessment Notification 2020’ (*The Hindu*, 2 August 2020) <<https://www.thehindu.com/sci-tech/energy-and-environment/the-hindu-explains-what-are-the-key-changes-in-the-environment-impact-assessment-notification-2020/article32249807.ece>> accessed on 10 December 2020. [↑](#footnote-ref-9)
10. **Alembic Pharmaceuticals v. Rohit Prajapati [2020] SC 347.** [↑](#footnote-ref-10)
11. Environment Impact Assessment Notification 2020 (draft bill, 2020) p. 29. [↑](#footnote-ref-11)
12. Ibid, p. 30. [↑](#footnote-ref-12)
13. Indian Constitution, Article 19(1) [↑](#footnote-ref-13)
14. Parth MN, ‘Delhi Police cites UAPA to block website opposing draft EIA 2020’(The Hindu, 24 July 2020) <https://www.firstpost.com/india/delhi-police-cites-uapa-to-block-website-opposing-draft-eia-2020-site-back-online-after-cops-withdraw-notice-8631891.html> accessed on 11 December 2020. [↑](#footnote-ref-14)
15. Environment Impact Assessment Notification 2020 (draft bill, 2020) p. 35. [↑](#footnote-ref-15)
16. *Ibid* p. 19. [↑](#footnote-ref-16)
17. *Ibid* p. 7. [↑](#footnote-ref-17)