

ROLE OF INDIAN REGULATORY AUTHORITIES IN INTEGRATING ENVIRONMENTAL JUSTICE INTO INDUSTRIAL SITING DECISIONS

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In the wake of the horrors wrought during the Bhopal gas tragedy, the issue of environmental justice was catapulted to the forefront of public discourse in India. Numerous studies and surveys conducted thereafter shed light on the unequal distribution of environmental benefits and harms between middle-to-high income communities and the low-income communities. While certain regulatory initiatives have been undertaken thereafter to mitigate these harms, the concerns of the marginalised communities are yet to be fully integrated into every environmental decision that affects them. This is specifically true in the context of industrial siting, where the concerns of the poor are given superficial consideration. In this paper, I attempt to assess the Indian legal framework on industrial siting through the lens of environmental justice, and to justify the need for incorporating principles of environmental justice within the Indian legal and regulatory framework. I seek to examine the extent to which the current framework on industrial siting decisions incorporates these principles, and to explore the ways in which environmental justice concerns have been incorporated into the domestic law of the USA, and how they are relevant for India. This analysis enables in outlining the recommendations on the measures that Indian regulatory authorities should take, so as to accord greater emphasis on environmental justice under laws relating to industrial siting. The proposed measures could be implemented by regulatory authorities by virtue of their duties under Articles 21, 19(1)(a), 14 and 15(4) of the Constitution.

I. INTRODUCTION

In 1984 the city of Bhopal in Madhya Pradesh, India woke up to one of the worst industrial disasters in Indian history, which had left over

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ten thousand people dead and more than two hundred thousand injured.¹ The toxic methyl isocyanate (MIC) gas that had leaked from a chemical factory located nearby was found to have led to the tragedy.² While the causes and consequences of the disaster have received considerable coverage in Indian and international literature, the issue of environmental justice, and its relevance to the incident, have continued to remain ancillary.

From the time the factory was established, the Union Carbide Corporation ('UCC') – its owner – had systematically adhered to a policy of discrimination in its design, construction and operation.³ Specifically, the low-income and marginalised communities around the factory had not been informed either by the UCC or by the regulatory authorities at the time, about the presence of hazardous substances on the factory premises.⁴ Furthermore, the regulatory authorities had made no efforts to ensure that the surrounding population was made aware of the safety procedures required to be complied with, in case of a leak.⁵ As a result, these communities were unprepared to withstand the environmental harm which resulted from the leak.

According to the United Nations Children's Fund (UNICEF), out of the two hundred thousand people affected by the leak, approximately seventy-five per cent were found to have been slum-dwellers.⁶ Another survey conducted by the Centre for Social Medicine and Community Health of the Jawaharlal Nehru University, New Delhi, also found that more than half of the population affected by the gas-leak were from a low-income background.⁷ The results of these surveys shed light on the unequal distribution of environmental benefits and harms between middle-to-high income communities and the low-income communities – which is precisely the issue that the concept of environmental justice seeks to address.

Bearing out of the civil rights movement in the United States of America ('the USA'), environmental justice seeks to eliminate the unequal distribution of environmental benefits and harms amongst the low-income and the middle-to-high income communities. It recommends the promotion of fair and equitable treatment of all persons, irrespective of their culture, race, colour, caste, gender or economic status, under environmental laws, regulations,

¹ CENTRE FOR SCIENCE AND ENVIRONMENT, *The State of India's Environment 1984-85: A Second Citizens' Report* 210 (1985), available at <http://cseindia.org/userfiles/THE%20BHOPAL%20DISASTER.pdf> (Last visited on April 30, 2017) ('Centre for Science and Environment').

² *Id.*

³ AMNESTY INTERNATIONAL, *Clouds of Injustice: Bhopal Disaster 20 Years On* 39-49 (2004).

⁴ Centre for Science and Environment, *supra* note 1.

⁵ *Id.*, 215; See also HESPERIAN HEALTH GUIDES, *A Community Guide to Environmental Health* 35-37 (2012), available at http://hesperian.org/wp-content/uploads/pdf/en_cgeh_2012/en_cgeh_2012_04.pdf (Last visited on April 30, 2017).

⁶ *Id.*, 210.

⁷ *Id.*

policies and decisions.⁸ While scholars across the globe continue to expand its scope, the essence of environmental justice strikes at the disproportionate distribution of environmental benefits and harms amongst low-income communities, and middle to high-income communities.⁹

In India, the concept of environmental justice is yet to garner the significance it deserves. While the low-income communities in India have constantly struggled to get equal treatment in the context of environmental decisions, they have rarely succeeded. The resistance of the Indian poor against the disproportionate environmental burden imposed upon them has also been referred to as ‘environmentalism of the poor’. The term ‘environmentalism of the poor’ was coined by the renowned environmentalist Mr. Anil Agarwal, and bore out of the Chipko movement in North India, wherein several villagers hugged the trees that were ordered to be felled by Maharaja Abhay Singh, the erstwhile ruler of Jodhpur.¹⁰ Over the years, the environmentalism of the poor has highlighted the injustice meted out to them in environmental decision-making.¹¹ These struggles have resulted in the enactment of landmark legislations such as the Panchayats (Extension to the Scheduled Areas) Act, 1996, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which strive to accord greater rights to the poor and low-income communities, including the tribal population. However, the concerns of these communities are yet to be fully integrated into every environmental decision that affects them. This is specifically true in the context of industrial siting, where the concerns of the poor are given consideration rather artificially in the preliminary phase of scoping and site selection – these tend to lose importance in the later phases of industrial development. An example of this could be gauged from the manner in which the environment impact assessment is conducted for industrial projects under the Environment Impact Notification, 2006, which will be discussed later in detail.

In light of the foregoing contextual background, this paper seeks to assess the Indian legal framework on industrial siting through the lens of environmental justice, and to justify the need for incorporating principles of environmental justice within the Indian legal and regulatory framework. In Part II of this paper, the concept of environmental justice is dismantled so as

⁸ United States Environmental Protection Agency, *Environmental Justice*, available at <https://www.epa.gov/environmentaljustice> (Last visited on June 12, 2017); See also, David A. McDonald, *What is Environmental Justice* in ENVIRONMENTAL JUSTICE IN SOUTH AFRICA 3-6 (David A. McDonald ed., 2002).

⁹ Glyn Williams & Emma Mawdsley, *Postcolonial environmental justice: Government and governance in India*, 37(5) GEOFORUM 660–670 (2006).

¹⁰ *Id.*

¹¹ Ramachandra Guha, *The Environmentalist of the Poor*, 37 (3) ECON. & POL. WEEKLY 204-207 (2002).

to highlight the key principles that must be assimilated into the legal and regulatory framework for securing environmental justice to the low-income and marginalised communities. In Part III, I outline the extent to which the current framework on industrial siting decisions incorporates these principles as outlined in Part II. In Part IV, I explore the ways in which environmental justice concerns have been incorporated into the domestic law of the USA, and how they are relevant for India. The USA's unique history, in the backdrop of the civil rights movement and its emphasis on environmental justice, renders it a model jurisdiction for India to emulate. In Part V, I briefly delineate the conclusions, and outline the recommendations on the measures that regulatory authorities should take so as to accord greater emphasis on environmental justice under Indian environmental laws relating to industrial siting. The proposed measures could be implemented by regulatory authorities by virtue of their constitutional duties under Articles 21, 19(1)(a), 14 and 15(4) of the Constitution.

II. DELINEATING THE THEORETICAL FRAMEWORK OF ENVIRONMENTAL JUSTICE: EVOLVING KEY GUIDING PRINCIPLES FOR PUBLIC REGULATORS UNDER INDIAN ENVIRONMENTAL LAWS

There is extensive literature on the scope and meaning of environmental justice and the manner in which it can be attained. The earliest attempt at defining environmental justice was made at the First National People of Colour Environmental Leadership Summit ('Summit') held in Washington DC in 1991.¹² While environmental justice as a concept originated much earlier in the United States, the Summit in 1991 imbued the concept with an international character. The delegates at the Summit adopted seventeen principles on environmental justice which, *inter alia*, affirmed substantive rights of all persons to be free from ecological destruction and to live in a healthy environment; demanded that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias; called for strict accountability of past and current producers for detoxification and containment at the point of production; demanded compensation and reparations for environmental injustices; and stressed on the need for participation at every level of decision-making.¹³ Together, these principles afforded a wide interpretation to environmental justice as a concept, and as a system for resolving environmental

¹² Phaedra C. Pezzullo & Ronald Sandler, *Introduction: Revisiting the Environmental Justice Challenge to Environmentalism* in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 4-7 (Phaedra C. Pezzullo & Ronald Sandler eds., 2007).

¹³ First National People of Colour Environmental Leadership Summit, *Principles of Environmental Justice* (October 24-27, 1991), available at <http://www.ejnet.org/ej/principles.html> (Last visited on April 30, 2017).

issues affecting vulnerable populations. However, within this paper, only those components of environmental justice that directly strike at the disproportionate distribution of environmental harms and benefits between the low-income and middle-to-high income communities have been covered. This is because, in its most basic form, environmental justice strives to equalise environmental benefits and harms among all classes of persons.

In the backdrop of the civil rights movement in the USA, which will be discussed in greater detail in Part IV, the early movement on environmental justice laid emphasis on equity and fairness in environmental decisions relating to industrial siting and the dumping of industrial waste.¹⁴ Various commentators have sought to outline these components by means of legal theory. In this regard, the work of John Rawls has proved to be immensely useful in dismantling the various elements of distributive justice that lay the foundation for equity and fairness in environmental decision-making.

In his famous work titled 'A Theory of Justice', John Rawls propounded the normative framework for distributive justice.¹⁵ One of the ways in which Rawls deconstructed the concept of distributive justice was by building upon the concept of social contract proposed by John Locke and Jean-Jacques Rousseau.¹⁶ According to Rawls, individuals who are bound by a social contract and are placed in an 'original position', where they know very little about themselves, make fair and rational decisions that benefit all.¹⁷ This is because when individuals are placed in the same position as others and are deprived of circumstances that set them apart – which allow prejudices to creep in – they make objective decisions that proportionately benefit all.

Through this 'original position', Rawls submits that rational individuals – who are also assumed to be self-interested – will arrive at key principles of justice, which are central to any individual's existence.¹⁸ Under the first principle of justice, individuals would agree to a basic set of liberties that would be applicable to all.¹⁹ Among other things, these liberties would include equal protection under law and equality of opportunity.²⁰ Under the second principle

¹⁴ Karen Bell, *The Concept and Measurement of Environmental Justice* in *ACHIEVING ENVIRONMENTAL JUSTICE: A CROSS-NATIONAL ANALYSIS* 1-3 (2014).

¹⁵ Robert V. Bartlett & Walter F. Baber, *Ethics and Environmental Policy in Democratic Governance: John Rawls, Public Reason, and Normative Precommitment*, 7(3) *PUBLIC INTEGRITY* 219 (2005); See also, Edward Abplanalp, *Background Environmental Justice: An Extension of Rawls's Political Liberalism* (Philosophy Dissertations, Theses, & Student Research, Paper No. 2, 2010), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1001&context=philosophydiss> (Last visited on April 30, 2017).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Gail E. Henderson, *Rawls & Sustainable Development*, 7 *MCGILL INTERNATIONAL JOURNAL OF SUSTAINABLE DEVELOPMENT LAW & POLICY* 3-31 (2011).

²⁰ *Id.*

of justice, individuals in the ‘original position’ would recognise that social and economic inequalities could set them apart in the future, but would stress on equality of opportunities for all individuals to occupy offices and positions that create such inequalities.²¹ The individuals would also recognise the fact that no one can be better off without making another person worse off.²² Keeping in mind these principles, rational individuals who would be placed in the ‘original position’ would make decisions that would benefit all, from the least advantaged to the most advantaged, assuming that they may be placed under any of those circumstances in the future.

Rawls’ work is useful in extracting normative principles that form the basis for environmental justice, or a legal framework that is environmentally just. If regulatory authorities make all their environmental decisions, including the ones relating to the siting of industries, keeping in mind the principles of distributive justice identified by Rawls, they would, by default, ensure that there is equal mitigation of environmental harms and equal distribution of environmental benefits among all persons, from the ones who belong to the low-income group, to the ones who belong to the middle-income and high-income groups.

Assuming that protection from environmental harms and access to environmental benefits constitute essential liberties, all individuals would receive equal treatment under all environmental decisions in accordance with the first principle proposed by Rawls. Where some individuals are denied equal treatment, they would be entitled to receive adequate compensation for being put at a disadvantage by regulatory authorities vested with performing public functions. This would restore the disadvantaged individuals to their original position, where they would again be placed on an equal footing with those individuals who had initially benefitted. In accordance with the second principle proposed by Rawls, the regulatory authorities would also ensure that all persons are provided an equal opportunity to occupy advantageous positions, from where they can make environmental decisions that affect them.

Even though aspects of procedural justice have not been explicitly alluded to under Rawls’ theory, they are essential to the application of Rawls’s principles. The two main components of procedural justice entail that *first*, the State or its authorities allow adequate access to information to all citizens, to enable them to make informed environmental decisions; and *second*, that the State or its authorities make transparent and fair decisions that can be reviewed by citizens, and, if necessary, can be amended or changed. These components are crucial to the realisation of the right to information – which has been

²¹ *Id.*

²² *Id.*

outlined in domestic as well as international instruments²³ – and are essential for securing equality of opportunity for all persons to make environmental decisions that affect them. By adhering to these components, the State and its authorities may be able to promote social justice by equalising the disparities among all people, and providing a level playing field for them. However, compliance with these components may not necessarily guarantee an environmentally just outcome in all environmental decisions. This is because there are other aspects of environmental justice, such as the geographic availability of environmental benefits and special vulnerability of groups and individuals to environmental harms, which also need to be assessed to ensure an environmentally just outcome. Regardless, compliance with procedural components of environmental justice by regulatory authorities is useful in affording all persons the right to have an equal say in the achievement of environmental outcomes. Without these, environmental justice may have been done, but may not be seen to have been done. The USA's framework, discussed below, provides a good example of the manner in which all these aspects can be collectively addressed under the legal and regulatory framework on the environment.

The Indian philosophy, by its very nature, is closely similar to Rawls' theory, when applied to the environment. According to the notable scholar, Vandana Shiva, social justice and ecological needs are at the heart of the traditional Indian concept of *dharma*.²⁴ Since the Earth's resources are limited and its capacity to renew such resources are also limited, Shiva posits that the philosophy of *dharma* entails that middle to high-income communities reduce their consumption of energy and natural resources in order to allow the low-income and marginalised communities to access such resources 'equally'.²⁵ By using the concept of 'Earth Democracy', which mirrors Rawls' original position, Shiva discusses the need for systematic and inclusive responses to environmental issues, which are not self-serving and fragmented.²⁶ In an Earth Democracy, all animals and humans are equal, and have equal rights to the resources of the earth for their sustenance.²⁷ These resources are part of the ecological commons, to which everyone is entitled and which are regulated by the State and its authorities. According to Shiva, the excessive exploitation of natural resources by one community, which adversely affects another community, violates the notion of *dharma* that is at the core of an 'Earth Democracy'.²⁸ While laying emphasis on socialistic principles, Shiva endorses the relevance

²³ These instruments include the entire text of the Right to Information Act, 2005 (India), Article 19 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 16, 1966), and Article 19 of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

²⁴ See Vandana Shiva, *Soil not Oil: Environmental Justice in the time of Climate Crisis*, 35(3) ALTERNATIVE JOURNALS 22 (2008).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

of environmental justice in the Indian context, and highlights the link that the State and its authorities must draw between environmental justice and social justice, through the notion of *dharma*.

The views of both Rawls and Shiva not only charge the State to promote a just and fair society that allows everyone equal access to environmental resources, but also recommends that the State and its authorities impartially mitigate environmental harm that affects any person or community. Keeping in mind their views, the authorities of the State, or simply the public authorities, must comply with the following obligations to secure environmental justice in its truest sense: *first*, they must provide equal opportunity to all persons to make environmental decisions that affect them. *Second*, they must allow all persons to access information which enables them to make informed environmental decisions. *Third*, they must ensure the equal distribution of environmental benefits among all persons, from the ones who belong to the low-income group, to the ones who belong to the middle to high-income groups. *Fourth*, they must implement measures for mitigating environmental harm for all persons. If all public authorities under Indian environmental laws and regulations comply with each of the components outlined above, they would be able to secure an environmentally just legal and regulatory framework that distributes environmental benefits equally among all persons, and that does not unfairly impose a disproportionate burden of environmental harm on low-income and marginalised communities.

The next Part of this paper discusses the extent to which Indian regulatory authorities adhere to principles of environmental justice, alluded to above, in making industrial siting decisions.

III. DUTIES OF REGULATORY AUTHORITIES UNDER THE EXISTING SYSTEM OF INDUSTRIAL SITING IN INDIA

While there are several Indian laws and regulations that govern the siting of industries, only a few address the environmental concerns of the poor and marginalised communities. The discussion below outlines the manner in which decisions on industrial siting are currently being made by regulatory authorities, and the extent to which the concerns of the poor and marginalised communities are being addressed under such decisions. In this regard, judicial pronouncements on the challenges to decisions on industrial siting have also been cited to provide a better insight into the way in which laws and regulations on industrial siting are applied in practice.

Within this paper, an industry and a factory have both been construed to mean an establishment, where the manufacturing of a product takes

place. In the interest of brevity, the discussion below is limited to only those Central laws and regulations that have a direct bearing on industrial siting decisions – other Central and state laws that have an indirect bearing on industrial siting decisions have not been discussed.

It must be noted that there are several steps involved in the process of setting up an industry. Each step requires the prospective owners of the industry/factory to obtain prescribed approvals and clearances under the applicable Central and state laws.²⁹ It must be noted that only those permissions and approvals that directly or indirectly impact the environment have been discussed below.

A. PERMISSION FROM LOCAL BODIES

One of the initial approvals required to be obtained by a prospective industry owner for siting his/her industry in a particular area is from the local bodies within the area.³⁰ The proposal for setting up the industry can be approved only if it is in line with the guidelines and policies on planning and development for each city/area, issued by the state governments; if it is prepared in consultation with local bodies; and if these local bodies are certain of the feasibility of the industry in the area. The principles of environmental justice attain significant relevance in this context. Assessing the feasibility of an industrial project should ideally include gauging the impact that the project would have on communities, especially low-income and marginalised communities located in the vicinity of the project. It should also involve engagement with communities through public hearings and dissemination of information. However, except for the local bodies in forest areas and in Scheduled Areas, the urban and rural local bodies in other areas are not under an obligation to comply with any of these principles of environmental justice. Furthermore, the manner in which the urban local bodies function is markedly different from the way in which the rural local bodies function. These issues and dichotomies are discussed in detail below.

²⁹ See Govt. of India, Department of Industrial Policy & Promotion, *Approval/Clearances Required for New Projects*, available at http://dipp.nic.in/sites/default/files/approval_clearances_required_for_new_projects.pdf (Last visited on April 30, 2017); Govt. of Gujarat, Industries Commissionerate, *Approvals Required for establishing an Industrial*, available at <http://ic.gujarat.gov.in/industry-facilitation.aspx> (Last visited on April 30, 2017); Government of National Capital Territory of Delhi, Industries Department, *FAQs (Policy)*, available at <http://www.delhi.gov.in/wps/wcm/connect/5625b500472a70dba3b8f3825d7a2a20/2+Industry+LAND+AND+POLICY.pdf?MOD=AJPERES&lmod=1287263871&CACHEID=5625b500472a70dba3b8f3825d7a2a20> (Last visited on April 30, 2017).

³⁰ *Id.*

1. Urban local bodies

The local bodies in urban areas are mandated with the task of preparing master plans of urban localities which allocate spaces for various categories of public and private establishments. These plans are publicly available and can be accessed by any interested person, free of cost.³¹ As a general practice, master plans stipulate that industries, especially large-scale industries be located at a considerable distance from residential complexes.³² Several master plans mention the exact distance that ought to be maintained between an industrial establishment and a residential establishment.³³ Villages and shanties are included within the purview of residential establishments, and are accorded the same level of protection as other establishments falling under this category.³⁴

In addition to master plans, the building bye-laws in urban areas also contain guidance on how and when local bodies should issue No Objection Certificates to buildings, including industries.³⁵ Each prospective industry owner needs to get the building plan of the industry approved by the concerned urban local body prior to commencing construction. While granting approval, local bodies can issue directions to industry owners to comply with certain environmental safeguards.³⁶

According to the Model Building Bye-Laws 2016 ('Model Bye-Laws'), which serve as the basis for local building bye-laws all over India and that contain guidance on the manner in which urban local bodies are to regulate the construction of buildings, builders are required to install equipment that reduces air and water pollution, to dispose of waste appropriately and to take other measures as specified under bye-laws for reducing pollution.³⁷ However, the only instance where the Model Bye-Laws allow local bodies to give special consideration for the poor and marginalised communities is with reference to the design and construction of a building. According to the Model Bye-Laws,

³¹ Master Plans for Delhi, Patna and Jaipur, *infra* note 32.

³² See Ministry of Urban Development (Delhi Division), *Master Plan for Delhi – With the Perspective for the Year 2021*, S.O. 141 (E) (Notified on February 7, 2007), available at http://dda.org.in/tendernotices_docs/jan12/Gazette%20notification%20MPD2021.pdf (Last visited on April 30, 2017); Government of Bihar, Urban Planning & Housing Department, *Patna Master Plan 2031*, No. 338 UD&HD Patna (Declared on August 13, 2014 and notified on October 28, 2016), available at <http://urban.bih.nic.in/PMP/0831-28-10-2016.pdf> (Last visited on April 30, 2017); Jaipur Development Authority, *Master Development Plan, 2025: Jaipur Region*, Vol. 2, available at <http://jda.urban.rajasthan.gov.in/content/dam/raj/udh/development-authority/jda-jaipur/pdf/MDP/Vol2.pdf> (Last visited on April 30, 2017) ('Master Plans for Delhi, Patna and Jaipur').

³³ *Id.*

³⁴ *Id.*

³⁵ See Model Building Bye-laws of the Town and Planning Country Organisation, Ministry of Urban Development (2016), available at <http://www.indiaenvironmentportal.org.in/files/file/MODEL%20BUILDING%20BYE%20LAWS-2016.pdf> (Last visited on April 30, 2017).

³⁶ *Id.*

³⁷ *Id.*, ¶10.2.5.

a builder ‘may’ take concerns of the poor and marginalised into account in the construction of the building.³⁸ While the Model Bye-Laws refer to the need for formulating codes for slum clearance, and resettlement, they do not refer to any safeguards that urban local authorities should observe, while clearing slums, or resettling slum dwellers. These safeguards could have included considerations of environmental justice, such as consultation with slum dwellers, award of compensation for displacement, and availability of a safe and pollution-free space for resettlement.

As a general practice, Model Bye-Laws and master plans permit certain small-scale industries to operate in residential areas that are designated as ‘mixed use’ areas.³⁹ Only those industries that do not adversely affect the environment, or the health of the population residing nearby, are permitted in mixed-use areas.⁴⁰ Such industries include, among other things, industries for building material (timber, timber products, marble, iron and steel, and sand), firewood, coal and any hazardous and other bulky materials, repair shops, schools, nursing homes etc.⁴¹

It must be noted that master plans and building bye-laws are subjected to public consultations in the initial phases of drafting.⁴² In the later phases, the text of such laws may be amended for the benefit of the public, if and when urban local bodies or the Central/State government feel the need.⁴³ In this regard, urban local bodies or other regulatory authorities are not legally obliged to consult residents within their jurisdiction, while formulating developmental plans and spatial rules.⁴⁴ While the urban poor has representation in local bodies, the representatives are relatively fewer in number and do not possess adequate influence to effectuate changes in regulatory functioning.⁴⁵ As a result, indigent residents are rarely able to express their concerns regarding the allocation of space in urban areas. In any event, the safeguards that do exist against the ill-treatment of the poor and marginalised communities under urban

³⁸ *Id.*, ¶3.1.1.

³⁹ *Id.*, ¶¶3.8, 3.9, 9.1.

⁴⁰ For example, please see the Mixed-Use Regulations formulated by the Delhi Development Authority, available at http://dda.org.in/tendernotices_docs/jan12/Gazette%20notification%20MPD2021.pdf (Last visited on April 30, 2017); *See also*, explanation of the regulations, available at https://www.dda.org.in/planning/docs/15_MIX_USE.pdf (Last visited on April 30, 2017), and at <http://www.tnkpssc.com/image/publicnotice.pdf> (Last visited on April 30, 2017).

⁴¹ *Id.*

⁴² PETER SHIRLEY & J.C. MOUGHTIN, *URBAN DESIGN: GREEN DIMENSIONS* 150 (2nd ed., 2005).

⁴³ *Id.*

⁴⁴ *M. Naga Venkata Lakshmi v. Visakhapatnam Municipal Corpn.*, (2007) 8 SCC 748 (the Supreme Court specifically directed the Visakhapatnam Development Authority to give the persons who may be affected by the zonal and master plans, an opportunity to be heard prior to the finalisation of such plans).

⁴⁵ Sudev J. Sheth, *Historical Transformations in Boundary and Land Use in New Delhi's Urban Villages*, 52 (5) *ECON. & POL. WEEKLY* 41-49 (2017).

local laws are more often than not disregarded by local regulatory authorities as well as industries.

For instance, in *M.C. Mehta v. Union of India*,⁴⁶ a Committee set up by the Supreme Court found that 39,166 applicants out of the 43,045 applications, which were scrutinised, did not qualify for grant of necessary permission to operate in the residential areas of Delhi. In view of the Committee's findings, the Court was compelled to direct public authorities such as the Ministry of Urban Development, the Delhi Development Authority, the Municipal Corporation of Delhi and the Government of the National Capital Territory of Delhi to initiate the closure of such industries.

In another case of *R.K. Mittal v. State of U.P.* ('R.K. Mittal'),⁴⁷ the Supreme Court was asked to consider whether the New Okhla Industrial Development Authority could permit users other than residential users, to use areas that were specifically earmarked for 'residential use' in the Master Plan of the New Okhla Industrial Development Area. While ruling that such use could not be permitted without following the procedure prescribed under law, the Court went on to observe:

"The law imposes an obligation upon the Development Authority to strictly adhere to the plan, Regulations and the provisions of the Act. Thus, it cannot ignore its fundamental duty by doing acts impermissible in law. There is not even an iota of reason stated in the affidavits filed on behalf of the Development Authority as to why the public notice had been issued without amending the relevant provisions that too without following the procedure prescribed under law.

The concept of public accountability and performance of public duties in accordance with law and for the larger public good are applicable to statutory bodies as well as to the authorities functioning therein. We find no justification, whatsoever, for the Respondents to act arbitrarily in treating equals who are similarly placed as unequals [...] A few officers of the Development Authority cannot collectively act in violation of the law and frustrate the very object and purpose of the Master Plan in force, Regulations and provisions of the Act."⁴⁸

These pronouncements highlight the weak enforcement of urban local laws by local bodies, which contributes to widespread violations of such

⁴⁶ *M.C. Mehta v. Union of India*, (2002) 9 SCC 534.

⁴⁷ *R.K. Mittal v. State of U.P.*, (2012) 2 SCC 232.

⁴⁸ *Id.*, ¶72-73.

laws by private entities. As evident from the pronouncements above, weak enforcement mechanisms lead industry owners to neglect their obligations under the law, and to disregard the concerns of the communities that may be residing near the industrial site. Among such communities, the poor and marginalised groups almost always appear to be the ones that bear the unfair consequences of the actions of private entities. Despite the existence of some safeguards under urban local laws, the public authorities also seem more inclined to uproot the poor and marginalised communities and to resettle them in any available area. There are no regulatory safeguards to ensure the land on which the communities are resettled is environmentally safe and viable. As evident from the decision in R.K. Mittal, regulatory authorities seem inclined to allow industry owners to occupy land near residential colonies, which on most instances are occupied by poor. This may be because the powerless communities residing in such areas pose little or no threat to the establishment of industries in their vicinity. Such communities may also be made to believe that the siting of industries nearby would actually benefit them economically. However, the environmental consequences that might flow out of such industrial siting decisions are rarely ever conveyed to such communities in as much as detail as might be necessary.

2. Rural local bodies

In rural areas, the local bodies are required to prepare developmental plans within their respective jurisdictions, in conjunction with the District Planning Committee set up under the Constitution.⁴⁹ In addition to consolidating plans prepared by the Panchayats, the District Planning Committees prepare draft development plans for each district as a whole.⁵⁰ Such committees also exist in urban areas and prepare similar for the benefit of urban local bodies.⁵¹ While preparing such development plans, the District Planning Committees need to be mindful of matters of common interest between the Panchayats and the Municipalities, including spatial planning, sharing of water and other physical and natural resources and their availability, and the integrated development of infrastructure and environmental conservation.⁵² However, there are many municipalities and villages where such committees are yet to be set up.⁵³

Furthermore, in rural areas particularly, local bodies, including such Committees lack the adequate expertise or funds to perform their

⁴⁹ The Constitution of India, 1950, Art. 243ZD (Committee for district planning for Panchayats and Municipalities).

⁵⁰ *Id.*

⁵¹ *Id.*; The Constitution of India, 1950, Art.243ZE (Committee for Metropolitan planning).

⁵² *Id.*

⁵³ Rajni Kumari, *Status of District Planning Committee Formation in India*, 4(9) INT. J. ADV. RES. 383-386 (2016); See also Government of India, Planning Commission, *Manual for Integrated District Planning* (2008), available at http://planningcommission.nic.in/reports/genrep/mlp_idpe.pdf (Last visited on April 30, 2017).

functions effectively.⁵⁴ Furthermore, the percolation of funds to local bodies in rural areas is low, as urban planning is almost always prioritised over rural planning.⁵⁵ Due to these reasons, spatial planning in rural areas is undertaken in an unorganised manner, where there is little or no link between the developmental activities of the Panchayats with those of the Municipalities. In several cases, this leads to uneven sharing of resources and infrastructure between the Panchayats and the Municipalities, and to meting out unfair treatment to persons living in rural areas, as compared to those living in urban areas.

As a local body, the Panchayat is specifically endowed with the power to prepare a village-level plan for economic development, and to implement state-level and Centre-level schemes that promote social justice within the village.⁵⁶ However, unlike urban areas, there appears to no guidance on how a Panchayat or any other rural local body should undertake spatial planning in a rural area. Rural local bodies also appear to be under no obligation to consult the residents within their jurisdiction in formulating spatial and developmental plans. While local bodies may be involved in assigning spaces for residential areas and for industries in rural areas, the conditions under which such bodies grant permissions for setting up industries are not publicly available, thus leaving room for discretion in spatial planning and for unfair treatment of the rural population.

The public hearing component under various environmental laws, which will be discussed below, requires local bodies to gauge the concerns of the rural population, and to present them before the prospective industry owners, the State Pollution Control Boards ('SPCBs') and the officials of the State government. However, rural local bodies do not have the expertise or the manpower to adequately determine the suitability of an industrial site, or the distance that ought to be observed between the siting of polluted industries and residential towns and villages. Furthermore, the focus of rural local bodies is on socio-economic planning and development, and not on spatial planning or industrial siting.⁵⁷ Due to these reasons, rural local bodies are unable to effectively gauge the threat posed by the siting of industries near rural areas, to the residents of such areas. Hence, the consent given by rural local bodies, on behalf of persons residing in their jurisdiction, during public hearing processes, may sometimes be misleading and not fully informed.

⁵⁴ VISHWAMBHAR NATH, ADMINISTRATION AND DEVELOPMENT PLANNING IN INDIA 38 (2011).

⁵⁵ Anil Kumar Vaddiraju, *Urban Governance and Right to the City*, 51 (32) ECON. & POL. WEEKLY 21-23 (2016); Scroll.in, *Why engineering interventions won't prevent another flood in Chennai*, September 7, 2016, available at <https://scroll.in/article/815821/why-engineering-interventions-wont-prevent-another-flood-in-chennai> (Last visited on April 30, 2017).

⁵⁶ The Constitution of India, 1950, Art. 243G.

⁵⁷ Planning Commission, *supra* note 53.

3. Local bodies in special areas

In the context of special areas such as forest land and Scheduled Areas, the local bodies are expressly required to give due consideration to traditional and local practices followed by the indigenous and marginalised communities in such areas, whilst allocating natural resources. The acquisition of forest land for industrial development or otherwise, heavily affects the rights of forest dwellers and Scheduled Tribes, who reside in such forests. Consequently, local bodies need to ensure that these communities consent to such acquisition, that the acquisition has minimum impact on the life of such communities, and that such communities are adequately compensated for any adverse impact on their lives, irrespective of its magnitude.

The Panchayats (Extension to Scheduled Areas) Act, 1996 ('PESA') modifies the provisions of Part IX of the Constitution to provide better safeguards to the rights of persons residing in Scheduled Areas.⁵⁸ In accordance with the PESA, rural local bodies in Scheduled Areas are required to conform to customary laws, social and religious practices and traditional management practices of community resources that prevail in the areas within their jurisdiction.⁵⁹ The PESA also directs the setting up of a separate Gram Sabha for communities that live separately and prefer to manage their affairs according to their own traditions and customs.⁶⁰ The Gram Sabhas under the PESA are not only vested with the responsibility of approving developmental activities, disseminating information regarding environmental activities, ensuring mandatory consultation of all persons in the acquisition of land in those areas that are occupied by the marginalised communities and guaranteeing resettlement and rehabilitation of communities that get displaced, but are also vested with ownership over minor forest produce.⁶¹

The Gram Sabhas in forest areas are charged with regulating access to, and to stop activities that adversely affect forest resources under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ('Forest Rights Act').⁶² For undertaking any industrial activity in forest areas under the Forest Rights Act, the industry owners need to obtain the free and informed consent of the Gram Sabhas.⁶³ The Forest Rights Act recognises the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers that have resided in forests for generations and have faced decades of oppression.⁶⁴ It provides a framework for vesting, restoring

⁵⁸ The Panchayats (Extension to the Scheduled Areas) Act, 1996, Preamble.

⁵⁹ *Id.*, §4(a), §4(d).

⁶⁰ *Id.*, §4.

⁶¹ *Id.*

⁶² The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, §5.

⁶³ *Id.*, §4.

⁶⁴ *Id.*, Preamble.

and recognising the rights of forest dwellers in a manner that is not only fair but also just. The beneficiaries of these rights have been granted ownership over minor forest produce, and the power to preserve and protect these resources.⁶⁵ The rights guaranteed under the Forest Rights Act can only be taken away under exceptional circumstances, such as the setting up of schools, dispensaries, etc., which would, in any case, entail the payment of adequate compensation and rehabilitation and resettlement.⁶⁶

Since both the PESA and the Forest Rights Act are applicable to only those persons who reside in Scheduled Areas and in forests, the poor and marginalised communities residing in the suburbs of cities or within cities are not guaranteed the same rights and privileges as the aforementioned communities. While it is admitted that the pattern of land ownership is different in urban areas from Scheduled Areas and forests, local bodies in other rural areas and in urban areas still ought to be granted the power to preserve and protect resources, and to guard the rights of communities residing within their jurisdiction. However, none of the other environmental laws recognise local bodies as the nodal point for enforcing environmental decisions, and for according rights to vulnerable communities in these areas.

In any event, the available literature on the PESA and the Forest Rights Act suggests that State governments, SPCBs and industry owners are unwilling to fully comply with the provisions of the PESA and Forest Rights Act, and that they usually look for ways to evade the process envisaged under both Acts.⁶⁷ Besides imposing conditions on the right of forest dwellers to collect and sell minor forest produce, which is against the letter and spirit of the Forest Rights Act, State governments also attempt to trick the higher authorities into believing that a large number of community claims are cleared by them under the Act, when in reality, only a small number of claims that are settled by them actually give community rights.⁶⁸ There has also been active resistance by State governments in implementing the provision of the PESA

⁶⁵ *Id.*, §3.

⁶⁶ *Id.*

⁶⁷ See JOINT COMMITTEE OF MINISTRY OF ENVIRONMENT AND FORESTS AND MINISTRY OF TRIBAL AFFAIRS, *Report of the National Committee on Forest Rights Act* (December 2010), available at http://www.moef.nic.in/downloads/public-information/FRA%20COMMITTEE%20REPORT_FINAL%20Dec%202010.pdf (Last visited on April 30, 2017) ('Report of the National Committee on Forest Rights Act'); See also, KALPAVRKISH AND VASUNDHARA & OXFAM INDIA, *Citizens' Report 2015: Community Forest Rights Under The Forest Rights Act* (May 2015), available at <http://fra.org.in/document/CITIZENS%20REPORT%202015%20COMMUNITY%20FOREST%20RIGHTS%20UNDER%20THE%20FOREST%20RIGHTS%20ACT.pdf> (Last visited on April 30, 2017); See also OXFAM INDIA, *Implementing the Forest Rights Act: Lack of Political Will?* (2015), available at <https://www.oxfamindia.org/sites/default/files/PB-implementing-forest-rights-act-lack-of-political-will-261115-en.pdf> (Last visited on April 30, 2017).

⁶⁸ Richard Mahapatra et al, *How government is subverting Forest Rights Act*, November 15, 2010, available at <http://www.downtoearth.org.in/coverage/how-government-is-subverting-forest-rights-act-2187> (Last visited on April 30, 2017).

that accords ownership rights over minor forest produce to Scheduled Tribes.⁶⁹ Several State government officials are also unaware of the provisions of the Forest Rights Act, and their duties mentioned thereunder.⁷⁰ In some instances, such officials also lack adequate capacity and staff to implement the provisions of both Acts.⁷¹ Due to the lack of detail under the PESA, most States have not formulated rules to implement the provisions of the Act.⁷² While all laws that were in conflict with the PESA should have been repealed after its enactment, the repeal is yet to be effectuated till date.⁷³ In view of these regulatory lapses, the PESA and the Forest Rights Act cannot be said to have been effectively implemented in their letter and spirit, thus leading to the denial of environmental rights to marginalised communities in forests and in Scheduled Areas.

B. ROLE OF REGULATORY AUTHORITIES IN THE ACQUISITION OF LAND

The acquisition of land is also fundamental to the setting up of an industry under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the LARR Act'). The LARR Act came into effect on January 1, 2014, and replaced the Land Acquisition Act, 1894. Under the LARR Act, land belonging to private individuals can be acquired by the Central or State governments for a number of 'public purposes', such as infrastructural projects, military/navy/air force, or planned development.⁷⁴ In addition to public sector industries, the LARR Act also permits public-private partnership industries to be established on the acquired land, subject to the consent of the majority of affected families who would be impacted by the acquisition.⁷⁵

All those families who may be affected by the land acquisition under the LARR Act are entitled to compensation, rehabilitation and resettlement packages available under the Act.⁷⁶ In this regard, the LARR Act requires the Central and state governments to consult all communities that may be affected or displaced due to the acquisition of land, in decisions around the acquisition of land, as well as the formulation of the resettlement and rehabilitation

⁶⁹ Report of the National Committee on Forest Rights Act, *supra* note 67.

⁷⁰ *Id.*; See also The Economic Times, *Are Tribal Really Benefiting from the Forest Rights Act?*, August 9, 2015, available at http://articles.economictimes.indiatimes.com/2015-08-09/news/65379826_1_forest-rights-act-forest-lands-forest-villages (Last visited on June 10, 2017).

⁷¹ Report of the National Committee on Forest Rights Act, *supra* note 67; Mahapatra, *supra* note 68.

⁷² Mahapatra, *supra* note 68.

⁷³ *Id.*

⁷⁴ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, §2(1).

⁷⁵ *Id.*, §2(2), §2(3).

⁷⁶ *Id.*, §16.

plan.⁷⁷ The fairly broad definition of ‘affected families’ under the LARR Act ensures that *all* classes of persons, who may be affected by the acquisition, are covered within its scope.⁷⁸

The Social Impact Assessment (‘SIA’), which is required to be conducted prior to the acquisition of land under the LARR Act, intends to assess the social effect that an industrial project would have on neighbouring communities (which may later become affected families) and the feasibility of the acquisition. The Central and state governments (as applicable) are charged with conducting the SIA in consultation with local bodies in the area surrounding the land.⁷⁹ The SIA process also requires the Central and state governments to gauge the concerns communities residing in and around the land sought to be acquired, prior to the initiation of the acquisition process under the Act.⁸⁰ It must also be noted that the SIA is different from environmental clearances, which is also an essential component of the acquisition process under the LARR Act.

Despite intending to promote social welfare, the LARR Act has not proved to be a successful framework for the acquisition of land. While the LARR Act allows public authorities to only displace persons, including the poor and marginalised communities from their land under limited circumstances and in public interest, there have been several instances where land has been acquired and families have been displaced (mostly the poor and marginalised communities), but the authorities have failed to utilise the land for any purpose at all.⁸¹ These actions reflect poorly on the functioning of regulatory

⁷⁷ *Id.*, §18, §19.

⁷⁸ *Id.*, §3(c) (states that:

“an affected family includes— (i) a family whose land or other immovable property has been acquired; (ii) a family which does not own any land but a member or members of such family may be agricultural labourers, tenants including any form of tenancy or holding of usufruct right, share-croppers or artisans or who may be working in the affected area for three years prior to the acquisition of the land, whose primary source of livelihood stand affected by the acquisition of land; (iii) the Scheduled Tribes and other traditional forest dwellers who have lost any of their forest rights recognised under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007) due to acquisition of land; (iv) family whose primary source of livelihood for three years prior to the acquisition of the land is dependent on forests or water bodies and includes gatherers of forest produce, hunters, fisher folk and boatmen and such livelihood is affected due to acquisition of land; (v) a member of the family who has been assigned land by the State government or the Central Government under any of its schemes and such land is under acquisition; or (vi) a family residing on any land in the urban areas for preceding three years or more prior to the acquisition of the land or whose primary source of livelihood for three years prior to the acquisition of the land is affected by the acquisition of such land”).

⁷⁹ *Id.*, §4

⁸⁰ *Id.*, §5.

⁸¹ The Hindu, *A Lesson on Land Acquisition*, April 4, 2015, available at <http://www.thehindu.com/opinion/columns/Chandrasekhar/cp-chandrasekhar-column-on-sezs/article7067787.ece> (Last visited on April 30, 2017); See also The Hindu, *Land Bill, A Step in the Right Direction*,

authorities and the motivations that such authorities may have for acquiring such land.

While the LARR Act does not impose a duty upon regulatory authorities to continuously consult the affected population on all decisions that affect them, its provisions, as they presently exist, incorporate all the other principles of environmental justice outlined in Part II. However, amendments to dilute the provisions of the LARR Act continue to be debated in Parliament.⁸² This is because one of the biggest criticisms of this Act from industry groups has been that the large number of steps involved in acquiring land has made the process of acquisition unduly long and time-consuming. To remedy this, the procedural as well as substantive safeguards under the LARR Act, including the one relating to the SIA, have been proposed to be diluted to pave the way for speedier acquisition.⁸³ These developments point to the lack of consideration given by regulatory authorities to the plight of the vulnerable population for whom the procedural and substantive safeguards under the LARR Act were actually put in place. The dilution of the provisions of the LARR Act essentially implies the weakening of the regulatory framework under which the LARR Act operates. This ongoing dilution of the LARR Act heavily impacts its compliance with principles of environmental justice.

C. ENVIRONMENTAL CLEARANCES

For operating an industry, each industry owner needs to obtain environmental clearances under the Water (Prevention and Control of pollution) Act, 1974, ('Water Act'), the Air (Prevention and Control of pollution) Act, 1981, ('Air Act'), and the Environment Protection Act, 1986 ('EPA').⁸⁴ While the regulatory framework of the Water Act and Air Act is the same, the regulatory framework under the EPA is noticeably distinct from the other two statutes.

April 2, 2015, available at <http://www.thehindubusinessline.com/opinion/land-bill-a-step-in-the-right-direction/article7061801.ece> (Last visited on April 30, 2017).

⁸² Dhanmanjiri Sathe, *Land Acquisition Act and the Ordinance*, 50(26) ECON. & POL. WEEKLY 90-95 (2015).

⁸³ CENTRE FOR POLICY RESEARCH, *Submission to the Joint Parliamentary Committee Reviewing the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Second Amendment) Bill, 2015* (2015), available at http://cprindia.org/sites/default/files/policy-briefs/06.08.15.lri_note_to_parliamentary.standing.committee.pdf (Last visited on April 30, 2017).

⁸⁴ *Id.*

1. Role of Central Pollution Control Board and the State Pollution Control Boards under the Water and Air Acts

Release of industrial emissions into water and air are controlled, and regulated under the Water Act and the Air Act respectively.⁸⁵ The Central Pollution Control Board ('CPCB') and the SPCBs, established under the Water and Air Acts, set industry-specific standards on water and air pollution, as well as formulate Zoning Atlases for the siting of industries in different regions and areas.⁸⁶ Zoning Atlases recognise villages and other, smaller residential colonies as human settlements and lay emphasis on siting industries at a considerable distance from such settlements.⁸⁷ The CPCB and SPCBs are also mandated with collecting and disseminating information regarding air and water quality standards, and air and water pollution to the public at large.⁸⁸ However, the Air and Water Acts do not outline the procedure through which such information is to be collected and disseminated.⁸⁹

The Ministry of Environment, Forest and Climate Change ('MOEFCC'), in conjunction with the CPCB has also categorised industries as "Red", "Orange" and "Green" to facilitate industrial siting decisions under the Air and Water Acts.⁹⁰ The CPCB has directed all SPCBs to maintain uniformity in the categorisation of industries in accordance with the industry list prepared by the CPCB.⁹¹ Within this list, a "Red Industry" has a Pollution Index Score (cumulative assessment of air and water pollution (maximum score of forty for each) and hazardous waste management (maximum score of twenty)) of sixty and above, an "Orange industry" has a Pollution Index Score of forty-one to fifty-nine, a "Green" industry has a Pollution Index Score of twenty-one to forty, and a "White industry" has a Pollution Index Score of up to twenty.⁹²

⁸⁵ The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and Control of Pollution) Act, 1981.

⁸⁶ The Zoning Atlas for siting of industries zones and classifies the environment in a District and presents the pollution receiving potential of various sites/zones in the District and the possible alternate sites for industries through easy-to-read maps. The objectives of preparing a Zoning Atlas for siting of industries are: to zone and classify the environment in a District; to identify locations for siting of industries; and to identify industries suitable to the identified sites. See Central Pollution Control Board, *Zoning Atlas*, available at http://www.cpcb.nic.in/Env_Planning.php (Last visited on April 30, 2017).

⁸⁷ *Id.*

⁸⁸ The Water (Prevention and Control of Pollution) Act, 1974, §16-18 (on the Powers and Functions of Boards under this Act); The Air (Prevention and Control of Pollution) Act, 1981, §16-18 (on the Powers and Functions of Boards under this Act).

⁸⁹ Central Pollution Control Board, *Environmental Planning*, available at http://cpcb.nic.in/Env_Planning.php (Last visited on January 30, 2016).

⁹⁰ Central Pollution Control Board, *Final Document on Revised Classification of Industrial Sectors under Red, Orange, Green and White Categories* (February 29, 2016), available at http://cpcb.nic.in/upload/Latest/Latest_118_Final_Directions.pdf (Last visited on April 30, 2017).

⁹¹ *Id.*

⁹² *Id.*

Based on these categories, consent notices are issued to industries, depending upon the extent of pollution each industry emits. The CPCB has released guidance on the kinds of emissions generated by various different kinds of industries for assisting SPCBs in issuing clearances for the siting of industries.⁹³ While the directions of the CPCB are comprehensive, there is no distinction made between the various categories of industries on the extent of impact that such industries have on public health in general, and more specifically, on the poor and marginalised sections of the population. The SPCBs have also not been directed to survey the industrial site for assessing the impact that a particular industry would have on the surrounding population. The only direction that has been made to SPCBs is to ensure that Red Industries are not located in eco-sensitive zones.⁹⁴

Despite being two of the earliest laws for the protection of the environment, the Air Act and the Water Act have not been successful in deterring industries which have been granted clearances, from emitting air and water pollution.⁹⁵ The criminal nature of penalties under both Acts has made the process for initiating action against defaulting industries long and arduous, involving complex issues of intent and causation. The CPCB and SPCBs have also not been vested with disciplinary or enforcement powers under the Air and Water Acts, due which they are unable to ensure compliance with environmental standards. This leads such entities to believe that they can escape the consequences of grave violations of environmental standards, which have adverse implications on the public health of the unsuspecting and largely poor and marginalised population.

There have also been accusations of political interference in appointments of personnel within the CPCB and the SPCBs, resulting in rent-seeking behaviour and corruption, which favours the interest of defaulting industries. This was pointed out by the Supreme Court, when it reprimanded both institutions for their complete failure in cleaning the Ganga.⁹⁶ In addition to this, the CPCB and the SPCBs have also been found to be understaffed, and without adequate technical and financial resources.⁹⁷ In view of these issues, the CPCB and SPCBs have proved to be ineffective in regulating not only air

⁹³ *Id.*

⁹⁴ *Id.*, 6.

⁹⁵ C.M. ABRAHAM, ENVIRONMENTAL JURISPRUDENCE IN INDIA 66 (1999).

⁹⁶ NDTV, *Ganga Clean-Up: Pollution Control Boards a Story of Complete Failure, Frustration, says Supreme Court*, October 29, 2014, available at <http://www.ndtv.com/article/india/ganga-clean-up-pollution-boards-a-story-of-complete-failure-frustration-says-supreme-court-613338> (Last visited on April 30, 2017).

⁹⁷ TATA INSTITUTE OF SOCIAL SCIENCES, *Environmental Regulatory Authorities in India: An Assessment of State Pollution Control Boards* (2013); See also CENTRE FOR SCIENCE AND ENVIRONMENT, *Turnaround: Reform Agenda for India's Environmental Regulators* (2009), available at <http://www.cseindia.org/node/479> (Last visited on April 30, 2017).

and water pollution, but also the impact such pollution has on the poor and marginalised groups.

2. Duties of authorities under the Environment Protection Act

§3 and §6 of the EPA vest the Central Government with the power to take appropriate measures that may be necessary or expedient to protect and improve the quality of the environment, and prevent and control environmental pollution.⁹⁸ Among other things, these measures include prohibiting or restricting areas, within which industries may be sited, as well as carrying out and sponsoring investigations into environmental pollution. Rule 5(1)(ix) of the Environment (Protection) Rules, 1986 ('the EP Rules'), builds upon the provisions under the EPA and specifically directs the Central Government to take 'human settlements' into account while prohibiting or restricting the location of industries.⁹⁹ The term 'human settlements' is fairly broad and may be said to include persons from all sections of society, be it from middle-income communities, high-income communities or low-income communities, or the urban or the rural population. However, the provisions of the EPA or the EP Rules do not contain any guidance on the measures that public authorities need to observe to safeguard the environmental rights of different sections of society, especially the poor and marginalised communities.

The draft Environment (Siting for Industrial Projects) Rules, 1999, issued under the EPA endeavour to address the concerns of the low-income population in industrial siting decisions, by prohibiting regulatory authorities from approving the setting up of industries in *inter alia*, those areas that are within the bounds of a Municipal Corporation, Municipal Council and Nagar Panchayat (by whatever name these are known in each state), and are within twenty-five kilometres of cities that have a population of more than 1 million.¹⁰⁰ However, these rules continue to be draft rules, and have not been enacted under the EPA.

The MOEFCC has also released guidelines on industrial siting, wherein the areas that must be avoided for siting industries have been listed.¹⁰¹

⁹⁸ The Environment Protection Act, 1986.

⁹⁹ The Environment (Protection) Rules, 1986.

¹⁰⁰ Draft Environment (Siting for Industrial Projects) Rules, 1999 (These rules have not been enacted). The guidelines on industrial siting, as issued by the Ministry of Environment, Forest and Climate Change, do not make an explicit reference to the impact the industry would have on persons residing around it. *See also* Ministry of Environment and Forests, *Siting Guidelines for Industries* (2013), available at http://envfor.nic.in/sites/default/files/moef_gov_in_citizen_specinfo_siguin_html.pdf (Last visited on April 30, 2017).

¹⁰¹ Ministry of Environment and Forests, *Environmental Guidelines for Industries* (2013), available at <http://www.moef.gov.in/citizen/specinfo/enguin.html> (Last visited on April 30, 2017); *See also* Ministry of Environment and Forests, *Siting Guidelines for Industries* (2013), available at http://envfor.nic.in/sites/default/files/moef_gov_in_citizen_specinfo_siguin_html.pdf (Last visited on April 30, 2017).

Among other things, the guidelines require industries to be sited at least twenty-five kilometres away from the projected growth boundary of major settlements with a population of 300,000 persons or more.¹⁰² The distance sought to be maintained accounts for the urban sprawl around the settlement, for at least a decade. The guidelines also direct industry owners to install equipment to curb air and water pollution.¹⁰³ While being useful in channelling industrial siting decisions, such guidelines are not adequately comprehensive. For instance, there is little or no reference to the disciplinary sanctions that may be imposed on industry owners that violate the content of the guidelines. Furthermore, relatively smaller settlements with a population of less than 300,000 persons are essentially excluded from being protected against harmful industrial emissions that they may be exposed to due to the proximity of an industry. Several of these smaller settlements are composed of the poor and marginalised communities who are unable to afford housing in other, denser areas.

In addition to the guidelines, the siting and functioning of industries is sought to be regulated through the Environment Impact Assessment Notification, 2006 ('the EIA Notification').¹⁰⁴ Under the EIA Notification, each industrial project has to be specifically appraised by an expert committee that assesses the environmental benefits and harms that may result from the project. While granting its approval to an industry, the committee has the power to direct the industry owner to observe certain parameters for reducing and mitigating environmental harm. For assisting the committee in its functions, the EIA Notification directs the Central and State government, and other responsible public authorities to disseminate information relating to industrial projects among all those communities, who may be affected by such projects.¹⁰⁵ Thereafter, the relevant public authorities are also required to conduct a public hearing prior to the approval of the project, through which communities that may be affected by a prospective industrial project in their neighbourhood, are able to express their concerns regarding the project.¹⁰⁶ In this regard, the EIA Notification imposes a duty upon the SPCBs to also record the public hearing process.¹⁰⁷

Any person, who is either locally affected by the industrial project or has a plausible stake in the project, has the right to express his/her concerns

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Ministry of Environment and Forests, *Environment Impact Assessment*, S.O. 1533 (Notified on September 14, 2006), available at <http://envfor.nic.in/legis/eia/so1533.pdf> (Last visited on June 10, 2017) ('EIA Notification').

¹⁰⁵ *Id.* (Environmental Impact Assessment ('EIA') is a study that is undertaken prior to the grant of an environmental clearance. The structure of the EIA has been explained in detail under the EIA Notification).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; See generally Ministry of Environment and Forests, Government of India, *Annual Report of Ministry of Environment and Forests (2006-2007)*, available at <http://www.moef.nic.in/report/0607/chap03.pdf> (Last visited on April 30, 2017).

about the project, or the activities that might be undertaken by the project in a public hearing, which forms a mandatory component of the EIA Notification.¹⁰⁸ Affected persons may also express their grievances through written responses, which may be sent to the regulatory authorities.¹⁰⁹ Despite these measures, however, the public hearing process has not been effective in ensuring that the concerns of the affected population are addressed by the expert committee under the EPA.

For instance, public authorities are ‘required’ to conduct public hearings ‘only’ during the preliminary stages of the industrial siting process.¹¹⁰ Concerns that may arise subsequently do not warrant the same level of consideration as those expressed in the preliminary stages of the EIA. Furthermore, in many instances, the affected persons are illiterate and unaware of the specifics of the environmental decision-making process that allows regulatory authorities and industry owners to obtain consent without disclosing all the information that is necessary for obtaining consent.

For instance, in *Gram Panchayat, Tiroda v. Ministry of Environment and Forests*,¹¹¹ the Principal Bench of the National Green Tribunal (‘NGT’) reprimanded the MOEFCC and the Environment Appraisal Committee (‘the EAC’) established under the EIA Notification for not disclosing essential information to the persons residing in the Tiroda village during the initial decision-making process. The residents of the village had challenged the environmental clearance given by the Ministry of Environment and Forests for the conduct of mining operations within their village. While recognising that the environmental clearance should not have been given as there were serious lapses on the part of regulatory authorities in disclosing information, the Principal Bench of the NGT did not quash the clearance.¹¹² This was because the respondent industry had already taken several follow-up actions to comply with the environmental clearance. Regardless, the NGT referred to the need to clear and correct information under the EIA Report for the benefit of persons who may be affected by the mining operations in their vicinity.¹¹³ These instances demonstrate that the public hearing process is not always conducted in a manner that ensures that the concerns of the poor and marginalised communities are addressed.

Since regulatory authorities and industry owners are not under an obligation to engage with affected communities ‘after’ an industry has obtained environmental clearances, the environmental concerns of affected

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Gram Panchayat, Tiroda v. Ministry of Environment and Forests*, 2011 SCC OnLine NGT 10.

¹¹² *Id.*

¹¹³ *Id.*

communities that may arise after the environmental clearance is granted, may not necessarily be heard or addressed. In instances, where environmental concerns as well as violations of air and water clearances have been reported by affected persons, the CPCB and SPCBs have failed to take disciplinary action against the defaulting industries under the Air and Water Acts.¹¹⁴ As a result, litigation appears to be the only way through which affected communities can report their environmental concerns regarding the actions of an industry, after such industry has been granted an environmental clearance certificate.

For instance, in *Indian Council for Enviro-Legal Action v. Union of India*,¹¹⁵ the State government of Rajasthan, as well as other public authorities such as the Rajasthan State Pollution Control Board, were unsuccessful in regulating the toxic emissions that were being released by the chemical industrial plants located near the Bichhri village in Udaipur. The matter in question was filed by an environmentalist organisation to bring to light the sufferings of the people living in Bichhri village due to the actions of chemical industrial plants located nearby. The plants had caused severe pollution and had dumped toxic waste near the village, thereby affecting the health of the residents. The case in question had been filed in 1989 and was subject to a decade-long litigation by the respondents to avoid compliance. While ruling in favour of the petitioners and directing the respondent industries to pay appropriate costs for remediating the area, the Supreme Court of India referred to its earlier orders and judgment in the case, and reprimanded the industry owners for having inflicted untold misery upon the poor and unsuspecting villagers, in pursuance of their private profit.¹¹⁶

Aside from litigation, which is greatly expensive and time consuming for low-income and marginalised communities, the only other mechanism through which industries that have been granted environmental clearances can be supervised is through the mandatory reporting of compliance by the industry. Under the EIA Notification, each industry that receives an environmental clearance is required to submit half-yearly reports on its functioning.¹¹⁷ However, the compliance reports submitted by industries do not always reflect accurate information.¹¹⁸ In many instances, industry owners wilfully conceal information about their unauthorised activities.¹¹⁹ There is no way for public authorities to crosscheck the information provided by industry owners. Furthermore, regulatory authorities lack the capacity to compel industries to submit compliance

¹¹⁴ CENTRE FOR SCIENCE AND ENVIRONMENT, *Turnaround: Reform Agenda for India's Environmental Regulators* 22-27 (2009), available at <http://www.cseindia.org/node/479> (Last visited on May 24, 2016).

¹¹⁵ *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 8 SCC 161.

¹¹⁶ *Id.*

¹¹⁷ The Environment (Protection) Rules, 1986, Rule 14.

¹¹⁸ Shibani Ghosh, *Demystifying the Environmental Clearance Process in India*, 6 NUJS L. Rev. 3 (2013).

¹¹⁹ *Lafarge Umiam Mining (P) Ltd. v. Union of India*, (2011) 7 SCC 338.

reports on a regular basis, as required by the EIA notification.¹²⁰ In cases where compliance reports are submitted, public authorities have been found to fail in their duty that requires them to make such reports available to the public for review.¹²¹ As a result, violations of environmental standards by an industry may sometimes go unreported, and may unfairly impact communities that may be residing near the industry, without their knowledge.

D. REGULATORY FRAMEWORK UNDER THE FACTORIES ACT

After obtaining the required clearances, the industry/factory needs to register itself under the Factories Act, 1948 ('Factories Act') and to comply with all the measures and safeguards on health and environment provided under the Act.¹²² The Factories Act, which is one of the earliest known legislation on industries, aims to protect the rights of workers employed in factories/industries.¹²³

After the Bhopal gas tragedy, the Factories Act was amended in 1987 to include more safeguards, not only for the workers employed at a factory, but also for human settlements that resided near factories.¹²⁴ The Site Appraisal Committee set up under the Act, which is responsible for evaluating the suitability of a location for a hazardous industry, is required to ensure that factories engaging in hazardous substances are located at a considerable distance from residential areas, including villages.¹²⁵ The Act requires every factory owner who uses hazardous substances to disclose information on the activities undertaken by the factory to the factory workers, the Chief Inspectors, the local bodies within whose jurisdiction such factories are situated, and the population residing near such factories.¹²⁶ The factories registered under the Act are also required to follow several strict procedures on health and safety of workers, and

¹²⁰ CENTRE FOR SCIENCE AND ENVIRONMENT, *Environment Impact Assessment* (2012), available at <http://www.cseindia.org/userfiles/02%20ASSESSMENT.pdf> (Last visited on April 30, 2017).

¹²¹ J.M. MAUSKAR COMMITTEE, *Report of the Committee on the Draft Amendments to the EIA Notification, 2006* (2009), available at http://www.moef.nic.in/sites/default/files/FinalReport_EIA.pdf (Last visited on April 30, 2017).

¹²² *Id.*

¹²³ The Factories Act, 1948, Preamble.

¹²⁴ Usha Ramanathan, *Communities at Risk: Industrial Risk in Indian law*, 39(41) ECON. & POL. WEEKLY 4521-4527 (2004); (The new provisions included §§7A (General duties of the occupier), 7B (General duties of manufactures, etc., as regards articles and substances for use in factories), 41A (Constitution of Site Appraisal Committees) and 41B (Compulsory disclosure of information by the occupier), and Chapters III (Health) and IV (Safety) under the Factories Act).

¹²⁵ The Factories Act, 1948, §41A.

¹²⁶ *Id.*, §41B.

in relation to the surrounding areas of the factory – the non-adherence of which makes the factory owner liable to criminal penalties.¹²⁷

While the provisions of the Factories Act endeavour to protect the rights of marginalised communities, factory owners do not always comply with these provisions. In fact, the health and safety of workers continues to be a pressing concern for policy-makers, as the factory owners rarely, but ever take the safety and security of workers into consideration, while framing their internal policies.¹²⁸ Public authorities under the Factories Act have also failed to ensure that all industries/factories comply with the provisions of the Act.¹²⁹ This is because the requisite number of Chief Inspectors, for monitoring the premises of every factory, does not exist. In any event, the provisions of the Factories Act do not expressly require factory owners to continuously disseminate information regarding the activities of the factory, and the extent of its environmental compliance, to the communities residing in and around the factory. Due to this, the concerns of the communities may not necessarily be taken into consideration in the running of factory. These lapses point to the deficiencies in the regulatory structure of the Factories Act in effectively addressing the concerns of affected communities, including the poor and the marginalised.

E. DISSEMINATION OF INFORMATION

Any individual who desires information on any environmental decision taken by a public authority can make an application to a designated Public Information Officer ('PIO') for obtaining such information under the Right to Information Act, 2005 ('RTI Act').¹³⁰ Under §4(1) of the RTI Act, all public authorities must maintain their records and periodically publish information on their website for the public at large.

While giving statutory backing to the right to information under Article 19(1) of the Constitution, the RTI Act permits PIOs to withhold information under limited circumstances, in line with reasonable restrictions under Article 19(2).¹³¹ However, the denial of information by a public authority is sub-

¹²⁷ The provisions under Chapters III (health) and IV (safety) of the Factories Act list out the duties of the occupiers of factories to put in place health-related and safety measures for the benefit of the workers employed at the factory, and for the surrounding population. §92 of this Act prescribes criminal penalties for the violation of any of the provisions of the Act.

¹²⁸ Occupational Health & Safety Assn. v. Union of India, (2014) 3 SCC 547; See also Ashok Chandak v. State of A.P, 2010 SCC OnLine AP 1052 : 2011 Cri LJ 638.

¹²⁹ *Id.*

¹³⁰ The Right to Information Act, 2005, §6.

¹³¹ Namit Sharma v. Union of India, (2013) 1 SCC 745; The Right to Information Act, 2005, §8(1) (states that:

“notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,— (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; (b) information

ject to review before the First Appellate Authority, and later, before the State or Central Information Commission.¹³²

The RTI Act has proved to be an important tool for ensuring greater transparency and accountability in governance. While other environmental laws may or may not include provisions on dissemination of information, the regulatory authorities under all of these laws are all still subject to the mandatory disclosure requirements under the RTI Act. However, if the information disclosed to the public is legally or factually incorrect, either deliberately or negligently, then there is little recourse available to persons, especially the poor and the marginalised communities, for having such information vetted or crosschecked.¹³³ By necessary implication, this means that unless a person who is well informed calls out the discrepancies in the information provided, there is no statutorily defined way to assess the veracity of the information disclosed to persons, especially the poor.

Public information authorities under the RTI Act have also been known to often cite exceptional circumstances for withholding information, which is, actually, of interest to individual members of the public, or the public,

which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign Government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”

¹³² The Right to Information Act, 2005, §19.

¹³³ Ghosh, *supra* note 118 (If it is found out that the information adduced is, in fact, false, then the industries are liable to have their environmental clearances cancelled. However, the safeguard with regarding to verification of the information is not provided for).

as a whole.¹³⁴ There have also been cases where public authorities have provided incomplete information, or have delayed the process of obtaining information.¹³⁵ Several public authorities, including authorities responsible for making environmental decisions, have also not been forthcoming in periodically publishing information relating to their activities, as they are required to do under §4 of the RTI Act.¹³⁶ As a result, the poor and marginalised communities have little or no recourse available to them for obtaining reliable information over environmental decisions and actions that may adversely affect them. Due to this, many of these communities end up being caught off-guard in cases of a grave environmental disaster, as they have not been provided with adequate information to pre-empt the disaster. The tragedy at Bhopal is example of such a situation.

F. DISPUTE RESOLUTION

Any person, be it an affected person or a public-spirited citizen, can report violations of environmental standards by an industry to the NGT, the High Courts or the Supreme Court of India.

Under §16 of the National Green Tribunal Act, 2010 ('NGT Act'), an aggrieved person has the power to appeal any order or decision made by a regulatory authority under any of the enactments listed under Schedule I of the NGT Act.¹³⁷ The jurisdiction of the civil court is expressly barred over any matter that the NGT is empowered to determine under its original or appellate jurisdiction.¹³⁸ However, the writ jurisdiction of the Supreme Court and High Courts under Articles 32 and 226 of the Constitution respectively allow both forums to rule over matters that involve the unjust distribution of environmental goods and services, irrespective of the NGT's jurisdiction. Some of the measures employed by the NGT, the Supreme Court and the High Courts to equalise the unjust distribution of environmental goods and services, include giving directions to regulatory authorities, conducting field studies and

¹³⁴ Prakash Chandra v. D. Verma, 2009 SCC OnLine CIC 4625; *See also* Shrikant Murlidhar Apte v. LIC, 2010 SCC OnLine CIC 2195; Durgesh Kumari v. Income Tax Deptt., 2010 SCC OnLine CIC 16531.

¹³⁵ Rajeev Sharma v. K.L. Das, 2012 SCC OnLine CIC 7945; Paramveer Singh v. Punjab University, 2006 SCC OnLine CIC 252; Gita Dewan Verma v. Urban Development Deptt., Delhi, 2006 SCC OnLine CIC 307.

¹³⁶ *Id.*; *See also* PARTICIPATORY RESEARCH IN ASIA, *Analysis of Judgments of the Central Information Commission on the Right to Information Act, 2005*, (October 2007), available at <http://cic.gov.in/sites/default/files/PRIA-AnalysisOf-CIC-Judgements.pdf> (Last visited on April 30, 2017).

¹³⁷ The enactments covered under the NGT Act include The Water (Prevention and Control of Pollution) Act, 1974; The Water (Prevention and Control of Pollution) Cess Act, 1977; The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991; and The Biological Diversity Act, 2002.

¹³⁸ The National Green Tribunal Act, 2010, §29.

surveys, awarding compensations, granting injunctions, setting up of a monitoring authority, and other such measures.¹³⁹

Since the Indian environmental laws (with the exception of the NGT Act) do not vest regulatory authorities with the power to order mitigation of environmental damage, or to award compensation to persons who may be adversely affected by the activities of industries, long-drawn litigation before the Supreme Court, High Courts, or even the NGT, seems to be only option available to any citizen, whether rich or poor, to have his/her environmental rights reinstated. However, environmental litigation has its own set of drawbacks.

While courts have played an important role in securing environmental rights to all sections of society, judicial pronouncements on the protection of the environment have been rather scattered. This is because such pronouncements are not based upon statutorily defined environmental principles that could assess environmental damage, and the impact it has on the health of the population, especially vulnerable groups.¹⁴⁰

In *Rana Sengupta v. Union of India*,¹⁴¹ the applicants challenged the environmental clearance that was granted to the concerned steel plant which was looking to expand, on the basis that such expansion may cause pollution. While ruling against the applicants, the NGT held that there was no tangible material to show that the pollution level would become intolerable after the expansion of the project, and noted that the villagers had not objected to the expansion during the public hearing as well. However, in another case of *Jeet*

¹³⁹ The National Green Tribunal Act, 2010, §15. (The measures employed by the NGT include, among other things, ordering compensation for the restitution and restoration of water, adoption of better pollution control technology through use of incinerators, and the formation of a Special Committee to review the implementation of the NGT's directions (*Krishan Kant Singh v. National Ganga River Basin Authority*, 2014 SCC OnLine NGT 2364); asking for the upgradation of pollution control equipment to ensure maintenance of prescribed parameters, and for the Government to consider the possibility of online monitoring of emissions (*Sukhdev Vihar Residents Welfare Assn. v. State of NCT of Delhi*, 2013 SCC OnLine NGT 1898; ordering the polluting industry to deposit compensation in a relief fund for the affected population and directing the public authorities to follow proper procedure for granting environmental clearances (*Mahesh Chandulal Solanki v. Union of India*, 2013 SCC OnLine NGT 66. The measures employed by the Supreme Court and High Courts include, among other things, cost of remediation and cost litigation (*Indian Council for Enviro-Legal Action v. Union of India*, (2011) 8 SCC 161), phasing out of vehicles that did not use clean fuel (*Smoke Affected Residents Forum v. Municipal Corpn. of Greater Mumbai*, 2002 SCC OnLine Bom 372 : (2002) 4 Bom CR 479, *M.C. Mehta v. Union of India*, (1999) 6 SCC 12), and set up an authority to ascertain the extent of environmental damage and remediate the same, along with monitoring compliance with environmental standards (*Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647, *Centre for Urban and Rural Environment (CURE) v. Ministry of Environment and Forests*, (2004) 7 ALT 411).

¹⁴⁰ *The Hindu*, *Scattered Effort on Ground to Implement NGT Order*, April 10, 2015, available at <http://www.thehindu.com/news/cities/Delhi/scattered-effort-on-ground-to-implement-ngt-order/article7087206.ece> (Last visited on April 30, 2017).

¹⁴¹ *Rana Sengupta v. Union of India*, 2013 SCC OnLine NGT 31.

Singh Kanwar v. Union of India,¹⁴² the NGT quashed the clearance for setting up a thermal power plant, on the sole basis that the installation and operation of the plant 'could' cause pollution. In one case, the NGT allowed an industry to operate despite the possibility of pollution; while in another case, the NGT quashed the clearance for establishing a thermal power project on the basis of the precautionary principle.

In another case, there was a clash of jurisdictions between the NGT and the Nagpur Bench of the Bombay High Court.¹⁴³ While the Bombay High Court wanted to allow the construction of a highway over a wildlife corridor, the NGT ordered a stay on the felling of trees in the area for the protection of wildlife. Eventually, the Supreme Court intervened and sided with the High Court. The Supreme Court ordered the case to be finally disposed of before the High Court, instead of the NGT.¹⁴⁴ Such clashes between two courts over environmental matters, where both courts have different stances, reflect poorly on the manner in which judicial decisions on environmental matters are made.¹⁴⁵ Decisions of this nature also lead to unpredictability in litigation, which may discourage several potential litigants, especially the ones with limited resources, from reporting environmental violations to courts.

G. OBSERVATIONS

The observations made within this part identify certain regulatory lapses that are common to each stage of the industrial siting process. These lapses include: lack of continuous engagement with the poor and marginalised communities with respect to environmental decisions that affect them; inadequate dissemination of information on environmental decisions as well as on the functioning of an industry; administrative and legal deficiencies in the functioning of regulatory authorities; and lack of a mechanism for mitigating environmental harm and compensating persons who may be affected by such harm.

To address these lapses, it is imperative that principles of environmental justice are incorporated into every stage of the industrial siting process. This may either be done through a uniform policy on environmental justice, or

¹⁴² *Jeet Singh Kanwar v. Union of India*, 2013 SCC OnLine NGT 1.

¹⁴³ *Shrushti Paryavaran Mandal v. Union of India*, MA No. 926 of 2015, decided on 7-9-2015 (Del); *Court on its Own Motion v. National Highways Authority of India*, 2015 SCC OnLine Bom 6353.

¹⁴⁴ *Jee Down to Earth, Apex Court Rejects Petition Against NH-7 Widening Project*, January 21, 2016, available at <http://www.downtoearth.org.in/news/apex-court-rejects-petitions-against-nh-7-widening-project-in-kanha-pench-tiger-reserves-52551> (Last visited on April 30, 2017).

¹⁴⁵ *See Anil Hoble v. Kashinath Jairam Shetye*, 2015 SCC OnLine Bom 3699; *Om Dutt Singh v. State of U.P.*, Misc. Application No. 1050 of 2015, decided on 19-2-2016; *Vaamika Island (Green Lagoon Resort) v. Union of India*, (2013) 8 SCC 760; *Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India*, (2012) 8 SCC 326.

through a standalone law that provides regulatory authorities with guidance on the manner in which the poor and marginalised communities can be accorded fair and equal treatment under environmental laws. For this purpose, it may be useful for us to look at the way in which principles of environmental justice, alluded to in Part II, have been incorporated into the legal and regulatory framework in the USA. The various devices and techniques used by federal authorities to assimilate environmental justice into USA's regulatory structure may serve as important examples for India to emulate.

IV. A BRIEF ACCOUNT OF ENVIRONMENTAL JUSTICE IN THE UNITED STATES OF AMERICA: WITH SPECIAL FOCUS ON INDUSTRIAL SITING

The USA has embraced the concept of environmental justice with open arms, and has established systems for tackling the unfair exposure of marginalised communities to environmental harm. In this Part of the paper, the legal framework for environmental justice in the USA has been outlined.

The earliest known conceptualisation and use of the term 'environmental justice' emerged out of the civil rights movement in the USA, which was opposed to the unjust siting of toxic facilities in predominantly African American neighbourhoods. The decision to bury 30,000 cubic yards of soil contaminated with highly toxic substances in an African American rural county in North Carolina in 1982 resulted in widespread protests and the arrest of nearly 500 persons.¹⁴⁶ The protestors questioned the rationale behind illegal dumping of toxic wastes in neighbourhoods occupied by ethnic minorities, including African Americans.¹⁴⁷ While the protests eventually proved to be unsuccessful, they marked the first attempt at mobilising public opinion against what is now known as 'environmental injustice'.¹⁴⁸ The demonstrations also prompted the U.S. General Accounting Office ('GAO') to conduct a study of the decisions of the Environment Protection Agency on the siting of hazardous waste landfills.¹⁴⁹ On its release in 1983, the GAO Study revealed clear evidence of a relationship between the location of hazardous waste landfills and the socio-economic status of surrounding communities.¹⁵⁰ Thereafter, the United Church of Christ Commission for Racial Justice ('CRJ') also undertook an investigation into similar issues and published its landmark report titled

¹⁴⁶ Robert D. Bullard, *Environmental Justice for all*, available at <http://nationalhumanitiescenter.org/tserve/nattrans/ntuseland/essays/envjust.htm> (Last visited on June 10, 2017).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ UNITED STATES GENERAL ACCOUNTING OFFICE, *The Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (June 1, 1983), available at <http://archive.gao.gov/d48t13/121648.pdf> (Last visited on April 30, 2017).

‘Toxic Wastes and Race in the United States’, in 1987.¹⁵¹ The evidence adduced in the CRJ Report found race to be the single most significant factor in the decisions concerning siting of toxic facilities.¹⁵² The observations in both these reports laid the foundation for the environmental justice movement in the USA, which is still prevalent today.

It is pertinent to mention that the civil rights movement in the USA is very similar to the environmentalism of the poor in India. In both cases, the low-income and marginalised communities have made an active effort to have their voices heard and to get their environmental concerns addressed. While the civil rights movement in the USA resulted in the incorporation of environmental justice into all stages of environmental decision-making, environmentalism of the poor is yet to make a similar impact in India. Nevertheless, the manner in which environmental justice manifests itself in the legal and regulatory framework of the USA can serve to highlight the various ways in which India can assimilate principles of environmental justice into its legal and regulatory framework. It must be noted that the components of environmental justice that have been alluded to in Part II of this paper are all part of the environmental justice framework in USA. It must also be noted that the environmental justice framework discussed below is uniformly applicable to industrial siting decisions in the USA as well. As a result, no specific distinction has been made on the application of principles of environmental justice in the specific context of industrial siting.

The first attempt at incorporating principles of environmental justice into the legal and political framework of environmental decision-making in the United States was by means of the Executive Order No. 12898 (‘Executive Order’), which was issued by President Clinton, in 1994.¹⁵³ Under this Order, all federal agencies were directed to develop strategies, and to specifically identify and address the ‘disproportionate’ effects of their programs, policies, and actions relating to the environment on low-income groups. Hence, federal agencies charged with making industrial siting decisions are also mandated to follow the contents of the Executive Order.

In pursuance of the Executive Order, President Clinton also issued a memorandum to the heads of all federal departments and agencies.¹⁵⁴

¹⁵¹ NATURAL RESOURCES DEFENSE COUNCIL, *Toxic Wastes and Race at Twenty 1987-2007*, available at <https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf> (Last visited on April 30, 2017).

¹⁵² *Id.*

¹⁵³ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12898 of February 11, 1994, available at <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf> (Last visited on April 30, 2017).

¹⁵⁴ The White House, *Memorandum for the Heads of all Departments and Agencies*, February 11, 1994, available at https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf (Last visited on April 30, 2017).

The memorandum specifically directs the Environment Protection Agency ('US EPA') to consider environmental justice concerns while reviewing decisions of other federal agencies. All entities that receive federal financial assistance are prohibited under the memorandum from engaging in any form of discrimination based on race, colour, or national origin, by virtue of Title VI of the United States Civil Rights Act, 1964. The memorandum also imposes an obligation upon each federal agency to analyse the impact of environmental decisions on the low-income and minority populations in accordance with National Environmental Policy Act, 1969 ('NEPA').

Among other things, NEPA imposes an additional obligation upon all federal agencies to incorporate environmental justice considerations into their decisions on various issues, including those relating to industrial siting.¹⁵⁵ All federal agencies are specifically charged under the NEPA to include certain key environmental justice considerations into their environment impact assessment statements, which they must prepare prior to approving or planning any developmental activities that have environmental consequences.¹⁵⁶ These considerations, which mirror the theoretical framework on environmental justice laid down in Part II of this paper, include:¹⁵⁷ assessing the presence of low-income and minority communities in the area that would be affected by an environmental decision; determining whether an environmental decision has a disproportionately high and adverse human impact on the low-income and marginalised communities; collecting and assessing data from multiple sources on the exposure patterns in the affected area and the potential for adverse exposure from an environmental decision; keeping in mind the cultural, social, occupational, historical, or economic factors that can amplify adverse environmental impact on the low-income and marginalised communities; formulating strategies for engaging with low-income and marginalised communities at every step of environmental decision-making; and finding ways to mitigate environmental damage in the affected area and equalise environmental benefits among all sections of the population.

In accordance with the Executive Order, and the memorandum, a working group composed of all federal agencies was also established for ensuring inter-agency coordination on environmental justice.¹⁵⁸ Recently, the

¹⁵⁵ Environmental Protection Agency, *What is the National Environmental Policy Act?*, available at <https://www.epa.gov/nepa/what-national-environmental-policy-act> (Last visited on April 30, 2017).

¹⁵⁶ Environmental Protection Agency, *Environmental Justice and National Environmental Policy Act*, available at <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> (Last visited on April 30, 2017).

¹⁵⁷ *Id.*

¹⁵⁸ See Environmental Protection Agency, *Federal Agency EJ Strategies & Annual Implementation Progress Reports*, available at <https://www.epa.gov/environmentaljustice/federal-interagency-working-group-environmental-justice-ej-iwg> (Last visited on April 30, 2017).

working group, along with the machinery under NEPA, released a report with a compilation of best practices on the ways in which federal agencies should incorporate the aforementioned environmental justice considerations into their decision-making process.¹⁵⁹ The report provides step-by-step guidance for federal authorities on how to infuse environmental justice into their decisions that impact the environment, directly or indirectly.

In addition to these measures, the US EPA has also independently developed Environmental Justice Access Plans that set out measurable commitments for all regulatory authorities to follow.¹⁶⁰ A National Environmental Justice Advisory Council, which is the federal advisory committee, is tasked with providing advice and making recommendations on environmental justice issues to the US EPA.¹⁶¹

The US EPA construes environmental justice to essentially mean the same degree of protection for all persons from environmental and health hazards and equal access to the decision-making process for all persons in order to maintain a healthy environment in which to live, learn and work.¹⁶² The US EPA promotes environmental justice through the fair treatment of all persons, irrespective of their race, colour or socio-economic status.¹⁶³ Fair treatment in this context means that no group of persons would bear the ‘disproportionate’ brunt of environmental harm resulting from industrial development and growth.

Another principle that informs the actions of the EPA is equitable development, which promotes responsive spatial planning and development that can reduce disparities among various sections of the population.¹⁶⁴ Through prioritised planning and development, the low-income and marginalised communities are sought to be presented with opportunities to improve their standard of living, which would benefit such communities greatly and reduce the burden of environmental harm upon them.

¹⁵⁹ Environmental Protection Agency, *Report of the Federal Interagency Working Group on Environmental Justice & NEPA Committee* March, 2016, available at https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf (Last visited on April 30, 2017).

¹⁶⁰ Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc.A/HRC/28/61 (2015).

¹⁶¹ Environmental Protection Agency, *National Environmental Justice Advisory Council Recommendations*, available at <https://www.epa.gov/environmental-justice/national-environmental-justice-advisory-council-recommendation-reports-0> (Last visited on April 30, 2017).

¹⁶² Environmental Protection Agency, *Learn About Environmental Justice*, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (Last visited on April 30, 2017) (‘Learn About Environmental Justice’).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

In furtherance of both principles, the US EPA formulates and implements various policies and programs that endeavour to meet the needs of underserved communities.¹⁶⁵ For instance, the US EPA's policy on Environmental Justice for Tribes and Indigenous Peoples endeavours to ensure greater participation of tribes and indigenous persons in environmental decision-making.¹⁶⁶ Certain statutes such as the Toxics Substances Control Act, 1976 also expressly direct the US EPA to take into account the concerns of the low-income population while setting standards, while others direct the US EPA to consider the concerns of the vulnerable population in making decisions.¹⁶⁷

While all the aforementioned measures to secure environmental justice are uniformly applicable to industrial siting decisions of federal agencies and authorities, the US EPA has also independently released guidance documents on incorporating considerations of environmental justice into land use planning and zoning.¹⁶⁸ Among other things, fair treatment of all sections of the population and 'meaningful engagement' with low-income and marginalised communities are two of the key tenets on which land use planning and zoning must be based. For meaningful engagement and fair treatment, all the affected communities must have the opportunity to participate in environmental decisions that affect them; to influence decisions of regulatory authorities; to be involved in the monitoring process; and to be entitled to mitigation of adverse environmental and public health impacts.¹⁶⁹ Based on all of these measures, it is evident that, at least on paper, the legal and regulatory framework on the environment in the USA contains all the components that are essential to securing environmental justice.

Bearing in mind the US framework, there are a number important lessons that regulatory authorities in India can learn and imbibe, which may be

¹⁶⁵ Environmental Protection Agency, *Equitable Development and Environmental Justice*, available at <https://www.epa.gov/environmentaljustice/equitable-development-and-environmental-justice> (Last visited on April 30, 2017).

¹⁶⁶ Environmental Protection Agency, *Environmental Justice for Tribes and Indigenous Peoples*, available at <https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples> (Last visited on April 30, 2017).

¹⁶⁷ Learn About Environmental Justice, *supra* note 162.

¹⁶⁸ National Academy of Public Administration, *Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning*, July 2003, available at <https://www.epa.gov/sites/production/files/2015-02/documents/napa-land-use-zoning-63003.pdf> (Last visited on April 30, 2017); Office of Environmental Justice, Environment Protection Agency, *Environmental Justice in The Permitting Process: A Report from the Public Meeting on Environmental Permitting Convened by the National Environmental Justice Advisory Council, Arlington, Virginia – November 30-December 2, 1999*, available at <https://www.epa.gov/sites/production/files/2015-02/documents/permit-recom-report-0700.pdf> (Last visited on April 30, 2017); Environmental Protection Agency, *Creating Equitable, Healthy, and Sustainable Communities: Strategies for Advancing Smart Growth, Environmental Justice, and Equitable Development*, available at <https://www.epa.gov/sites/production/files/2014-01/documents/equitable-development-report-508-011713b.pdf> (Last visited on April 30, 2017).

¹⁶⁹ *Id.*

useful in integrating the principles of environmental justice within the Indian legal and regulatory framework. *First*, the US framework on environmental justice charges all major federal agencies to infuse environmental justice considerations into every decision that they make. *Second*, the US framework requires federal agencies to continuously engage with low-income and marginalised communities. Lastly, the US framework specifically requires regulatory authorities to make special efforts to equalise environmental benefits and proportionately mitigate environmental harm amongst all sections of the population, in order to allow everyone to enjoy natural resources equally. It would be useful for Indian regulatory authorities to incorporate some of the best practices on environmental justice in the USA into the Indian legal and regulatory framework. With requisite modifications to suit Indian needs, these practices might be useful in equalizing the distribution of environmental benefits and mitigation of environmental harms among all sections of the Indian population.

V. RECOMMENDATIONS AND CONCLUSION

Since the US framework on environmental justice is fairly comprehensive and detailed, it might serve as a useful basis for guiding Indian regulators and public authorities in infusing principles of environmental justice into the Indian legal framework on industrial siting. In this regard, it must be noted that the Constitution of India imposes mandatory obligations upon the State and the regulatory authorities that fall within the definition of a State under Article 12 of the Constitution to ensure public authorities to safeguard the right of each Indian citizen to a clean and a healthy environment that is devoid of pollution.¹⁷⁰ This right forms part of the right to life under Article 21 of the Constitution of India, which entitles each individual to not just mere animal existence, but also the right to live with dignity, safety and in a clean environment.¹⁷¹ Environmental justice, as a concept that aims to uphold the right of every individual to environmental benefits and reduced environmental harm, may also be said to fall within the folds of this right, to which every Indian citizen is entitled. This is because compliance with environmental justice ensures that ‘each’ individual is able to exercise his/her right to live in a clean and healthy environment.

For fulfilling all the components of the right under Article 21, every public authority must not only treat every person with dignity, but must also create a climate which makes it possible for ‘every’ person to live with

¹⁷⁰ *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42; *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647.

¹⁷¹ *Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124; *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545; *Tirupur Dyeing Factory Owners Assn. v. Noyyal River Ayacutdars Protection Assn.*, (2009) 9 SCC 737; *M.C. Mehta v. Union of India*, (2009) 6 SCC 142.

dignity and in a clean environment.¹⁷² The necessary corollary of this requires the State and all its authorities, including the CPCB, SPCB, Chief Inspector of factories, the Central and state governments to make special efforts to ensure that all sections of the population, from the low-income communities to the high income communities, are able to live in a clean and safe environment, aside from undertaking developmental activities, which are necessary for economic growth.¹⁷³ To fulfil this purpose, public authorities ought to consult persons who may be affected by an industrial siting decision; disseminate adequate information on siting decisions that they make; abstain from making any decision that adversely affects ‘any’ individual or community; and implement measures to reduce the impact of existing toxicity and pollution on ‘each’ and ‘every’ individual.¹⁷⁴ In this regard, Articles 14, 15, 19 and 21 of the Constitution serve as the foundational basis for imposing mandatory duties upon the State and its authorities to comply with principles of environmental justice, discussed in Part II.

A. DUTIES OF REGULATORY AUTHORITIES

1. Duty to disseminate adequate information on environmental planning and management and consult low-income communities in environmental decisions that affect them

Article 19(1)(a) of the Constitution entitles each person to impart and receive information regarding various aspects of governance by public authorities, including their decisions relating to the environment.¹⁷⁵ This entitlement also includes the right of each person to express his/her grievances and participate in making decisions that affect him/ her.¹⁷⁶ While these entitlements are non-derogable, they are subject to certain reasonable restrictions under

¹⁷² Amarnath Shrine, In re, (2012) 12 SCC 497.

¹⁷³ *Id.*; M.C. Mehta v. Union of India (2009) 6 SCC 142; Virender Gaur v. State of Haryana, (1995) 2 SCC 577; Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42.

¹⁷⁴ Global Energy Ltd. v. Central Electricity Regulatory Commission, (2009) 15 SCC 570 (the Supreme Court observed:

“All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19. The constitutive understanding of aforementioned guarantees under the Fundamental Rights chapter in the Constitution does not give rise to a mere rhetoric and symbolic value inherited by the polity but has to be reflected in minute functioning of all the three wings of state - executive, legislature and judiciary [...]”).

¹⁷⁵ Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 : (1995) 1 SCR 1036; Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294; Namit Sharma v. Union of India, (2013) 1 SCC 745.

¹⁷⁶ *Id.*

Article 19(2) of the Constitution.¹⁷⁷ Consequently, unless a matter pertains to any of the listed restrictions, public authorities are required to ensure that every person is able to express his/her grievances relating to all public issues, including environmental issues; to obtain information, including the ones relating to the environment, in order to stay informed; and to make informed decisions on all issues, including environmental issues, that may affect them. By providing these guarantees, public authorities may also be successful in securing compliance with two of the principles of environmental justice, which require authorities to provide equal opportunity to all persons to make environmental decisions that affect them, and to allow such persons to access information relating to environmental activities.

The collection of environmental information through multiple sources appears to be a good way to ensure that the information relating to the environment is reliable and true. While public authorities and industry owners do collect information under the industrial siting process, it might be useful to employ an independent external agency to cross check the veracity of the information collected by public authorities and industry owners, and to collect information on its own. The information collected from various sources could then be collectively disseminated to all persons who may be affected by an industrial siting decision. It is imperative that the dissemination of information is continuous, and is in easily comprehensible language, which may also be vernacular. The information could be disseminated either through print or visual media, or through trained professionals who explain the meaning of such information to each affected household or community.

2. Identify barriers to engaging with different sections of the population and find ways to overcome such barriers

It is imperative for public authorities to continuously engage with communities that may be affected and are being affected by the siting of an industry, or by an environmental decision, that is a part of the industrial siting process. For this purpose, it might be useful for public authorities to identify linguistic, cultural, geographic, economic, historical, or other barriers that hamper effective engagement with the poor and marginalised communities in various parts of the country. By finding ways to overcome these barriers, public authorities might be able to effectively communicate information regarding the adverse effects of an industrial siting decision or an environmental decision relating to industrial siting to all communities that may be affected by such decisions. This in turn will enable the affected communities in making informed

¹⁷⁷ These restrictions may relate to questions of sovereignty and integrity of India, security of India, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation or incitement to an offence.

decisions and choices in relation to the environment, when regulatory authorities consult them.

3. Duty to equally distribute environmental benefits and mitigate environmental harm for all persons

Under Article 14 of the Constitution, the same rules, privileges and remedies are applicable to all persons, who are similarly situated as regards the subject matter of the legislation.¹⁷⁸ Accordingly, public authorities, who have been conferred with constitutional and statutory power to make environmental decisions, including industrial siting decisions and enforce environmental standards, cannot arbitrarily discriminate amongst persons who are similarly placed under environmental laws and regulations.¹⁷⁹ In this regard, the expression ‘arbitrarily’ has been construed to mean unreasonable, or non-rational, based upon will alone.¹⁸⁰ Given the element of public interest involved their functioning, public authorities cannot be arbitrary in their decision-making process.¹⁸¹ If an action is arbitrary, without reason, and not in public interest, it would be liable to be invalidated by courts.¹⁸² Hence, for any of its environmental decisions to be tenable under Article 14, every public authority would need to assess whether the decision in question is the least restrictive choice of measure for the purpose it seeks to achieve. If the decision in question disproportionately impacts the environmental benefits available to different sections of the population, it is liable to be invalidated on the grounds of violation of Article 14.¹⁸³ Consequently, every public authority needs to ensure that in each instance where it makes an environmental decision, including an industrial siting decision, it does so in a fair and equitable manner that promotes public interest, and treats all persons, who are similarly placed, equally.¹⁸⁴ In the instance of certain persons being treated unequally, public authorities ought to make efforts to adequately compensate such persons, so as to bring them back to their ‘original position’. These norms are not only aligned with the first principle of liberty propounded by Rawls and the notion of *dharma* as discussed by Shiva, but are also fundamental to securing environmental justice as outlined under Part II of this paper.

Similarly, under Article 15 of the Constitution, the State and public authorities are prohibited from discriminating against any person, based on her/his race, religion, caste, sex, place of birth, disability or class.¹⁸⁵ However,

¹⁷⁸ Special Courts Bill, 1978, In re, (1979) 1 SCC 380; See also National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, (2011) 3 SCC 238.

¹⁷⁹ Kasturi Lal Lakshmi Reddy v. State of J&K, (1980) 4 SCC 1.

¹⁸⁰ Om Kumar v. Union of India, (2001) 2 SCC 386.

¹⁸¹ Board of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741.

¹⁸² Kasturi Lal Lakshmi Reddy v. State of J&K, (1980) 4 SCC 1.

¹⁸³ Om Kumar v. Union of India, (2001) 2 SCC 386.

¹⁸⁴ A.P. Aggarwal v. Govt. of NCT of Delhi, (2000) 1 SCC 600.

¹⁸⁵ The Constitution of India, 1950, Art. 15.

under Article 15(4), this prohibition is not applicable to those actions of the State, or its authorities, that endeavour to uplift the socially and educationally backward communities, including Scheduled Castes and Scheduled Tribes.¹⁸⁶ While Article 14 of the Constitution requires all laws and regulations to be applied equally to 'all' persons, Article 15(4) of the Constitution expressly permits regulatory authorities to pay special consideration to the environmental rights of the socially and economically backward communities. These special considerations also include compensatory State action on the part of regulatory authorities for advancing the cause of those, who are economically and socially deprived.¹⁸⁷ The rationale behind such special considerations is to bring about equality amongst all classes of persons and create a level field, which is devoid of inequalities that stem from historical actions.¹⁸⁸ The utility of such actions can also be explained on the basis of the second of principle of liberty propounded by Rawls (discussed in Part II of this paper), which is also a component of environmental justice. For fulfilling their environmental justice obligations relating to equal distribution of environmental benefits and mitigation of environmental harm, which flow from Articles 14 and 15(4), public authorities could implement the following measures into their decision-making process:

a. Identify vulnerable sections of the population that could be severely affected by an environmental decision

For securing an environmentally just framework, all public authorities need to accord due consideration to the environmental concerns of all sections of the population. In particular, the concerns that the vulnerable sections of the population may have with regard to an industrial siting decision, need to be give due attention by regulatory authorities. For this purpose, it is imperative for the regulatory authorities to survey the geographical location that will be impacted by the siting of an industry and to identify the vulnerable sections of the population who may be gravely affected by such siting. The identification process should not only analyse the unique conditions under which such vulnerable communities reside, but should also examine the specific health, socio-economic and cultural vulnerabilities of such communities. By means of such identification, public authorities would be better placed to engage with each vulnerable community, and to give due consideration to the specific needs of the community in all environmental and industrial siting decisions that affect them.

¹⁸⁶ *Id.*

¹⁸⁷ Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

¹⁸⁸ *Id.*

b. Continuously evaluate the impact of environmental decisions on various sections of the population

In order to ensure that environmental benefits are equally divided and that environmental harms are equally mitigated for all classes of persons, it is imperative for public authorities to continuously evaluate the short-term and long-term effects of their environmental decisions, specifically industrial siting decisions, on all sections of the population, and especially on the poor and the marginalised. Through continuous or even periodic evaluation, public authorities would be enabled to take appropriate follow-up action to remedy the unfair access to environmental benefits, or disproportionate burden of environmental harm that may be placed upon certain sections of the population.

B. CONCLUDING REMARKS

By incorporating the aforementioned measures, which flow from the best practices compiled by NEPA, into an overarching law, or policy on environmental justice, Indian regulatory authorities may be able to overcome many of the barriers to securing environmental justice as identified in Part III of this paper. Since the enactment of a law is a time-consuming and arduous process, the formulation of an overarching policy on environmental justice, which is binding on all public authorities, and is similar to the one in the USA, would certainly be a speedier measure for spurring such authorities to act immediately and to accord greater weightage to principles of environmental justice. With the formulation of such a policy that incorporates environmental justice into environmental governance, specifically in the context of industrial siting, India could move a step closer in securing a clean and a healthy environment for the poor and marginalised sections of its population.