Milking the (C)ash Cow: A Searing Critique of India's U-Turn on Clean Air

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ABSTRACT

In January 2020, India's Federal Government passed a highly controversial Ordinance and subsequently amended the Coal Mines (Special Provisions) Act, 2015. The Act has further pushed the Modi Government's efforts to privatise Coal & Lignite in India and has been referred to by News Media as a 'catalyst' in the dawn of an Atmanirbhar Bharat (Self-Reliant India) – the world's 5th highest Coal & Lignite producing nation.

Corporate entities may own any number of coal or lignite blocks without any prior experience in handling them. Interestingly, there is no need to specify any end-use either. Most importantly, the Government has waived the requirement to utilise 'washed' coal (introduced in 1997) and the requirement to reduce Particulate Emission norms by 40%, terming them as an 'unnecessary burden'.

The present paper seeks to present a brief analysis of the suicidal ramifications of such a decision on India's commitments towards International Labour Law and International Environmental Law. It analyses its impact on India's image as a 'responsible state' by analysing its pre-existing domestic legislation (particularly in areas such as Competition Law), which are grossly inadequate at upholding International best practices and treaty obligations.

Keywords: International Environmental Law, Public International Law, Coal, Clean Air

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Why is Coal Washing Important?

Before we commence with the legalese – let us delve a little bit into elementary science.

Coal, as a mineral, is an intricate potpourri of as many as 72 of the 96 materials on the Periodic Table[1], with most of them possessing vastly different physical properties. Coal contains numerous pieces of rocks, sand, and other elements. Among them is fly ash. Analysts predict that India's coal reserves contain anywhere between 30-50% of Fly Ash.[2] Such a high amount of fly ash is hazardous as it consists of numerous materials which, if found to be a high concentration amongst inhaled particles, can cause serious health problems[3]– with Coal Mineworkers and the local populace living in the vicinity of the mine the most vulnerable[4]. Arsenic (Cancer)[5] and Cadmium (Hypertension)[6] are good examples of the same. Thus, coal must be cleaned and subsequently go through a detailed pollution control process before the sale.

Lastly, and most importantly, the process of coal washing would also result in the provisioning of coking coal, which is essential for India's steel sector[7], the world's 2nd largest crude steel producer[8].

Coal Washeries: A Historic Outlook at the Pernicious Precipices of Indian Public Administration

Upon the founding of India's Constitution, Entry 23 of List II in Schedule 7 of the Constitution of India, 1950 ('**Constitution**'), empowers States in the Union to enact laws

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[1] Stanley P. Schweinfurth, *Coal- A Complex Natural Resource*, USGS (https://pubs.usgs.gov/circ/c1143/html/text.html#:~:text=Coal%20may%20contain%20as%20many,elements%20of%20the%20periodic%20table.&text=The%20most%20common%20minerals%20in,iron%2C%20sulfur%2C%20and%20calcium. (Last accessed at 12:13 AM IST on 16 Dec 2020)

[2] Craig D. Zamuda & Mark A. Sharpe, *A Case for the Enhanced Use of Clean Coal in India: An Essential Step Towards Energy Security and Environmental Protection*, presented at the WORKSHOP ON COAL BENEFICATION AND UTILISATION OF REJECTS (Ranchi, India on 22-24 Aug, 2007), pg. I (Last accessed at https://fossil.energy.gov/international/Publications/Coal_Beneficiation_Workshop/coal_beneficiation_paper_zamuda.pdf at 01:06 AM IST on 16 Dec 2020); also see Ankur Upadhyay & Manish Kamal, *Characterization and Utilization of Fly Ash*, BTech (Mining Engineering) Thesis, DEPARTMENT OF MINING ENGINEERING, NATIONAL INSTITUTE OF TECHNOLOGY, ROURKELA, pg iii (Last accessed at https://core.ac.uk/download/pdf/53188891.pdf at 01:11 AM IST on 16 Dec 2020)

[3] Robert B. Finkelman, *Health Impacts of Coal: Facts and Fallacies,* Ambio 36(1), 105

[4] Robert B. Finkelman, W. Orem, V. Castranova, C.A. Tatu, H.E. Belkin, B. Zheng, H.E. Lerch, S.V. Maharaj & A.L. Bates, *Health Impacts of Coal and Coal Use: Possible Solutions*, Int J. Coal Geol. 50, 425-443

[5] Agency for Toxic Substances & Disease Registry, *What are the Routes for Exposure for Arsenic?*, CDC.GOV (last accessed at https://www.atsdr.cdc.gov/csem/csem.asp?csem=1&po=6 at 01:19 AM IST on 16 Dec 2020)

[6] Id

[7] Patrick, J. (1974), The Coking of Coal, Science Progress (1933-), 61(243), 375-399 (Retrieved 19 Dec 2020, from http://www.jstor.org/stable/43420254)

[8] Ministry of Steel (Govt. of India), *India Becomes Second Largest Producer of Crude Steel*, https://pib.gov.in/PressReleasePage.aspx?PRID=1602023

regarding mines and mineral development. However, we must note that Entry 23 is subject to Entry 54 of List 1- in terms of which the Central Government is empowered to legislate in respect of mines and minerals. Generally, legislative powers of States defer to those of the Central Government in the event of a conflict.

Section 4 of the Mines & Minerals Act provides that all mining operations shall be under a license. Under the Mineral Concession Rules of 1960 ('**Rules**'), framed in exercise of powers under Section 13 of the Mines & Minerals Act, an applicant would first make an application to the relevant State Government. After that, the applicant must submit the plan to the Central Government. Once approved, the applicant was entitled to procure a license from the State Government. The Mines & Minerals Act and the Rules provide for the grant of license for operating in respect of mines and minerals stated under the Mines & Minerals Act.

In 1973, the Union Government, led by its Leftist policies, nationalised the Mining Sector via the passage of the Coal Mines Act in order to *"reorganise and reconstruct coal mines and ensure coordinated and scientific development and utilisation of coal, for the common good of the people of India"*[9]. Section 5(1) of the legislation was particularly noteworthy as it empowers the Government of India to vest legal ownership and all the following rights and duties arising after that of an owner with a coal mine to a Public Sector Undertaking (such as Coal India or Bharat Coking Coal Ltd). Section 1A, inserted by an amendment in 1976[10], empowered India's Government to *"take under its control the regulation and development of coal mines"*.

Although coal washing is essential for the growth of Micro, Small and Medium Enterprises (MSMEs), it is a glaring example of the failure of public administration in India. When the Indira Gandhi-led Government passed the legislation mentioned above in 1973, it did not have adequate provisions for the setting up and tendering large-scale coal washeries.[11] Sadly, that has remained a problem to date[12] and has gradually led to the sapping of India's coal supply – leading some analysts even to argue that the Government has vastly overestimated India's coal supply[13]. Ever since then, coal has been at the forefront of Indian politics on numerous occasions.

The 1993 Coal Amendment and Subsequent Regulations (1993 & 1998)

The first of the two most notable incidents occurred in 1993 when the legislation mentioned above underwent an amendment to allow corporations reporting 'Coal-Washing' as their end-use activity. The amendment created a furore in Parliament with politicians such as Rita

[9] The Coal Mines Nationalization Act (India), 1973
[10] Ins. by Act 67 of 1976, s. 2 (w.e.f. 29-4-1976)
[11] R. Kumar, *Nationalisation by Default: The Case of Coal in India*, Economic and Political Weekly, 16(17), 757-768 (Retrieved 19 Dec 2020, from http://www.jstor.org/stable/4369752)
[12] Shreya Jai, *Washery Tenders Delayed, Clean Coal Plan in Suit: Here are the Details*, BUSINESS STANDARD. (19 Aug 2019)
[13] RK Batra and SK Chand, *India's Coal Reserves are Vastly Overstated*, TERI POLICY REPORT (March 2020) (Last accessed at https://www.teriin.org/sites/default/files/2017-12/TERI_PolicyBrief_Coal_March11.pdf)

Verma (a member of the then principal Opposition – Bhartiya Janata Party from Dhanbad, who then held the charge of the same ministry from 1996-1999) leading from the front.[14] The furore in Parliament led to the levelling of several allegations of corruption against senior members of the then-Congress Government, including the then-Prime Minister PV Narasimha Rao, who became India's second Prime Minister to face serious criminal charges; after losing power in the 1996 general election.[15] A period of political instability followed, with three governments falling in quick succession between 1996 and 1999. However, one salient General Service Regulation (GSR), which dealt with the safe disposal of ash emanating out of Coal Washeries, was released in 1998.[16]

Manohar Lal Sharma v. The Principal Secretary & Ors.: The 'Coal-Gate' Scam Case (2014)

Facts of the Case

In 2014, eminent advocate Manohar Lal Sharma and Common Cause, a Non-Governmental Governmental Organisation (NGO), filed a Writ of Quo-Warranto under Article 32 of the Constitution of India in the interest of the public at large – challenging the allocation of 216 Coal Block licenses that the Government of India allocated for allowing mining activities in 7 different states between 1993-1996 and 2004-2014. There were four principal grounds on which the decision as mentioned above was challenged before the Supreme Court[17], after placing reliance on a 2012 report by the Comptroller and Auditor General (CAG) of India, which brought the scam into the light[18], which were:

i. The Government had not abided by the procedures as were mandated by the Mines & Minerals Act
ii. The Government had violated Section 3(3)(iii)
iii. The screening committee granted licenses to ineligible corporate entities throughout 36meetings.

[14] https://parliamentofindia.nic.in/ls/lsdeb/ls10/ses6/1719049301.htm
[15] AP Dow-Jones News Service, *Rao Arrested, Released on Corruption Charges*, THE WALL STREET JOURNAL (Oct 10, 1996)
[16] Ministry of Environment and Forests (Government of India), *Notification 763 (E)* (14 Sept 1999), THE GAZETTE OF INDIA – EXTRAORDINARY (Last accessed at http://ecobrick.in/resource_data/KBAS100031.pdf at 4:05 PM IST on 29 Dec 2020)
[17] M.S. Ananth & Pratibha Jain, *Coal Allocations Cancelled!* REGULATORY HOTLINE – NISHITH DESAI ASSOCIATES (16 Oct 2014), (Last accessed at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/2609/html/1.html?no_cache=1 at 4:42 PM on 30 Dec 2020)
[18] Moinak Mitra, *CAG Vinod Rai: An accountant who's calling the Government to account*, ECONOMIC TIMES (18 Aug 2012) (Last accessed at https://economictimes.indiatimes.com/news/politics-and-nation/cag-vinod-rai-an-accountant-whos-calling-government-to-account/articleshow/15540142.cms at 4:37 PM IST on 29 Dec 2020)

Contentions Presented by the Union of India

The Union of India, represented by the Attorney General, presented two significant contentions in its petition, which were as follows:

1. The principle of *precedence* laid down in the Constitution of India inspired from the Constitution of Australia, which divides items under the Union, State and Concurrent lists respectively; states that in cases where an item falls under the Union list, the decision of the Government of India shall take precedence over the states.
2. Section 1A and Section 3(3) of the Mines Act, 1952, which lay down the powers mentioned above, are in exclusion to those defined under the Mineral Concession Rules and are in addition to Article 73 of the Constitution of India.
3. The process followed by the Screening Committee, which included the scrutinization and grading of applications, was within the ambit of numerous legislative instruments and that due process had indeed taken place.

The Petitioners then submitted their rebuttal, based on two grounds:

(i) Section 3(3)(iii) was restrictive and lucid, in the sense that it enumerated which companies could operate coal mines clearly and concisely.
(ii) Further, neither the Coal Mines Act nor the Mines & Minerals Act empowered the Central Government to make allocations as made by the Screening Committee and that neither legislation provided for the arbitrary allocation procedure followed by the Screening Committee.

Quite interestingly, this was one of those rare cases that took place before the Supreme Court after the dawn of the 21st Century where the State Governments applied for the support of the petition by stating that the Government of India's process was contrarian to natural justice. They further argued that this was antithetical to the principle of healthy Centre-State relationships as it did not allow any recourse for appeal or consultation regarding the decisions made by the Government of India regarding Coal allocations.

Supreme Court's Decision

The Division Bench of the Supreme Court, led by Hon'ble (then) Chief Justice of India RM Lodha, concluded that neither of the two cardinal legislative instruments, namely, the Mines & Minerals Act & the Coal Mines Act; possessed any provisions which gave the Government of India a monopoly over all decisions related to the allocation of coal blocks. The Court also went on to note that although the provisions of the Act as mentioned earlier are well within the Constitution, how the Government of India had construed them in order to sit on the high horse of power was *ultra vires* the Constitution and was impermissible under the Doctrine of Colourable Legislation.

The Doctrine of Colourable Legislation: A Brief

The Doctrine traces its origin from the Latin maxim *"Quando aliquid prohibetur ex directo, prohibetur et per obliquum"*, which means "you cannot do indirectly, what you cannot do

directly" and emphasises the importance of Separation of Powers.[19] The principle finds a notable mention in the speech of Alladi Krishnaswamy Iyer in the Constituent Assembly Debates of India[20]:

"*It is an accepted principle of Constitutional Law that when a Legislature, be it the Parliament at the Centre or a Provincial Legislature, is invested with a power to pass a law in regard to a particular subject matter under the provisions of the Constitution, it is not for the Court to sit in judgment over the Act of the Legislature…Of course, if the legislature is a colourable device, a contrivance to outstep the limits of the legislative power or to use the language of private law, is a fraudulent exercise of the power, the Court may pronounce the legislation to be invalid or ultra-vires*".

The Supreme Court of India has upheld the legitimacy of the principle in a host of cases[21], the earliest of which was *KC Gajapati Narayan Deo v. State of Orissa*[22], where the CJ Patanjali Sastri noted that a contravention of the rule was a *'fraud on the constitution'*[23].

The Supreme Court's Decision (continued)

The Court took note of the numerous intervention applications filed by a host of State Governments and observed that the Central Government's sheer defenestration of the requirement of consulting State Governments regarding all matters concerning the allocation of coal blocks was illegal and led to the denudation of Centre-State relations.

The bench categorically stated that neither did Section 1A nor Section 3 of the Coal Mines Act empowered India's Government to commit such a dastardly omission by reducing the State Government's role to a mere rubber stamp. Even the amended version of Section 3 did not permit the same as it would determine how the Mines and Minerals Act, and not the Coal Mines Act, would be applied to the present situation and that the Government of India had issued no rules or notifications specifically to allocate Coal Blocks.

The Court, quite interestingly, chose to remain silent on the arguments raised by the Attorney General of India as to whether Coal Block auctions should have been allowed in the first

[19] Venkatanarayanan S., *Article 370: What the Supreme Court Will Have to Consider While Examining the Centre's Move*, THE WIRE (10 Oct 2019) (Last accessed at https://thewire.in/law/supreme-court-article-370-doctrine-of-colourable-legislation at 6:35 PM IST on 20 Jan 2021); also see Anchal Challani, *The Doctrine of Colourable Legislation: Indian Constitution*, JUS DICERE (17 Jul 2020) (Last accessed at https://www.jusdicere.in/the-doctrine-of-colorable-legislation-indian-constitution/ at 1:32 AM IST on 18 Jan 2021)

[20] Government of India, *Constituent Assembly Debates*, Vol 9, Document 138, Paragraph 53 (Freely accessible at https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-12?paragraph_number=53#9.138.53)

[21] See Ashok Kumar v. Union of India, 1991 SCC 3 498; also see State of Kerala v. PUCL, 2009 8 SCC 46; Dharma Dutt v. Union of India, 2004 1 SCC 712; State of Bihar v. Maharajadhiraja Sir Kameshwar Singh, 1952 1 SCR 889; Kunnathat Thattuni Moopil Nair v. State of Kerala, 1961 AIR 552; M.R. Balaji v. State of Mysore, 1963 AIR 649; State Transportation Officer (STO) v. Ajit Mills Ltd, 1977 4 SCC 98; Gullapalli Nageshwar Rao v. State Road Transport Corporation (SRTC), AIR 1959 SC 308

[22] KC Gajapati Narayan Deo v. State of Orissa, 1953 AIR 375

[23] See Challani, *Supra* 21

place or not – quoting a cardinal American Case[24] and terming it as a matter of 'the *unruly horse* called public policy', and *prima facie*, out of the jurisdiction of the judiciary. Instead, it elected to determine whether the process of auctioning the coal blocks was perverse to the Right of Equality[25] and Natural Justice; and concluded that it was so. It then reiterated its decision in the infamous 2G Spectrum Scam Case[26], where it held that any auctions held in a manner perverse to natural law and public policy are void ab initio.

Concluding Orders

After entertaining numerous applications from parties that sought a hearing because they would be adversely affected by any orders passed in the matter, the Supreme Court cancelled 212 out of the 216 coal block allocations and gave the coal block allottees and the Government of India and Coal India Limited 6 months to adjust to the orders passed by the Court. It scathingly observed that the nation's natural resources could not be dealt with in a manner as if they were the property of an 'exclusive club of individuals and not of the people of India, at large.

Lastly, and most importantly, it ordered that all the allottees with cancelled allocations pay an additional levy of 295 INR per metric ton of coal mined, although the overall environmental impact or the proposed cost of mining was unquantifiable. Lastly, it ordered a CBI inquiry into allocating 12 specific coal blocks, as identified in a sealed cover report by India's Attorney General. The details of the coal blocks that were an investigation took place have never been made public.

Doing Business in India – High Risk, High Reward: A Brief Analysis of the Manohar Lal Sharma Judgement, 6 Years On

Six years on from the judgment, India's environment is already one that has sent mixed signals to investors in light of the Government's contradictory sloganeering and advertising. Prime Minister Narendra Modi's ultra-nationalist Bharatiya Janata Party-led government has raised three interesting and contradictory slogans – 'Invest in India', 'Make in India' and 'Atmanirbhar Bharat (Self-Reliant India)'. The initiatives have received criticism for their 'policy casualness' and for their overlapping mandates, with leading Indian scholars declaring that the initiatives were a result of excessive appeasement and equivocation, and thus, "destined to fail" as "*swadeshi* (domestic) products cannot be made successfully with foreign capital".[27]

The *Manohar Lal* judgement's clarion call to adhere to judicial 'due process' seems to have gone sadly unanswered. Even today, companies contracting with the Government, funnily

[24] Richardson v. Mellish (1824), 2 Bing 229 at 252; also see John Shand, *Unblinkering the Unruly Horse: Public Policy in the Law of Contract*, The Cambridge L. J. 30(1) 1972(A), 144-167
[25] The Constitution of India, Article 14
[26] Dr Subramaniam Swamy v A Raja, 2012 9 SCC 257
[27] M. Suresh Babu, *Why 'Make In India' has failed*, THE HINDU (20 Jan 2020) (Last accessed at https://www.thehindu.com/opinion/op-ed/why-make-in-india-has-failed/article30601269.ece at 12:13 AM IST on 21 Jan 2020)

so, need to be sure that the Government has the power to enter into them and must be ready to defend their contract against any so-called 'public interest litigation. The rise of such motivated Public Interest Litigation processes is particularly shocking for India at a time where a former President of the Supreme Court of India's Bar Association (SCBA) publicly agreed that 'public interest litigation is not necessarily in 'public interest' all the time.[28]

It was also interesting to see how the Court did not pay heed to the laches' principle and cancelled decisions that dated back to 1993. The additional levy of 295 INR per metric ton without any justifiable manner to quantify the same came as a kick in the teeth for shareholders in companies such as Jindal Steel and Power Ltd (JSPL) and Jaiprakash Ventures Ltd and gave a short-term monopoly to state-owned Coal India Limited (CIL).[29]

As rightly noted by M. Ananth:
"While the rewards from doing business with Government of India may be high, the risks appear to be even higher".[30]

Against All Odds: The Peculiar Growth Story of the Adani Group

On the other hand, the BJP's magic wand seems to have worked for Adani Enterprises- in particular, Adani Power and Adani Green Energy, which are both publicly traded on the National Stock Exchange (NSE) of India (ADANIPOWER[31] and ADANIGREEN[32], respectively) and the Bombay Stock Exchange (BSE) (533096[33] and 541450[34], respectively).

The Adani Group now claims to be the largest producer of Photovoltaic Energy globally[35] and operates more than five airports and numerous coal mines in PPP mode – despite possessing no prior experience of running them[36]. However, the Adani Group's journey has not been a seamless experience. The group has faced widespread flak across

[28] Debayan Roy, *9 out of 10 PILs filed in Supreme Court are Motivated: Dushyant Dave*, BAR AND BENCH (18 Jan 2021) (Last accessed at https://www.barandbench.com/interviews/9-out-of-10-pils-filed-in-supreme-court-are-motivated-dushyant-dave at 12:23 AM IST on 21 Jan 2021)
[29] Rahul Oberoi, *Breaking Into Pieces*, BUSINESS TODAY (Nov 2014 – Print Edition) (Last accessed at https://www.businesstoday.in/moneytoday/stocks/coal-sector-coal-blocks-supreme-court-tata-group-jspl/story/211765.html at 12:32 AM IST on 21 Jan 2021)
[30] *Supra* 19
[31] National Stock Exchange, Adani Power (Live Stock Quote), NSE, https://www1.nseindia.com/live_market/dynaContent/live_watch/get_quote/GetQuote.jsp?symbol=ADANIPOWER (Last accessed 6 Mar 2021)
[32] BSE: 533096
[33] BSE: 541450
[34] Bombay Stock Exchange, Adani Green Energy (Live Stock Quote), BOMBAY STOCK EXCHANGE https://www.bseindia.com/stock-share-price/adani-green-energy/adani-green-energy/541450/ (Last accessed 6 Mar 2021)
[35] Adani Green Energy Ltd, *Adani Ranked as the Largest Solar Power Generation Owner in the world* (1 Sept 2020) (Last accessed at https://www.adanigreenenergy.com/newsroom/media-releases/Adani-ranked-as-the-largest-solar-power-generation-owner-in-the-world at 12:39 AM IST on 21 Jan 2021)
[36] Stephanie Findlay and Hudson Lockett, *'Modi's Rockefeller': Gautam Adani and the Concentration of Power in India*, FINANCIAL TIMES (13 Nov 2020), https://www.ft.com/content/474706d6-1243-4f1e-b365-891d4c5d528b

Australia for its plans to operate the Carmichael Coal Mine[37]. Moreover, the Government of Kerala (after its previous Writ Petition before the Ernakulam High Court was dismissed[38]) and the Mangalore Airport Employees' Association have now moved the Supreme Court of India against the concession of the Trivandrum[39] and Mangalore Airports (2 of the six airports for which Adani won the bid), respectively.

However, critics attribute this to the Corporation's open support of the Modi-led BJP government, which dates back to the time that Modi was the Chief Minister of the State of Gujarat[40], with images of Modi boarding a Private Jet owned by the Adani Group stirring controversy in 2014[41]. Meanwhile, Adani's worth has risen by more than 25 billion USD as his Corporation was successful in bidding for numerous government tenders and built infrastructure projects across the country.[42]

The Competition Commission: A Silent Spectator

In the meantime, the Competition Commission of India (CCI) has remained eerily quiet about whether such actions would give rise to allegations of 'Bid Rigging' under Section 3(3) of the *Competition Act, 2002*, as per its definition in the Explanation section of the Act:

"For the purposes of this sub-section, "bid-rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding"[43].

It is interesting to note that although Section 19 of the Act confers power on the Commission to *"inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on— (a) 29[receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or (b) a reference made to it by the Central Government or a State Government or a statutory authority"*, such inquiries are initiated mainly at the behest of the ruling Government (mostly

[37] Rishi Iyengar, *Australia Gives Approval for Work to Begin on Controversial New Coal Mine*, CNN (13 Jun 2019), https://edition.cnn.com/2019/06/13/business/adani-mine-australia-approval/index.html (Last accessed 6 Mar 2021)
[38] KP Suresh & Anr v. Union of India, WP(C) No. 7961/2019 (Ernakulam High Court)
[39] KP Suresh & Anr. v. Union of India, SLP(C) No. 14515/2020 (Supreme Court of India); also see Livelaw News Network, *Supreme Court to Hear Kerala Govt Plea Against Thiruvananthpuram Airport Lease to Adani Group On 16 Mar*, https://enalsar.informaticsglobal.com:2278/top-stories/supreme-court-kerala-plea-thiruvananthapuram-airport-lease-adani-group-march-16-169910 (Last accessed 1 Mar 2021)
[40] *Supra* 38
[41] Ananya Sengupta, *Modi Flies into Brand Cloud*, THE TELEGRAPH (24 May 2014), https://www.telegraphindia.com/india/modi-flies-into-brand-cloud/cid/182148 (Last accessed 7 Mar 2021)
[42] *Supra* 38
[43] Competition Act, 2002 (India), Explanation to Section 3(3)

in poll-bound states in order to gain political capital) and are not independent.[44] It is also important to note that such man-handling of the CCI by the Government of India is in direct contravention of *The United Nations Set of Principles on Competition, 1980*[45]. On the other hand, the positions established by the 'Dyestuffs Case Test'[46] and the Supreme Court of India's controversial judgment in *Rajasthan Cylinders & Containers Ltd.*[47] do give the Government of India a reprieve of sorts.

The *Rajasthan Cylinders* Case: A Convoluted Legal Precedent

Facts

The Appellants entered into a contract to supply 105,000 gas cylinders (14.2 kg each, with SC valves[48]) to the Indian Oil Corporation Ltd (IOCL) - a listed[49] Public Sector Undertaking (PSU) for the 2010/2011 financial year. After numerous allegations of 'bid-rigging' arose,

the CCI used its powers u/S. 19 of the Competition Act, 2002 and duly appointed a Director- General to conduct an impartial investigation into the matter. Based on the Director's General's report, the CCI ruled that collusive bidding had taken place and proceeded to impose penalties on 45 companies engaged in Bid Rigging and imposed a penalty of 9% of the 'average turnover of each of the companies.[50] Forty-four of these companies proceeded forthwith to appeal the Order before the Competition Appellate Tribunal of India (COMPAT).

COMPAT upheld the CCI's decision on the ground that the alleged Companies had engaged in cartelisation as per the provisions of Sections 3(3)(a) & 3(3)(d)[51] and went on to enlist ten factual grounds that proved the same- including the fact that all the bidders had met in Mumbai a few days before submitting their bids[52]. However, the COMPAT provided partial relief to the defendants by relaxing the penalties previously imposed by the CCI based on

[44] NE Now News, *Cement 'Syndicate' Hikes Cement Price in Poll-Bound Assam* (25 Feb 2021), NORTHEAST NOW, https://nenow.in/north-east-news/assam/cement-syndicate-hikes-cement-price-in-poll-bound-assam.html

[45] The United Nations Set of Principles on Competition (1980), TD/RBP/CONF/10/Rev.2, https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf (Last accessed 16 Mar 2021)

[46] F. A. Mann, The Dyestuffs Case in the Court of Justice of the European Communities, 22 INT'L & COMP. L.Q. 35 (1973).

[47] Rajasthan Cylinders & Containers Ltd. v. Union of India (2020), 16 SCC 615

[48] Id, Para 2.

[49] Bombay Stock Exchange, IOCL (Live Stock Quote), https://www.bseindia.com/stock-share-price/indian-oil-corporation-ltd/ioc/530965/ (Last accessed 8 Mar 2021)

[50] Niranjan Shankar Rao, *Relevant Turnover and its Basis Under the Competition Act*, INDIA CORP LAW BLOG (8 Oct 2017), https://indiacorplaw.in/2017/10/relevant-turnover-basis-competition-act.html#:~:text=For%20a%20company%20engaged%20in,could%20potentially%20worsen%20market%20behaviour. (Last accessed 16 Mar 2021)

[51] Aditya Bhattacharya & Oindrila De, Cartels and the Competition Commission, Econ. & Pol. W. 47(35) 14-17

[52] Shivani Chauhan, *Case Study: Rajasthan Cylinders and Containers Ltd v. Union of India* (3 Aug 2020), LEGAL WIRES, https://legal-wires.com/case-study/case-study-rajasthan-cylinders-and-containers-limited-v-union-of-india/ (Last accessed 16 Mar 2021)

the "relevant turnover" principle.[53] The companies then further appealed the COMPAT's Order to the Supreme Court of India.

The Supreme Court of India's Decision in the *Rajasthan Cylinders* Case

The Supreme Court allowed the appeal and set aside the decisions of the CCI and the COMPAT by taking a leaf out of its judgement in *Excel Crop Care Ltd. v. Competition Commission of India*[54], where it had laid down the scope and ambit of Section 3 of the Competition Act, 2002. The Court had previously noted that Section 3 prohibited anti-competitive agreements and thus fulfilled the primary purpose of Competition Law, i.e., not just eliminating anti-competitive practice which may adversely impact the market, but also to create a robust legal framework for the growth and development of healthy competition in the market.[55] However, it came with a caveat- the burden of proving the same should lie on the Petitioner, not on the defendant. The Court further relied on the principle of an 'oligopolistic market' presented in the Dyestuffs Case.[56] It went on to state that *"there has to be other credible and corroborative evidence to show that in an oligopoly the price reduction would swiftly attract the customers of the other two or three rivals, the effect on whom would be so devastating that they would have to react by matching the cut"*[57]. It said that in the present facts and circumstances, there were only three buyers (all 3 of which were

Public Sector Undertakings owned by the Government of India, namely – Bharat Petroleum, Indian Oil Corporation & Hindustan Petroleum) that were ready to purchase the LPG cylinders manufactured by the Petitioners. Out of the three buyers, Indian Oil had the largest market share at 48%, which led to creating an oligopolistic market.

Thus, the Court concluded its judgement by stating that price parallelism, in isolation, cannot be equated to bid-rigging and said that there was insufficient evidence to prove that bid-rigging had occurred in this case. It was interesting how the Court chose to castigate the CCI (an autonomous body, which can choose to summon corporate entities as and when it wants) for not summoning Indian Oil at an earlier stage, even though it had *"visible control over the entire tendering process"*[58].

'The (In)visible Hand' and the Dark Realities of a Fair Market: Everything That Went Wrong in *Rajasthan Cylinders* – A Concluding Note

Post the Supreme Court's decision in *Rajasthan Cylinders*, the Indian Media and numerous advocates hailed the decision as a milestone in the field of Indian Competition Law jurisprudence as it further strengthened the Supreme Court's decision in *Excel Crop Care*

[53] Supra 52
[54] Excel Crop Care Ltd v Competition Commission of India, 2017 8 SCC 47
[55] Id, Para 3
[56] Supra 47
[57] Supra 56, Para 99
[58] Supra 56, Para 105

Ltd. by emphasising the importance of market conditions in the assessment of Competition Law violations[59].

However, it is essential to acknowledge the presence of Paragraph 84 of the judgement, which acknowledges Paragraphs 44 and 45 of the Supreme Court's judgement in *Competition Commission of India v. Artistes & Technicians of West Bengal Film & Television & Ors.*[60] which states that:

"Even in the absence of proof of formal concluded agreement, when there are indicators that there was practical cooperation between the parties…that would amount to anti-competitive practices".

The decision had also stated that the Act should receive a chronological interpretation. The Court also stated that Section 2 of the Competition Act (which defines the term 'agreement') one must read Section 2 before Section 3 and that Courts must interpret the provisions in the broadest and most liberally possible when the Courts are looking to provide a judicial assessment of whether a practice was anti-competitive or not and that the CCI is the best judge for the same.[61]

Thus, the *Rajasthan Cylinders* Case decision constitutes bad law as it has presented conflicting opinions in its judgment and has chosen to acknowledge yet ignore the judicial position set in the *CCI v. WB Television* Case. The Supreme Court, which looked at the 'relevant turnover' principle and acknowledged that it did not exist within the ambit of the Act, still proceeded to conclude that imposing penalties based on the principle would be within the 'ethos' of the Act - thus muddying a well-set legislative instrument.[62]

All things said and done, the Court has not given value to well-set judicial and legislative precedents, neither has it paid heed to the fact that 'market conditions' are always tempered by money and political power. Thus, whether it is IPR, Capital Markets or Competition Law - the 'invisible hand' is not that invisible anymore.[63]

[59] Rahul Goel & Anu Monga, *Supreme Court Builds on Excel Crop Care Judgement to Examine Oligopsony in a Cartel Matter*, MONDAQ (16 Nov 2018), https://www.mondaq.com/india/antitrust-eu-competition-/755818/supreme-court-builds-on-excel-crop-care-judgment-to-examine-oligopsony-in-a-cartel-matter (Last accessed 16 Mar 2021)
[60] Competition Commission of India v. Artistes & Technicians of West Bengal Film & Television & Ors, 2017 5 SCC 17, Para 44-45
[61] Id, Para 13.
[62] Supra 52
[63] Naman Anand & Dikshi Arora, *The 'Dark' Reality of a 'Fair' Market: A Case Against Racist Trademarks and the Pernicious Precipices of Public Policy*, Baku State Uni L. Rev. 7(1)

The National Clean Air Programme, 2019 – 2 Years on A Harsh Lesson in Populist Policymaking

Background

The Government of India had launched an ambitious programme on 10 Jan 2019 to reduce the Particulate Matter pollution (PM 2.5 and PM 10[64]) present in 102 selected Indian cities that violated the National Ambient Air Quality standards (2009)[65], with 2017 as the base year[66], by 2023-2024. Each city was required to design its unique Air Quality Management plan and submit it to India's federal pollution regulating agency, the Central Pollution Control Board (CPCB). Such powers arose from the provisions of Section 16(2)(b) of the *Air (Prevention and Control of Pollution) Act, 1981,* which states that the CPCB shall *"plan and cause to be executed a nation-wide program for the prevention, control or abatement of air pollution"*[67]– who in turn directed the responsibility to monitor the efficacy of these plans to the respective State Pollution Control Boards (SPCBs). The programme document thus envisioned a cross-cutting, multi-sectoral partnership between the Centre and State Governments, emphasising a 3-Tier method of 'data collection, data archiving and action trigger systems'[68].

An Empty Suit

Although the scheme seems to an ambitious one, a thorough perusal of the Programme Document[69] shows us that the Programme has not received Federal backing under any law such as the *Environmental Protection Act, 1986*[70] or the *Air (Prevention and Control of Pollution) Act, 1981*[71]. Thus, the Programme was devoid of legal backing in a scenario when strict regulation and law enforcement should have been a priority for the Government of India. Consequently, there is no budgetary allocation for this Programme, which has led to much criticism from scholars and civil society at large.[72]

[64] Shikha Goyal, *What is PM 2.5 and PM 10 and how they affect health?* , JAGRAN JOSH, https://www.jagranjosh.com/general-knowledge/what-is-pm-25-and-pm10-and-how-they-affect-health-1528711006-1 (Last accessed 17 Feb 2021)
[65] Government of India, National Air Quality Standards (18 Nov 2009), B-29016/20/90/PCI-L, GAZETTE OF INDIA, https://cpcb.nic.in/uploads/National_Ambient_Air_Quality_Standards.pdf (last accessed 17 Feb 2021)
[66] The Hindu Net Desk, *All You Need to Know About the National Clean Air Programme* (11 Jan 2019), THE HINDU, https://www.thehindu.com/sci-tech/energy-and-environment/all-you-need-to-know-about-national-clean-air-programme/article25969287.ece (Last accessed 17 Feb 2021)
[67] Section 16(2)(b), Air (Prevention and Control of Pollution) Act, 1981
[68] Insights Editor, *National Clean Air Programme*, INSIGHT IAS, https://www.insightsonindia.com/2020/03/14/national-clean-air-programme-ncap-3/
[69] Government of India, *National Clean Air Programme (India)*, INDIA ENVIRONMENTAL PORTAL (10 Jan 2019), http://www.indiaenvironmentportal.org.in/files/file/NCAP.pdf (Last accessed 1 Mar 2021)
[70] Government of India, *The Environment Protection Act, 1986*, INDIA CODE, https://www.indiacode.nic.in/bitstream/123456789/13112/1/08_environment_protection_act_1986.pdf
[71] The Air (Prevention and Control of Pollution Act), 1981
[72] Niraj Bhatt, *A Critique of National Clean Air Programme*, THERMAL LAW WATCH, https://www.thermalwatch.org.in/resources/critique-national-clean-air-programme (Last accessed 1 Mar 2021)

A 2019 Greenpeace Report titled 'Airpocalypse-III'[73] made a few scathing observations concerning the Government's performance. It very rightly noted that the most severely impacted 'non-attainment cities' (i.e., cities that have not attained the adequate amount of air pollution controls and safety measures) would remain above the nationally prescribed 'maximum pollution levels'[74] even if the air pollution in each of those cities decreased by 30% year-on-year till the target year (2024)[75]. It also notes that there are 241 non-attainment cities, out of which the Government has shortlisted only 112- thus missing out on 139 cities below globally approved standards. The most notable omission was that of New Delhi- which has a notorious pollution record[76], which according to a Harvard University study[77], also led to a rise in COVID-19 cases in the capital. Instead, the city has received plaudits for its efforts in combatting air pollution due to its prior efforts under the Comprehensive Action Plan issued under the Environment Protection Act[78]. What is even more concerning is the Ministry of Power's recent office memorandum addressed to the Ministry of Environment, Forests and Climate Change to extend the deadline for 488 Coal power plant operators to comply with orders to reduce their Particulate Matter emissions by 40%.[79]

The *Benzene Convention* and India's *Directive Principles of State Policy*: Two Oft Overlooked Tools in the Fight for Clean Air in India

The Directive Principles of State Policy

The Directive Principles of State Policy were first introduced in the Government of India Act, 1935 and later incorporated in Chapter-IV of the Constitution of India Bill, 1950. The Principles were a result of the inspiration received from the *Prionsabail Stalarthoireac Hta Polasai Soisialta* (Article 45) of the Irish Constitution, which were, in turn, inspired by Pope Pius XI's *Quadregismo Anno*[80].

Similar to the Irish Constitution, religion or the Hindu idea of *Raja Dharma*[81], which is enunciated by ancient emperor Kautilya in the *Arthashastra* (given below), was vastly

[73] https://www.greenpeace.org/static/planet4-india-stateless/2019/08/8d46f0c0-airpocalypse-iii-report.pdf

[74] Id

[75] Id

[76] Vikas Pandey, *COVID-19 and Pollution: 'Delhi Staring at Coronavirus Disaster'*, BBC WORLD NEWS (20 Oct 2020), https://www.bbc.com/news/world-asia-india-54596245 (Last accessed 6 Mar 2021)

[77] X. Wu, R.C. Nethery, M.B. Sabath, D. Braun, & F. Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, Science Advances 6(45) (4 Nov 2020), https://advances.sciencemag.org/content/6/45/eabd4049 (Last accessed 6 Mar 2021)

[78] *Supra* 49, pg 4

[79] Soundaram Ramanathan, *Power Ministry, Asks MOEF&CC to dilute emission norms for coal based power stations*, Down To Earth (4 Jan 2021)

[80] Arthur W. Bromage & Mary C. Bromage, *The Irish Constitution: A Discussion of its Theoretical Aspects*, The Review of Politics 2 (2) 145-166 (Apr 1940, Cambridge University Press), https://www.jstor.org/stable/1404106 (Last accessed 11 Feb 2021)

[81] Sundara Sami Reddy, *Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution*, J. Indian Law Institute 22 (3) 404

influential in the addition of the DPSPs, leading some scholars such as Pritam Singh even to critique the Constitution and label it as an essentially 'Hindu-biased' document[82]:

"The King shall provide the orphan, the dying, the infirm, the afflicted and the helpless with maintenance; he shall also provide subsistence to helpless expectant mothers and also the children they give birth to".[83]

The principles are not justiciable based on the Sapru Committee's recommendations in 1945 to create two separate Rights – Justiciable and Non-Justiciable (which has also received criticism from notable scholars).[84] Although the principles are not justiciable according to Article 37 of the Constitution of India, they operate as fundamental indicators in the law-making of the nation, with legislators obliged to incorporate them to the maximum extent possible[85], as opposed to the former, which are purely for guidance – as seen in a catena of judgements by the Supreme Court of India[86].

Benzene Convention, 1971 (C-136, ILO)

Although India is not a party to the Aarhus Convention[87] or R-156 (ILO)[88]; the Benzene Convention (C-136)[89] may turn out to be an ideal route to affix liability for environmental damages arising out of dirty coal on the Government of India.

The Convention, whose primary purpose is to provide for *"protection from hazards arising from Benzene"*[90], was enacted by the ILO in 1971 and ratified by India on 11 Jun 1991[91]. The Convention has, quite surprisingly, been amiss from the broader academic discourse of

[82] Pritam Singh, *Hindu Bias in India's 'Secular' Constitution: Probing Flaws in the Instruments of Governance*, Third World Quarterly 26 (6) 909-926

[83] Supra 35, see footnote 31

[84] A.G. Noorani, *Centre-State Relations in India*, Verfassung und Recht in Ubersee/Law and Politics in Africa, Asia and Latin America 8 ¾ 319-329 (¾ Quartal 1975), http://www.jstor.org.rgnul.remotexs.in/stable/43108472 (Last accessed 12 Feb 2021)

[85] Madhavi Gopalakrishnan, *Contrasting the Directive Principles in the Indian and Irish Constitutions*, CONSTITUTION OF INDIA.NET (18 Jul 2020), https://www.constitutionofindia.net/blogs/contrasting_the_directive_principles_in_the_indian_and_irish_constitutions (Last accessed 11 Feb 2021)

[86] Narendra Madivalpa Kheni v. Manikrao Patil (Supreme Court of India), 1977 4 SCC 16; also see Revanasiddappa v Mallikarjun (Supreme Court of India), 2011 11 SCC 1

[87] Convention on Access to Information, Public Participation in Decision Making and Access to Environmental Matters (1998), https://unece.org/DAM/env/pp/documents/cep43e.pdf (Last accessed 8 Feb 2021)

[88] International Labor Organization, *Working Environment (Air Pollution, Noise and Vibration) Recommendation, 1977 (No. 156)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R156,/Document (Last accessed 8 Feb 2021)

[89] International Labour Organization, *The Benzene Convention* (1971), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C136 (Last accessed 8 Feb 2021)

[90] Supra 36, see Preamble

[91] International Labor Organization, *Ratifications of C-136 - Benzene Convention, 1971 (No. 136)*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312281 (Last accessed 8 Feb 2021)

International Law since its enactment – with just two publications centred on the Convention within 50 years.[92]

Article 1(b) of the Convention denotes that it shall also apply to 'products' where the Benzene (C6H6) content is more than 1%.[93] This interpretation can be altered on a 'temporary basis' by the 'competent authority' of the state party to the Convention.[94] Surprisingly enough, the Convention does not define the term 'product' and has not provided any specification of the 'temporary period' or the extent of the 'alteration' possible under Article 3(1). Neither does any other instrument of Public International law provide an answer, in clear terms, as to how the term 'product' may be defined. In such a case, we must place reliance on the domestic laws of India.

The relevant provision in the present circumstance is Section 2(33) of the *Consumer Protection Act, 2019*, which reads as follows:

"2. In this Act, unless the context otherwise requires-
(33) "product" means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid-state possessing intrinsic

value which is capable of delivery either as wholly assembled or as a part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs".[95]

It is interesting to note the key phrase here – *"gaseous…. state possessing intrinsic value capable of delivery"*. Such a provision allows for Indian coal containing Benzene, even if the same exceeds 1% in a soluble form, which Indian coal has been scientifically tested and proven to contain[96], to fall within the definition of the term *product* under Indian law and consequently fall under the aegis of the Benzene Convention, 1971. One can bolster this argument by the fact that coal has been considered as a 'product' in liquid[97], gaseous[98] and solid[99] form by the National Consumer Disputes Redressal Commission (NCDRC) of India.

[92] Ilise L Feithans, *Law and Regulation of Benzene*, Environmental Health Perspectives 82, 299-307 (Jul 1989), https://www.jstor.org/stable/3430788 (Last accessed 8 Feb 2021); also see Christopher Sellers, *From Poison to Carcinogen: Towards a Global History of Concerns About Benzene*, Global Environment 7(1) - RCC Special Issue on Hazardous Substances: Perceptions, Regulations, Consequences 38-71 (2014), https://www.jstor.org/stable/43201593 (Last accessed 8 Feb 2021)
[93] Supra 36, see Article 1 (b)
[94] Supra 36, see Article 3(1)
[95] Section 2 (33), Consumer Protection Act, 2019 (India), http://egazette.nic.in/WriteReadData/2019/210422.pdf (Last accessed 8 February 2021)
[96] MK Ghose and SR Majee, *Characteristics of Air-Borne Dust Emitted by Open-Cast Mining at Jharia Coalfield*, Indian Journal of Chemical Technology 8, 422 (2001)
[97] The Oriental Insurance Co Ltd v. S. Gurmeet Singh, 2011 SCC Online NDCRC 811
[98] Bira Kishore Naik v. Coal India & Ors, 1986 3 SCC 386
[99] Mohindra Gas Enterprises v. Jagdish Powal & Ors, 1992 SCC Online NDCRC 10

However, it is pretty saddening to note that despite numerous references by the ILO (with the latest one taking place in 2015), the Indian Government has not clarified the measures taken to comply with the Convention.

Conclusion

The situation in India is precarious and one that demands affirmative action from the highest echelons of Government. All kinds of relaxations given to corporates concerning environmental norms, which violate or significantly deter India's efforts to fulfil the Sustainable Development Goals, must be rolled back with immediate effect. Another critical factor is that non-governmental organisations and human rights defenders report on India's efforts to comply with the SDGs, notably Amnesty International, which had to cease its India operations citing excessive 'interference' by the Government of India[100], be allowed to function freely. The NCAP must possess the legislative and financial backing in order to become a full-fledged national scheme.

In addition to the same, India must review its commitments towards the ILO and other International best practices and Treaty Obligations. The judiciary must seek to critically analyse the Government's policies and refrain from engaging in eulogising the Government[101] or joining the Parliament post-retirement (which also led to severe criticism

of the institution from numerous legal scholars)[102] in order to maintain a healthy 'Separation of Powers'. Although the transition towards clean air and green energy cannot take place overnight, the Government of India must take appropriate measures to do more than just 'lip service' in order to ensure that it makes anything in India apart from a mockery of the rights of the citizens it elected to power

[100] Manveena Suri and Swati Gupta, *Amnesty International Halts India Operations after 'freezing' of its Bank Account*, CNN (29 Sept 2020), https://edition.cnn.com/2020/09/29/india/india-amnesty-international-freeze-intl-hnk/index.html (Last accessed 17 Mar 2021)

[101] Press Trust of India, *Supreme Court Judge Describes Modi as 'Popular, Vibrant and Visionary Leader'*, THW WIRE (25 Feb 2021), https://thewire.in/law/supreme-court-judge-describes-modi-as-popular-vibrant-and-visionary-leader (Last accessed 17 Mar 2021)

[102] Rajeev Dhavan, *The Revolving Door for Ranjan Gogoi Does the Supreme Court No Credit*, THE WIRE (25 Mar 2020), https://thewire.in/law/the-revolving-door-for-ranjan-gogoi-does-the-supreme-court-and-parliament-no-credit (Last accessed 17 Mar 2021)