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EDITORIAL

"*It's such an odd thing, the way you can know someone so perfectly through what they read.*"

- Fredrik Backman, Anxious People

The power of literature, as Backman notes, is that it can act as "tiny love letters" between people who can only communicate their feelings by pointing at other people's feelings. The power of academic literature lies in the fact that it allows authors to engage with the works of others, and develop such a wonderful understanding of the thoughts and viewpoints of others. It acts as a bridge connecting all those who engage with a particular area of law, not just in terms of academic arguments and legal improvements, but more often than not, on a personal level as well. With this, I am delighted to present to you the second issue of the NUALS Law Journal's eighteenth volume.

As I reflect on my tenure, two values have remained constant: the Board's willingness to take initiatives to make the arena of legal debate as accessible as possible, and the Board's commitment to making such improvements. The work of my predecessors, former and current members of the Board, and our faculty have been integral to creating such a system. I am particularly indebted to Antony, Ashna, Poorvi, Gokul, Divya, Rena and Sruthi, who have pointed me to and walked me through various systemic improvements that can be made.

This Issue would not have been possible without the tireless efforts of the Board of Editors, who thrived despite facing multiple challenges throughout the course of the publication year and our Faculty Coordinator, Hari sir, who

has been a source of constant support to the Journal, and the Board. I sincerely thank our authors, who are patient, cooperative and unhesitant in their journey towards contributing to academia.

On behalf of the Board of Editors,

Parameswaran Chidamparam,

Editor-in-Chief

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Constitutional Metamorphosis: Proposing Amendments for an Ecologically Fortified Indian Constitution

Tanya Verma[*] & Ravi Shankar Pandey[**]

Abstract

In light of the unprecedented challenges posed by the interplay of environment and modernisation, the urgency for robust environmental protection is apparent. While the Indian Constitution acknowledges this imperative and provides a legal framework, its efficacy is hampered by gaps in interpretation and implementation. This article advocates for imbuing the Constitution through Constitutional amendments promoting ecological resilience. Focusing on the Environmental Impact Assessment, it underscores the need for a participatory approach, involving citizens and civil society in shaping environmental policy. Meaningful dialogue with stakeholders is posited as a potent tool for sustainable development. The article also proposes amendments addressing 'ecocide' within both local and international contexts. Furthermore, it introduces the concept of Ecological Federalism, advocating for a decentralised approach to environmental governance within the nation. This paradigm empowers sub-national entities to tailor policies according to their ecological needs fostering a bottom-up approach to conservation. In essence, this article seeks to pave the way for a more responsive and environmentally conscious Constitutional framework by arguing for amendments, participatory governance, and innovative concepts such as ecological federalism.

I. Introduction

Erstwhile Prime Minister Indira Gandhi was of the view that though rich countries may look upon development as the sole reason for environmental

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destruction, for India, there is a justifiable emphasis on socio-economic development.[1] Mired in extreme poverty with a burgeoning population, India's primary purpose has been to eradicate its deep-rooted poverty, achieve modernisation and development via industrialisation, and regain what it considers its 'rightful place' in the world.[2] To this end, in India, environmental questions are solved through gap-filling exercises by the judiciary. The Apex Court has, using the tool of public interest litigation jurisdiction and activism, exploited suitable opportunities to protect the public from immediate and long-term environmental consequences. Such exercise, even when done with caution, rests on precedent law for future concerns, and citizens are unaware of environmental guarantees altogether. Oblivious to the presence of law, enforcement on the ground level appears to be a big ordeal.

This article attempts to connect this conception and the available laws to pave the way for a new Constitution. A Constitution that 'takes the Constitution away from the Hon'ble Supreme Court.' So far, its gap-filling exercise by itself provides valuable, and concrete rights and duties regime of environment protection. The amendments proposed in the article, if effectuated, would transform the Indian Constitution into an ecological Constitution. The article begins by outlining the existing literature and exploring the loopholes in the existing environmental protection regime. It further discusses the need for a change in such approaches in the case of India, keeping in mind the relevant stakeholders.

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[1] Indira Gandhi, Speech at the Plenary Session of the United Nations Conference on Human Environment, Stockholm, *On Man and Environment* (June 14, 1972), https://www.youtube.com/watch?v=l83x-hocJ94.

[2] WORLD BANK, ATLAS OF SUSTAINABLE DEVELOPMENT GOALS 2017: FROM WORLD DEVELOPMENT INDICATORS 2-3 (2017).

II. Existing Scholarship

The Indian environmental law framework is intricately tied to the Constitutional tort developments of the 1980s, wherein principles of tortious liability were extended to environmental matters by recognising the right to a clean and healthy environment[3] under Article 21.[4] In this section, the authors present a comprehensive analysis of the current legal framework and the positioning of environmental rights in a three-fold approach. First, the existing Constitutional provisions are examined. Second, an exploration of the status of legal personhood for the environment is presented, and then, considerations regarding their placement within the Indian Constitution are deliberated upon.

A. Existing Constitutional Provisions: Rights v. Duties

The original enactment of the Constitution of India in 1950 did not include any provisions outlining the duties of citizens. In 1947, Sir BN Rau, the Constitutional adviser to the Constituent Assembly,[5] prepared a Draft Constitution that included a section on the Duties of Citizenship within Chapter XI.[6] In 1969, nearly two decades after the enactment of the Indian Constitution, the Supreme Court recognised the presence of Constitutional duties imposed on citizens.[7] It identified Part IV of the Constitution, which outlines the Directive Principles of State Policy (DPSP), as the source of these duties. Consequently, India missed the opportunity to transition from an approach of filling gaps in Constitutional jurisprudence to one that prioritises

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[3] Rural Litigation and Entitlement Kendra v. State, AIR 1988 SC 2187.
[4] INDIA CONST. art. 21.
[5] G Durgabai, 164 (9) CONSTITUENT ASSEMBLY DEBATES (1949); B Pattabi Sitaramayya, 165 (11) CONSTITUENT ASSEMBLY DEBATES (1949).
[6] Kalyani Ramnath, *"We the People": Seamless Webs and Social Revolution in India's Constituent Assembly Debates*, 32(1) SOUTH ASIA RES. 57, 58 (2012).
[7] Loveleen Bhullar, *Environmental Constitutionalism and duties of individuals in India*, 34(3) J. ENVIRON. LAW 399, 399-418 (2022).

environmental justice. As a result, the void in environmental Constitutional provisions persists.

The Indian Constitution's chapter on fundamental duties explicitly imposes a duty on every citizen to safeguard the environment. Article 47[8] underscores the State's responsibility to prioritise enhancing nutrition levels, living standards, and public health as essential obligations. Article 48[9] addresses the organization of agriculture and animal husbandry, urging the State to adopt modern and scientific approaches. Further, to sum a few, Articles 51A(g),[10] 51(c),[11] 39,[12] and 48-A[13] collectively cast a duty to protect the environment. Both Court decisions and scholarly analysis acknowledge the United Nations Conference on the Human Environment, commonly referred to as the Stockholm Conference, held in June 1972, as a source of inspiration for Article 51A(g) of the Indian Constitution.[14] This provision pertains to the fundamental environmental duty of 'citizens' of India to protect and improve the natural environment and have compassion for all living creatures. Notably, the language and intent of this duty bear resemblance to the latter part of Principle 1[15] outlined in the Stockholm Declaration, providing the man a right and in turn imposing an equivalent duty to protect and improve the environment for present and future generations.

[8] INDIA CONST. art. 47.
[9] INDIA CONST. art. 48.
[10] INDIA CONST. art. 51A, §g.
[11] INDIA CONST. art. 51, § c.
[12] INDIA CONST. art. 39.
[13] INDIA CONST. art. 48, §A.
[14] *Supra* at note 8.
[15] Declaration of the United Nations Conference on the Human Environment, Principle 1, UN Doc. A/RES/2994(XXVII) (June 16, 1972).

In a global context, Portugal and Spain were pioneers in recognising the right to a healthy environment in their respective Constitutions.[16] In Portugal's Constitution, Article 66[17] explicitly states that *"Everyone has the right to a healthy and ecologically balanced environment and the duty to defend it."* Since the mid-1970s,[18] more than 90 national Constitutions have acknowledged some form of the right, with approximately two-thirds of these rights emphasising health, and one-quarter emphasising the right to an ecologically balanced environment.[19] Notably, African countries have been at the forefront in adopting substantive Constitutional rights to a healthy environment. With the recent inclusion of the right to a healthy environment in the Tunisian Constitution, over 30 African countries have now incorporated such a right into their Constitutions.[20] Many subnational governments, including Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania in the United States, have recognised the right to a healthy environment in their Constitutions, despite the absence of such recognition at the federal level.[21]

B. Seeking rights for the Environment

The question of establishing a connection between human rights and environmental protection was raised in the European Convention on Human Rights of 1950;[22] however, no concrete action was taken to establish an

[16] Maite Barasaluce and Pablo Diaz-Siefer, *Social-Environmental Conflicts in Chile: Is There Any Potential for an Ecological Constitution?*, 13 SUSTAINABILITY 1 (2021).
[17] PORTUGAL CONST. art. 66.
[18] David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC PRESS 59 (2012).
[19] *Id*, at 62.
[20] *Id*, at 149.
[21] JAMES MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 219 (2014).
[22] European Convention on Human Rights, 1950 (Adopted on Nov. 04, 1950).

interrelation between the two.[23] Environmental concerns and issues were not directly mentioned in the convention. In the influential case of *Lopez Ostra v. Spain*,[24] the European Court of Human Rights expanded the scope of the right to a clean and healthy environment, providing protection for human rights against environmental problems. It was also determined that environmental issues could infringe upon the right to privacy without necessarily violating the right to health. Furthermore, in the case of *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa (SEPG)*,[25] the European Court of Justice emphasised that environmental protection and pollution prevention are essential for sustainable development, referencing Principle 3[26] of the Rio Declaration.

In a groundbreaking move, Ecuador achieved a historic milestone in 2008 by amending its Constitution to incorporate rights for nature.[27] This progressive step was soon followed by Bolivia in 2010.[28] Notably, both instances of Constitutional change occurred alongside an increase in political influence for indigenous communities.[29] The profound impact of indigenous worldviews was evident in recognising the significance of Pachamama, meaning 'nature'

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[23] Council of Europe. *Human rights and the environment, a priority for the Council of Europe*, https://www.coe.int/en/web/human-rights-rule-of-law/humanrights-environment.
[24] Lopez Ostra v. Spain, [1994] ECHR 46.
[25] Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa (SEPG), European Court of Justice, ECLI:EU:C:1997:160.
[26] Rio Declaration on Environment and Development, Principle 3, UN Doc. A/CONF.151/26 (12 Aug. 1992).
[27] C Espinosa, *Interpretive affinities: The Constitutionalization of rights of nature*, 21 ECUADOR J ENVIRON POLICY PLAN 608–622 (2015); Mary Elizabeth Whittenmore, *The Problem of enforcing Nature's Rights under Ecuador Constitution: Why the 2008 amendments have no bite*, WASHINGTON INTL LAW JOURNAL (2011).
[28] J Abubaker and M Pell, *Bacterial community structure and microbial activity in different soils amended with biogas residues and cattle slurry*, 72 APPL SOIL ECOL, 171-180 (2013).
[29] *Supra* at note 27.

in the languages of the indigenous Quichua[30] and Aimara[31] groups, within the Constitutional framework. Similarly, in the case of *Mendoza Beatriz Silva and Others v. National Government of Argentina and Others*,[32] the Supreme Court of Argentina delivered a far-reaching decision grounded in Argentina's Constitutional right to a healthy environment, showcasing an intent, if not impact, to provide rights to the environment within the ambit of its Constitution.

In a significant development in 2014, the Supreme Court of India expanded the scope of Article 21 of the Indian Constitution, which guarantees the right to life, to include animals.[33] This landmark decision acknowledged the legal standing of 'Mother Nature' at the highest Court level within one of India's 28 States.[34] The ruling conferred upon nature the same legal status as a human being, thereby granting it *"all corresponding rights, duties and liabilities of a living person."* Moreso, the judges opined and stated that elevation of rights of animals to Constitutional rights is expected of the Parliament, as done by many countries in an attempt to protect their dignity and honor.[35] However, in 2017, the Supreme Court overturned[36] a ruling by the Uttarakhand High Court that granted[37] legal personhood to the Ganges and Yamuna rivers. The

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[30] Cassandra Roxburgh, *Environmental Personhood: A radical approach to Climate Justice*, NPQ, https://nonprofitquarterly.org/environmental-personhood-a-radical-approach-to-climate-justice/.
[31] *Id*.
[32] Mendoza Beatriz Silva et al. v. National Government of Argentina et al., M. 1569. XL. (2008), ¶8.
[33] Animal Welfare Board v. Nagaraja, (2014) 7 SCC 547.
[34] *Madras High Court grants mother nature 'living being' status with rights duties*, THE INDIAN EXPRESS (May. 1, 2022), https://indianexpress.com/article/cities/chennai/madras-high-Court-grants-mother-nature-living-being-status-with-rights-and-duties-7895543/.
[35] *Supra* at note 32, para 9.
[36] *India's Ganges and Yamuna rivers are not 'living entities'*, BBC NEWS (Jul. 7, 2017), https://www.bbc.com/news/world-asia-india-40537701.
[37] Mohd Salim v. State of Uttarakhand & ors, WP (PIL) No 126 of 2014.

Supreme Court deemed the decision legally unworkable as it imposed 'duties and liabilities' on the rivers, similar to those of human beings.[38] The ruling was overturned due to concerns about the practical implementation of such rights and responsibilities. Despite the ruling, subsequent decisions by High Courts have upheld the legal personhood status of nature, including animals. In 2018 and 2019, the Uttarakhand High Court[39] and the Punjab and Haryana High Court,[40] respectively, recognised animals within their States as legal persons, affording them the same rights, duties, and liabilities as human beings. These State-level rulings demonstrate a continuing trend of extending legal protections to nature and recognising the intrinsic value of animals within the legal framework.

Another significant development in the realm of nature's rights unfolded, where a petition filed in 2020, currently awaits a decision by the Supreme Court in New Delhi.[41] The petition seeks a declaration from the Court that all members of the animal kingdom, including birds and aquatic species, possess legal rights. This initiative builds upon a 2014 Supreme Court ruling[42] that affirmed the legal duties humans owe to animals. If successful, this petition could represent a landmark decision regarding the recognition and protection of the rights of animals in India. However, the situation still relies on a gap-filling exercise rather than concrete backing, which brings us to the next section of this piece which discusses the importance of placing environmental rights in the Constitution.

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[38] *Supra* at note 35.
[39] Narayan Dutt Bhatt v. Union of India, WP No 43 of 2014.
[40] Karnail Singh v. State of Haryana, CRR-533-2013.
[41] People's Charioteer Organization (PCO) v. Union of India, WP No. 885 of 2020.
[42] *Supra* at note 32.

C. Placing Environmental Rights in Part-III

Although the UN General Assembly passed a resolution recognising the right to a clean, healthy, and sustainable environment as a human right,[43] there is no further explicit acknowledgment of a right to a healthy environment in any global international agreement. Numerous national Constitutions and regional instruments have recognised this right. The Philippines Constitution includes as a State policy that *"[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."*[44] The Supreme Court of the Philippines has examined the Constitutional provision concerning the right to a healthy environment in several cases too. In its ruling in *Minors Oposa* case,[45] the Court clarified that the environmental right enshrined in the Constitution, although found within the section pertaining to State policy, possesses legal enforceability and is a self-executing right that imposes corresponding duties on the State. A similar approach was taken in the case of *Concerned Citizens of Manila Bay (CCMB).*[46] In Belgium, authorities are prohibited from weakening environmental protection standards, except in specific cases where a compelling public interest exists.[47] An illustrative example of this principle in action occurred when a proposal to relax air and noise pollution standards to

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[43] *UN General Assembly recognizes human right to a clean, healthy, and sustainable environment*, INTERNATIONAL LABOUR ORGANIZATION (2022), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_857164/lang--en/index.htm#:~:text=This%20reality%20was%20recognized%20by,been%20a%20long%20time%20coming.

[44] PHILIPPINES CONST. art. II, §6.

[45] Minors Oposa v. Secretary of the Department of Environmental and Natural Resources, 33 ILM 173 (1994).

[46] Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, GR Nos 171947–48, (Dec. 18, 2008) (Phil).

[47] Dr David R Boyd, *The Effectiveness of Constitutional Environmental Rights*, YALE UNITAR WORKSHOP (2013).

accommodate motor racing was rejected.[48] Similarly, Hungary's Constitutional Court rejected an attempt to privatise publicly owned forests due to weaker environmental standards applying to private land.[49] These instances reflect the standstill principle, which acknowledges that in society's pursuit of sustainable development, the trajectory must be towards stronger environmental laws and policies.

In the context of Germany, in February 2020, a legal challenge was brought forth by a group of German youth against Germany's Federal Climate Protection Act ("*Bundesklimaschutzgesetz*" or "*KSG*").[50] The case, known as *Neubauer et al. v. Germany*[51], contested the adequacy of the KSG's target of reducing greenhouse gas (GHG) emissions by 55% by 2030 from 1990 levels. The Court determined that Article 20A[52] of the Basic Law not only mandates the legislature to protect the climate and strive for climate neutrality but also encompasses the distribution of environmental burdens across different generations. Resultingly, the Court ordered the legislature to set provisions for reduction targets beyond 2030.[53] In response, lawmakers passed a bill approving an adapted KSG, requiring a minimum 65% reduction in GHGs by 2030. It has been in effect since August 31, 2021.

In essence, the judiciary has relied on the environmental duties of citizens and the State while exercising its writ jurisdiction in numerous cases concerning

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[48] *Id.*
[49] Cheryl W Gray et al., *Hungarian Legal Reform for Private Sector*, COLUMBIA LAW (1992), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3208&context=faculty_scholarship.
[50] Federal Climate Protection Act (Bundesklimaschutzgesetz), 2020.
[51] Neubauer et al v. Germany, Case No BvR 2656/18/1-Germany.
[52] The Basic Law (Grundgesetz)1849, art. 20A.
[53] *Supra* at note 48.

violation of fundamental rights *'to pass strong and wide-reaching orders and directions'.*[54] This trend signals an understanding of environmental duties as *'living provisions embodying a Constitutional commitment to protect the environment, as something more than bland policy statements'*.[55] The current State of existing laws warrants consideration, as they have remained unchanged, unexamined, and unamended for a considerable period. This stagnation in legislative development has led policy experts to assert that the proposed intentions of the Indian government may prove counterproductive in achieving their desired objectives. While the legislature is seen to be making effective changes in terms of various laws, for instance the advent of new criminal laws, it is pertinent to realise the need to amend, rather, incorporate certain provisions that relate to environmental laws as well.

For instance, in India, the '*Committee for reviewing the working of the Indian Constitution'* made environment-centric amendment recommendations that guide us for the same.[56] The committee proposed to insert article 30-D, highlighting, '*Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development'* in the Indian Constitution.[57] Though we expected hope, the recommendations never saw the light of the day. The authors argue the necessity of amending legislation to explicitly introduce environmental rights and confer legal personhood status upon the ecology as a whole. As David Boyd suggests, the *"existence of a*

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[54] Armin Rosencranz and Shiraz Rustomjee, *Citizens' Right to a Healthful Environment* 25(6) ENVIRONMENTAL POLICY AND LAW 324, 327 (1995).
[55] *Supra* note 50, at 328.
[56] FS Chapin et al., *Earth stewardship: A strategy for social–ecological transformation to reverse planetary Degradation,* 1 J. ENVIRON. SCI. STUD. 44, 44–53 (2011).
[57] *Report of the National Commission to Review the Working of the Constitution: Summary of Recommendations*, https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf.

Constitutional right to healthy environment gives concerned citizens or communities a set of tools that may be effective in addressing problems despite the absence of legislation,"[58] via this, the said placing can provide a safety net to protect gaps in statutory laws. The authors propose a similar arrangement for the environment by drawing parallels to the inclusion of the right to education within Article 21. This proposal reflects an evolving understanding of the environment as an entity deserving of protection and recognition, separate from its utility as a resource.

III. Need for Change

The preceding sections underscore the notion that the Indian Constitution, when optimally employed, assumes the character of an environmental Constitution rather than an ecological Constitution. While there have been certain efforts by the Apex Court and Committee recommendations, to date, there is no formal framework explicitly guiding the same, nor any Constitutional backing. The practical implementation of the theoretical foundations outlined earlier becomes imperative to effectuate this transformation. However, before delving into the practical application, it is crucial to comprehend the underlying reasons for amending the Constitution. This section provides a two-fold analysis, presenting the rationale for change and subsequently offering suggestions in line with the authors' perspective.

A. Climate Emergency

Regrettably, since the issuance of initial warnings, global greenhouse gas emissions have surged by approximately 40%.[59] This upward trend persists

[58] *Id*, at 47.
[59] William J Ripple and Timothy M Lenton, *World Scientists' Warning of a Climate Emergency* 72 BIOSCIENCE (2022).

despite repeated written alerts from the Intergovernmental Panel on Climate Change (IPCC) and a recent declaration by scientists, signed by nearly 15,000 individuals across 158 countries, emphasising the urgency of a climate emergency.[60] Presently, an overwhelming 90% of disasters are categorised as weather, and climate-related occurrences.[61] The ramifications of these disasters exact a hefty toll on the global economy, amounting to a staggering 520 billion USD annually.[62] Consequently, approximately 26 million individuals find themselves thrust into poverty as a direct consequence of these calamities.[63]

However, In the context of the climate emergency, there is a notable absence of extensive research and debate on how to effectively establish a balanced framework that considers the rights and responsibilities of citizens, States, and other species. Such discussions should encompass not only social and environmental perspectives but also adopt an integrated eco-social policy approach.[64] It is noteworthy that a country's objective environmental performance is primarily influenced by its GDP per capita rather than its welfare regime affiliation.[65] Despite this, prevailing policy responses to the

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[60] Rees, *End game: The economy as eco-catastrophe and what needs to change*, 87 REAL-WORLD ECON. REV. 132, 132-148 (2019).
[61] *The human cost of weather related disasters*, UNISDR https://www.preventionweb.net/files/46796_cop21weatherdisastersreport2015.pdf.
[62] *Breaking the link between extreme weather and extreme poverty*, GFDRR, https://www.gfdrr.org/en/breaking-link-between-extreme-weather-and-extreme-poverty.
[63] *Id.*
[64] Tuuli Hirvilammi, *Social Policy in a Climate Emergency Context: Towards Ecosocial Research Agenda*, JOURNAL OF SOCIAL POLICY (2023), https://www.cambridge.org/core/journals/journal-of-social-policy/article/social-policy-in-a-climate-emergency-context-towards-an-ecosocial-research-agenda/DAB7ED753DFA124A4BFEFC4E33086AEA#r103.
[65] Fanning, *The social shortfall and ecological overshoot of nations*, 5(1) NAT. SUSTAIN. 26–36 (2022).

climate crisis have relied mainly on the concept of "green growth,"[66] assuming that GDP growth can be decoupled from carbon emissions at a pace sufficient to sustain current levels of prosperity while achieving decarbonisation objectives. However, there is limited evidence supporting the feasibility of economy-wide decoupling of GDP growth from carbon emissions at a rate that would effectively mitigate the risks of climate change.[67] Furthermore, there is even less evidence regarding the potential decoupling of economic growth from unsustainable utilisation of natural resources.[68]

In the context of justifying the climate emergency, countries like Pakistan confront significant challenges due to their economic as well as geographical concerns. The country's population of 230 million predominantly resides along the Indus River, which experiences recurring floods during the monsoon season in July and August.[69] The UN Satellite Centre estimates that the floods affected nearly thirty thousand square miles of land, with approximately two-thirds of the flooded area comprising vital croplands.[70] Additionally, the destruction caused by the floods has resulted in food shortages, as 9.4 million acres of agricultural land and 1.2 million livestock have been lost, causing it to declare an emergency.[71]

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[66] Hickel and Kallis, *Is green growth possible?*, 25(4) NEW POLITICAL ECON. 469, 469–486 (2020).
[67] Haberl, *A systematic review of the evidence on decoupling of GDP, resource use and GHG emissions, part II: Synthesizing the insights*, 15(6) ENVIRON. RES. LETT., (2021).
[68] Siddharth Singh, *The relationship between growth in GDP and CO2 has loosened; it needs to be cut completely*, IEA (2024), https://www.iea.org/commentaries/the-relationship-between-growth-in-gdp-and-co2-has-loosened-it-needs-to-be-cut-completely.
[69] Mehrunnisa Wani, *A Climate Emergency in Pakistan, and the Way Forward*, FORBES (Oct. 30, 2022), https://www.forbes.com/sites/mwani/2022/10/30/a-climate-emergency-in-pakistan-and-the-way-forward/?sh=4a7773731909.
[70] *A framework for multi-sensor satellite data to evaluate crop production losses: the case study of 2022 Pakistan floods*, SCIENTIFIC REPORTS (2023).
[71] *Supra* at note 68.

Turkey and Syria have a similar stance. According to Professor Ibrahim Ozdemir,[72] a United Nations adviser and environmentalist, the exact cause of the February 2023 earthquake in Turkey and Syria remains uncertain.[73] However, emerging scientific evidence suggests that climate change amplifies the likelihood of such seismic events. Following the devastating earthquake, Turkish President Recep Tayyip Erdoğan declared a State of emergency in the affected regions.[74] *"Every minute, every hour that passes, the chances of finding survivors alive diminishes,"* said Tedros Adhanom Ghebreyesus, World Health Organization director-general.[75] *"Numbers do not tell us about the perilous situation that many families now face, having lost everything [and] forced to sleep outside in the middle of winter."*

In 2019, India experienced a severe heat wave, resulting in water scarcity in certain regions.Interestingly, dengue transmission is closely related to rainfall, humidity and temperature, which, while governed by geographical factors, see an upsurge usually due to climate change. Until November 2022, dengue cases were reported in all States and Union territories within the region, with climate change being linked to the increasing burden of the disease. India alone recorded 63,280 dengue cases by September 30, 2022, thereby exhibiting the

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[72] *Climate Change could have caused an earthquake in Turkey*, ECOPOLITIC, (Feb. 10, 2023), https://ecopolitic.com.ua/en/news/zmina-klimatu-mogla-sprichiniti-zemletrus-v-turechchini-2/.

[73] Staff, *The Coming earthquake is deadly damage*, DAILY NEWS (Dec. 5, 2021), https://www.nydailynews.com/2023/02/26/the-coming-earthquake-is-deadly-climate-change/.

[74] *Erdogan declares State of emergency in 10 quake-hit provinces*, ECONOMIC TIMES (Feb. 7, 2023), https://economictimes.indiatimes.com/news/international/world-news/erdogan-declares-State-of-emergency-in-10-quake-hit-provinces/articleshow/97698933.cms.

[75] Adam Samson and Raya Jalabi, *Erdoğan declares State of emergency in Turkey after deadly earthquake*, FINANCIAL TIMES (Feb. 8, 2023), https://www.ft.com/content/afbd1f50-0e6f-4d51-89ff-9772c5354d9b.

exacerbating changes.[76] Moreover, the reliance on fossil fuels has contributed to elevated levels of heat-related deaths, hunger, heat-related illnesses, and infectious diseases. Global food insecurity also intensified, affecting an additional 98 million people in 2020.[77] Furthermore, Uttar Pradesh, which faced drought conditions until August, encountered sudden heavy rains during the expected retreat of the southwest monsoon, resulting in severe flooding in certain districts.[78] Notably, extreme weather events are becoming more frequent, with India witnessing 300 such events in recent decades, causing a significant economic loss of Rs 5.60 lakh crore ($70 billion) and potentially leading to approximately 740,000 deaths annually.[79]

In the context of such an environmental situation, in 2019, the United Kingdom achieved a significant milestone by becoming the first major economy to pass legislation aimed at eliminating its contribution to global warming.[80] The country set a target to reach Net Zero emissions by the year

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[76] Taran Deol, *Is it climate change that impacts trajectory of dengue in India?,* DOWN TO EARTH (Nov. 11, 2022), https://www.downtoearth.org.in/news/climate-change/is-it-climate-change-that-impacts-trajectory-of-dengue-in-india--85930.

[77] SM Hartinger, *The 2022 South America report of The Lancet Countdown on health and climate change: trust the science. Now that we know, we must act*, THE LANCET REGIONAL HEALTH AMERICAS NATIONAL LIBRARY OF MEDICINE (2023), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10122119/.

[78] Express News Service, *UP facing diverse rain patterns, there is flood as well as drought: CM Adityanath*, THE INDIAN EXPRESS (Aug. 29, 2023), https://indianexpress.com/article/cities/lucknow/up-yogi-adityanath-flood-drought-8913987/.

[79] Frontline News Desk, *India saw extreme weather events almost every day from Jan to Sep 2023: report*, FRONTLINE (Dec. 1, 2023), https://frontline.thehindu.com/news/climate-crisis-india-saw-extreme-weather-events-almost-every-day-from-jan-to-sep-2023-report/article67590713.ece.

[80] Climate Emergency Declaration, *Climate emergency declarations in 2,349 jurisdictions and local governments cover 1 billion citizens*, (2023), https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/.

2050.[81] This commitment has since inspired 2,335 jurisdictions across 40 countries to declare a climate emergency.[82] The combined population residing within these jurisdictions exceeds 1 billion individuals, with over 61 million of them residing in the United Kingdom.[83] Notably, approximately 95% of the British population resides in areas where local authorities, totalling over 570 councils, have declared a climate emergency.[84] Projections indicate that by 2050, these declarations and the subsequent response plans implemented in the UK alone are expected to prevent the release of approximately 2.5 billion tons of CO_2 equivalents into the Earth's atmosphere.[85]

In the case of India, the Union Cabinet approved India's updated climate pledge to the Paris Agreement[86] on August 3, 2022.[87] The agreement aims to restrict global warming to below 2°C, with a preference for limiting it to 1.5°C, in comparison to pre-industrial levels. Initially, India's first pledge, referred to as a Nationally Determined Contribution (NDC), encompassed three primary

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[81] Dominic Carver 7Alan Walker, *Government Policy on reaching NetZero by 2050*, HOUSE OF COMMONS LIBRARY (2023), https://commonslibrary.parliament.uk/research-briefings/cdp-2023-0124/.
[82] *Supra* at note 62.
[83] *Climate Emergency: UK Universities' Declarations and Their Role in Responding to Climate Change*, FRONTIERS (2021), https://www.frontiersin.org/articles/10.3389/frsus.2021.660596/full.
[84] *Supra* at note 62.
[85] *Net Zero by 2050: A roadmap for the Global Energy Sector*, INTL. ENERGY AGENCY (2021), https://www.iea.org/reports/net-zero-by-2050.
[86] *See*, Paris Agreement to the United Nations Framework Convention on Climate Change, T.I.A.S. No. 16-1104 (Dec. 12, 2015).
[87] Avantika Goswami, *India's updated climate pledge to Paris Agreement gets Union Cabinet nod*, DOWN TO EARTH (Aug. 3, 2022), https://www.downtoearth.org.in/news/climate-change/india-s-updated-climate-pledge-to-paris-agreement-gets-union-cabinet-nod-84138#:~:text=India%27s%20updated%20climate%20pledge%20to%20the%20Paris%20Agreement%20received%20the,on%20Climate%20Change%20(UNFCCC).

objectives.[88] Firstly, it aimed to decrease the emissions intensity of the economy by 33-35 per cent below the levels recorded in 2005. Secondly, the target was to achieve 40 per cent of the installed electric power capacity from non-fossil fuel-based energy sources by 2030. Lastly, the objective was to establish an additional carbon sink of 2.5-3 gigatonnes of carbon dioxide equivalent (GtCO2e) by 2030 by expanding forest and tree cover.

According to the Climate Change 2023: Synthesis Report (Report),[89] in order to limit temperature increase to 1.5 degrees Celsius above pre-industrial levels, substantial and immediate reductions in greenhouse gas emissions across all sectors are imperative within this decade. The proposed solution by the IPCC is *'climate resilient development,'* which involves integrating climate change adaptation measures with actions that reduce or prevent greenhouse gas emissions, resulting in broader benefits. To advance the attainment of the Paris Agreement, Antonio Guterres has introduced an *Acceleration Agenda*,[90] which entails commitments from leaders of developed countries to achieve net-zero emissions as close as possible to 2040 and from developing countries as close as possible to 2050. The agenda includes measures such as phasing out of coal, and achieving net-zero electricity generation by 2035 for developed nations and by 2040 for the rest of the world.[91] One major point of focus includes the

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[88] *Cabinet approves India's Updated Nationally Determined Contribution to be communicated to the United Nations Framework Convention on Climate Change*, PRESS INFORMATION BUREAU (Aug. 3, 2022), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812.
[89] Intergovernmental Panel on Climate Change, IPCC PRESS RELEASE (2023), https://www.ipcc.ch/site/assets/uploads/2023/03/IPCC_AR6_SYR_PressRelease_en.pdf.
[90] *Secretary-General Calls on States to Tackle Climate Change 'Time Bomb' through New Solidarity Pact, Acceleration Agenda, at Launch of Intergovernmental Panel Report*, UNITED NATIONS MEETINGS COVERAGE & PRESS RELEASE (Mar. 20, 2023), https://press.un.org/en/2023/sgsm21730.doc.htm.
[91] *Id*, *see,* Acceleration Agenda.

mitigation pathways. In light of the Paris Agreement, Mitigation Pathways consistent with 1.5°C and 2°C carbon budgets imply rapid, deep, and, in most cases, immediate GHG emission reductions in all sectors.[92] The Report[93] exhibits (*figure 1*), focusing from a physical science perspective, limiting human-caused global warming to a specific level requires limiting cumulative CO2 emissions, reaching net zero or net negative CO2 emissions, along with solid reductions of other GHG emissions, thereby exhibiting the need for policies in place.

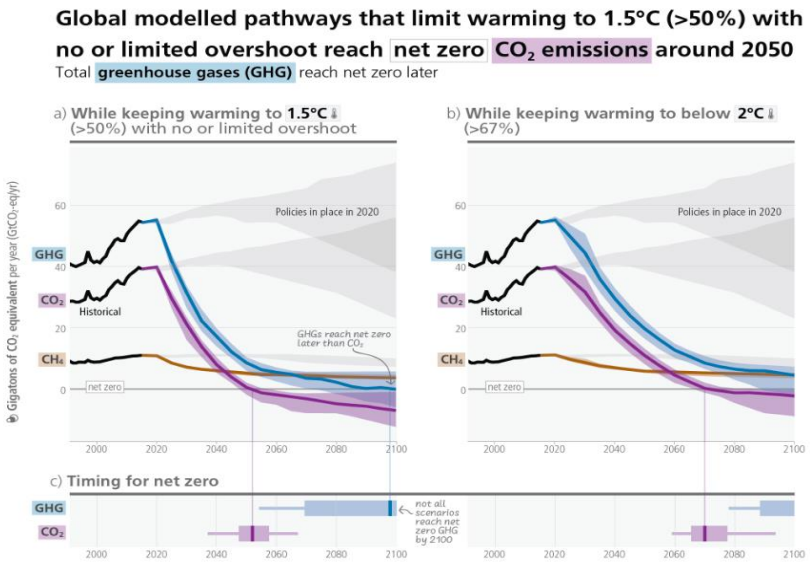

Figure 1[94]: The total GHG, CO2 and CH4 emissions and timing of reaching net-zero in different mitigation pathways

[92] IPCC, *Mitigation Pathways compatible with 1.5 degree C in the context of sustainable development*, https://www.ipcc.ch/sr15/chapter/chapter-2/.
[93] IPCC, *Climate Change 2023: Synthesis Report*, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf.
[94] *Id*, at 86.

The authors emphasise the imperative of undertaking proactive measures to address the climate emergency, which includes the declaration of a State of climate emergency. By acknowledging the urgency of the situation and taking appropriate actions, the authors argue that society can effectively confront the challenges posed by climate change.

B. Emergency & Ecocide

As a second limb for justification of the need, environmental experts consistently advocate for the necessity of criminalising ecocide, both at the domestic and international levels. The global encouragement to classify ecocide as a crime, particularly during times of war, is evident within international law and the Rome Statute.[95] The crucial link between criminality and Constitutional provisions lies in the recognition of ecocide as a criminal offense. International laws, like the Rome Statute, advocate for prosecuting ecocide during times of war. Several countries have also enshrined this principle in their domestic legislation, reflecting a global push to hold individuals and entities accountable for environmental harm.[96] This recognition underscores the importance of legal mechanisms in addressing the ecological crisis. Moreover, American environmental theorist Patrick Hossay has drawn attention to the significant role of the 'human species' in perpetuating an ongoing crisis of extinction and ecocide.[97] This crisis is often attributed to the unsustainable practices adopted by corporations in response

[95] CARSTEN STAHN, ENVIRONMENTAL PROTECTION AND TRANSITIONS FROM CONFLICT TO PEACE: CLARIFYING NORMS, PRINCIPLES, AND PRACTICES 220-254 (2017).
[96] Saumya Kalia, *Explained | The global push to make ecocide a crime*, THE HINDU (Sept. 4, 2023), https://www.thehindu.com/sci-tech/energy-and-environment/explained-the-global-push-to-make-ecocide-a-crime/article67241080.ece.
[97] Isabel Liao & Tharun Pranav, *The criminalisation of ecocide - an Indian perspective*, 7(2) NUJS L. R. 52, 52-59 (2022).

to the escalating consumer demands in a capitalistic environment. In contrast to the International Criminal Court's position, domestic laws define ecocide on a smaller scale, referring to the overall harm inflicted upon the environment by a range of entities, including individuals and large enterprises, within a particular country.[98] The term 'ecocide' is employed to encompass the broader damage caused to the environment under these national legal frameworks.[99]

The current State of environmental legislation is only beginning to address the issue of holding corporations and companies accountable for their actions leading to environmental damage.[100] A notable example is the *Union Carbide Corporation v. Union of India* case[101] in 1984, where the victims of the Bhopal Gas Tragedy received inadequate compensation, and the Indian Government took on much of the responsibility for their well-being, including providing specialiszed hospitals and addressing contaminated groundwater. Meanwhile, the responsible individuals, particularly the foreign company owner who neglected pipe maintenance leading to the methyl isocyanate leak, evaded punishment.[102] Similar situations can be observed in cases such as *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[103] and *MC Mehta v. Union of India,*[104] where corporations faced Court orders. Therefore, significant progress is still needed to ensure effective criminal liability for corporate environmental offenses.

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[98] *Supra* at note 88, *Acceleration Agenda*,
[99] *Supra* at note 91.
[100] *Greenwashing- the deceptive tactics behind environmental claims,* UNITED NATIONS, https://www.un.org/en/climatechange/science/climate-issues/greenwashing (last visited Apr. 15, 2024).
[101] Union Carbide Corporation v. Union of India, AIR 1992 SC 248.
[102] *Supra* note 95, Liao & Pranav.
[103] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.
[104] MC Mehta v. Union of India, AIR 1987 SC 965.

However, the decriminalisation could disproportionately benefit corporations and companies, as they are significant contributors to environmental damage and pollution. These entities could easily accommodate higher environmental penalties if the laws were revised, potentially favouring a specific section of society. While a detailed discussion on the implications of decriminalization is complex and warrants separate consideration, maintaining criminal provisions is crucial for upholding the integrity of environmental protection efforts. It ensures that those responsible for significant environmental harm face meaningful consequences, thereby promoting deterrence and accountability. Furthermore, the proposed penalties in the Acts[105] under consideration are insufficient to effectively discourage such violations.

Having justified the criminalisation of ecocide, it is imperative to discuss how it can be implemented. In the global discourse surrounding ecocide, most commentators primarily focus on the potential amendment of the Rome Statute, neglecting the exploration of the possibility of establishing an Independent Environmental Criminal Court (IECC).[106] Contrarily, the establishment of IECC may prove to be more feasible option comparable to amending the Rome Statute, keeping in mind factors such as *mens rea*[107] and *ecocentrism*.[108]

Several countries have established robust administrative tribunals that offer accessible avenues for individuals to challenge environmental permits or

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[105] Environment (Protection) Amendment Rules, 2022.
[106] Jojo Mehta & Julia Jackson, *To stop climate disaster, make ecocide an International crime. It's the only way*, THE GUARDIAN (Feb. 24, 2021), https://www.theguardian.com/commentisfree/2021/feb/24/climate-crisis-ecocide-international-crime.
[107] R.D. WHITE & DIANE HECKENBERG, GREEN CRIMINOLOGY: AN INTRODUCTION TO THE STUDY OF ENVIRONMENTAL HARM (2014).
[108] *Id*, at 45-59.

illegal environmental activities. These administrative tribunals have been recognised as facilitators of access to justice, providing remedies in cases where Constitutional rights to a healthy environment may be violated. One illustrative example is Costa Rica, where the Environmental Administrative Tribunal, established under the 1995 Environment Act No. 7554, possesses jurisdiction to address complaints related to violations of environmental and natural resource protection laws (Article 111).[109] Despite the absence of an explicit recognition of a right to the environment in its Constitution, India has implemented a robust mechanism to address environmental issues. The establishment of the National Green Tribunal in July 2011 has played a significant role in addressing environmental harms; however, its efficiency is a discussion for another day.[110]

In matters concerning the well-being of the environment, which is inherently interconnected with the land, future generations are the stakeholders. Environmental law emphasises the principle of "intergenerational equity", recognising the responsibility of the present generation to utilise available resources without compromising the ability of future generations to do the same, which brings us to the next section of this piece.

IV. Proposed Policy

The establishment of the Environmental Impact Assessment (EIA) procedure in India, governed by the Environment (Protection) Act, 1986 can be traced back to the 1992 Rio Declaration,[111] which underscored the importance of

[109] THE ECONOMIST INTELLIGENCE UNIT, http://country.eiu.com/article.aspx?articleid=211299405 (last visited Apr. 15, 2024).
[110] Rengarajan, S., Palaniyappan, D, et al. *National Green Tribunal of India—an observation from environmental judgements*, ENVIRON SCI POLLUT RES 25, 11313–11318 (2018).
[111] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (12 August 1992).

involving the public directly in environmental decision-making processes. This legislation mandates comprehensive environmental assessments for proposed projects. It ensures that potential environmental risks are identified and managed before project approval. Moreover, the International Association for Impact Assessment, an international body composed of professionals engaged in assessing the social and environmental impacts of projects, defines EIA as the systematic process of identifying, predicting, evaluating, and mitigating the physical, social, and other pertinent effects of development proposals before significant decisions are made and commitments are undertaken.[112]

There is an increasing consensus that comprehensive and timely stakeholder involvement is crucial for effective environmental assessment, as well as for project planning, evaluation, and development in general. Studies, such as the one conducted by Mwalyosi and Hughes in Tanzania, have shown that EIAs that successfully engage a wide range of stakeholders tend to result in more influential assessment processes and, consequently, in development that yields greater environmental and social benefits.[113] Conversely, EIAs that lack inclusivity often have limited influence on planning and implementation, leading to higher social and environmental costs.[114]

As an affirmative action, Ghana has implemented a commendable approach to enhancing accessibility to environmental law and administrative processes for communities lacking legal literacy. The AKOBEN program, initiated in 2010

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[112] Vikrant Yadav, *Environmental Impact Assessment: A critique on Indian Law and Practices*, 5(1) INTL J. OF MULTIDISCIPLINARY RESEARCH AND DEV. 1, 1-5 (2018).
[113] Ross Hughes, *Environmental Impact Assessment and Stakeholder Involvement*, INTL INSTITUTE FOR ENV. AND DEV. (1998).
[114] *Id.*

and executed by the Ghanaian Environmental Protection Agency (GEPA), serves as a notable example.[115] The program employs a five-colour rating scheme to evaluate the performance of mining and manufacturing operations, presenting information in a user-friendly manner that can be easily comprehended by the public. Similarly, the South African Department of Environmental Affairs publishes an annual report on enforcement activities, which empowers civil society to take legal action and criticise companies engaged in illegal environmental activities.[116] In Canada's province of Ontario, the Environmental Registry[117] provides public access to environmental information and proposed initiatives in compliance with the Ontario Environmental Bill of Rights, which aims to protect the right to a healthy environment.[118]

Simultaneously, it is imperative to seek EIA in the context of stakeholder participation. It entails a process whereby individuals or groups with a vested interest in a project actively engage in decision-making regarding its planning and management.[119] In light of stakeholders' interests, there is a need to transition from an anthropocentric perspective to a stewardship approach.[120]

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[115] GHANA ENVIRONMENTAL PROTECTION AGENCY, http://www.epaghanaakoben.org/ (last visited Apr. 15, 2024).
[116] SOUTH AFRICAN DEPARTMENT OF ENVIRONMENTAL AFFAIRS, https://www.environment.gov.za/mediarelease/necer_201213report (last visited Apr. 15, 2024).
[117] ENVIRONMENTAL REGISTRY, GOVERNMENT OF ONTARIO, http://www.ebr.gov.on.ca/ERS-WEB-External/content/about.jsp?f0=aboutTheRegistry.info&menuIndex=0_1 (last visited Apr. 15, 2024).
[118] Ontario Environmental Bill of Rights, 1993, CHAPTER 28, § 2, No. 28, Acts of Legislative Assembly of Ontario, 1993 (Ontario).
[119] Bridget Kafui Anthonio-Apdezi, *Environmental Impact Assessment-Towards the concept of Sustainable development*, (Jan. 9, 2019) (unpublished Ph.D. thesis, Birmingham University) (on file with the Birmingham University).
[120] Bennett, N.J., et al., *Environmental Stewardship: A Conceptual Review and Analytical Framework*, ENVIRONMENTAL MANAGEMENT 61, 597–614 (2018).

Initial analysis indicates five key leverage points within the framework where governmental and non-governmental organisations strive to promote environmental stewardship through various interventions.[121] These include: (1) introducing new actors, (2) providing incentives, (3) strengthening local capacity or institutions, (4) supporting the implementation of specific actions, and (5) monitoring and evaluating the outcomes of stewardship to facilitate adaptive management. Traditionally, stewardship has been associated with the concept of guardianship, involving a long-term relationship between stewards, the land, and both human and non-human beings under their care.[122] This approach shall foster (a) inter-generational equity, (b) environmentally sustainable growth and not mere development, and (c) precautionary principle enforcing the first two.

To this, India's highly centralised federal structure sits uneasily with the problem. The top-heavy Indian federal system is out of sync with the bottom-up nature of the climate problem.[123] The 2023 Joshimath incident was a disaster waiting to happen, where the calamity struck the town of Joshimath when torrents of water gushed out of its lower slope on the night of 2 January.[124] The ecologists blame the NTPC hydropower project as a proximate cause.[125] Over the proclaimed expansion, red flags that were not heeded

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[121] RESEARCH GATE, https://www.researchgate.net/publication/321329030_The_concept_of_stewardship_in_sustainability_science_and_conservation_biology (last visited Apr. 15, 2024).
[122] Jennifer Welchman, *A defence of Environmental Stewardship*, 21(3) ENVIRONMENTAL VALUES 297 (2012).
[123] IDEAS FOR INDIA, https://www.ideasforindia.in/topics/environment/reimagining-indian-federalism-in-the-climate-crisis.html (last visited Apr. 15, 2024).
[124] Joydeep Gupta, *Opinion: Joshimath was a disaster waiting to happen, but nobody paid heed,* SCROLL (JAN. 11, 2023), https://scroll.in/article/1041559/opinion-joshimath-was-a-disaster-waiting-to-happen-but-nobody-paid-heed.
[125] Vishwas Mohan, *Experts blame hydro-power projects, mindless growth in ecologically fragile region for Joshimath crisis*, THE TIMES OF INDIA (Jan. 8, 2023),

attention had been raised. Voices from Joshimath have arisen against a tone-deaf approach to the well-being of locals.[126] Back in 2014 too, the State government of Uttarakhand had recognised the imminent risks and approved the establishment of a 4,179 square km eco-sensitive zone in the Bhagirathi Valley.[127] However, in May 2013, Uttarakhand Chief Minister Vijay Bahuguna opposed the decision, calling for a review and asserting that the State's consent was not obtained, highlighting the need for concrete Centre-State relations or, 'ecological federalism.'[128] Consequently, the Centre's decision had a detrimental impact on hydroelectric projects spanning the extensive stretch of the river between Gomukh and Uttarkashi regions in Uttarakhand, affecting projects with a capacity exceeding 1,743 megawatts.[129]

In light of federalism, the 42nd amendment to the Constitution in 1976[130] and the enactment of the Environmental Protection Act in 1986[131] marked a significant phase in the establishment of Green Federalism in India. The Constitution does not specifically mention 'environment' as a separate entry in the legislative rights schedule. Instead, 'land' and 'water' fall under the jurisdiction of the States, 'forests' and 'wildlife' come under concurrent

https://timesofindia.indiatimes.com/india/experts-blame-hydro-power-projects-mindless-growth-in-ecologically-fragile-region-for-joshimath-crisis/articleshow/96836089.cms.

[126] Livemint, *Joshimath's emergency memo on sustainability*, MINT (Jan. 10, 2023), https://www.livemint.com/opinion/online-views/joshimaths-emergency-memo-on-sustainability-11673281704140.html.

[127] *Approval accorded to Zonal Master Plan of Bhagirathi Eco-Sensitive Zone* (July 17, 2020) (on file with the Ministry of Environment, Forest and Climate Change).

[128] Denise Scheberle, *Environmental Federalism and the Role of State and Local Governments* in THE OXFORD HANDBOOK OF U.S. ENVIRONMENTAL POLICY (2012).

[129] Hughes, *supra* note 120.

[130] THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976, NO. 91, ACTS OF PARLIAMENT, 1976 (India).

[131] The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

jurisdiction, and 'environment' as a whole is considered a residuary subject.[132] The power of Parliament to legislate on environmental matters can be traced back to Article 252,[133] which allows two or more States to delegate their powers to the central government for enacting legislation on subjects listed in the State List. For instance, the States of Bihar (now Jharkhand) and Bengal authorised Parliament to legislate for the establishment of the Damodar Valley Corporation.[134] In a similar vein, the Parliament, under Article 252, enacted India's first specialised legislation for environmental protection, the Water (Prevention and Control of Pollution) Act, 1974.[135]

Ecological federalism plays a significant role in environmental matters for three reasons. Firstly, the environment is a concern that affects all citizens, regardless of territorial boundaries. It is essential to adopt a unified approach to protect and conserve the environment, without compromising the availability of resources and the political capacity to manage it. Secondly, federal legislations do not aim to centralise command and control over environmental matters. Instead, States are entrusted with responsibilities and administrative roles in environmental protection. The granting of consent for industrial establishments, resource access permissions, and ensuring environmental quality are examples of State-centric approaches in environmental legislation. Thirdly, State governments have a primary role, as outlined in Article 256,[136] in the enforcement and implementation of

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[132] THE ENERGY AND RESOURCES INSTITUTE, https://www.teriin.org/eventdocs/files/disc-paper-gfi.pdf (last visited Apr. 15, 2024).
[133] INDIA CONST. art. 252.
[134] The Damodar Valley Corporation (Amendment) Act, 2011, No. 1, Acts of Parliament, 2012 (India).
[135] The Water (Prevention and Control of Pollution) Act, 1974, No. 6, Acts of Parliament, 1974 (India).
[136] INDIA CONST. art. 256.

environmental laws. State Pollution Control Boards, State governments, and the Ministry of Environment are involved in the decision-making process of granting environmental clearances for projects in EIA alongside stakeholders.[137] They can also enforce the conditions and compliance requirements specified in such licenses and grants.

Subject to eco-federalism discourse,[138] to bring a balance in the Centre-State relations in dealing with such calamities, an amendment can be considered by the parliament in this regard. Also, environmental principles of protection (precautionary, liability etc.) might be added in brief in the Constitution itself so that environmental protection trickles down[139] to the basic levels of governance and the last citizen of the country, prior to that, it is imperative that anticipated challenges be considered, hence the following section.

V. Challenges to Address While Placing the Rights

Within certain communities, a notable 'knowledge gap' persists regarding the intricate interdependencies between human rights and the environment. The European Court of Human Rights has emphasised that the right to a healthy environment should be more than a symbolic provision and must be effectively upheld. This view was expressed in a case concerning noise pollution in Spain.[140] Numerous successful lawsuits have demonstrated the power of legal action in addressing environmental issues. For instance, the

[137] Hadden, *supra* note 125.
[138] C. Hunold, *Canada's Low-level Radioactive Waste Disposal Problem: Voluntarism Reconsidered*, 11 ENVTL. POL. 49, 49-72 (2002).
[139] SCIENTIFIC REPORTS, https://www.nature.com/articles/s41598-022-25940-6 (last visited Apr. 15, 2024).
[140] *See* Moreno Gómez v. Spain, ECtHR (application No 4143/02) judgment, 16 February 2005.

Urgenda climate case in the Netherlands,[141] the *Port Lamu* cases in Kenya[142] involving a coal mine and port development, significant pollution cases in the Philippines[143] and Argentina,[144] and the *Dejusticia* case[145] on deforestation in Colombia have made notable impacts in promoting environmental protection and sustainability through legal means.

However, the right to a healthy environment, akin to other Constitutional guarantees of human rights, is subject to limitations. Constitutions may incorporate four types of provisions that restrict all or specific aspects of the recognised rights. Firstly, many Constitutions feature generic provisions authorising restrictions on human rights to serve the public interest in areas such as security, order, health, or the exercise of other rights. For instance, Canada's Charter includes Section 1,[146] which permits reasonable limits on rights and freedoms justifiable in a free and democratic society, on similar note, Kenya's Constitution permits restrictions on rights in the interest of national security, public order, or health.[147] Secondly, Constitutions may explicitly empower restrictions on rights during emergency situations, such as wars, invasions, or natural disasters. Emergency provisions may identify specific rights that can be suspended or those that remain inviolable even during times of crisis. Thirdly, in some developing nations, the right to a

[141] State of the Netherlands v Urgenda Foundation, Supreme Court of Netherlands, ECLI:NL:HR:2019:2006 (2019).
[142] Mohamed Ali Baadi v. Attorney General, High Court of Kenya at Nairobi, No. 22 of 2012, 2018; Save Lamu et. al v. National Environmental Management Authority and Amu Power Co. Ltd., Tribunal Appeal No. Net 196 of 2016,[2019] eKLR.
[143] MMDA v. Concerned Residents of Manila Bay, 574 SCRA 661 (2008).
[144] Mendoza Beatriz Silva v. National Government of Argentina, M. 1569. XL (2008).
[145] DeJusticia (Rodríguez Peña and others) v. Colombia, Supreme Court of Colombia, STC4360-2018 (2018).
[146] Constitution Act, 1982, Part I, §1, No. 11, Acts of Parliament, 1982 (Canada).
[147] Constitution of Kenya, 2010, Chapter 14.

healthy environment is circumscribed by the concept of progressive implementation, recognising the differing capacities and resources of individual nations in upholding, safeguarding, and fulfilling human rights. Turkey's Constitution exemplifies this, stating that the State shall fulfill its duties within its financial resources, prioritising accordingly.[148] On the other hand, generally countries, depending on their resources and infrastructure uphold and recognise the importance of environmental conservation. Fourthly, a limited number of Constitutions contain provisions seemingly unrelated to the right to a healthy environment, yet effectively restrict its application. For instance, in the Maldives, non-Muslims do not appear to enjoy equal Constitutional rights, including the right to a healthy environment.[149]

In contrast to the majority of nations that incorporate the right to a healthy environment within their Constitutions, a select few adopt a distinctive Constitutional model that delves into environmental policies with comprehensive detail, resembling environmental legislation commonly found in countries like Canada, thereby highlighting the disparity.[150] Switzerland's Constitution, for instance, includes explicit provisions on zoning, water management, forest conservation, nature reserves, fishing regulations, protection of alpine ecosystems, energy policy, and biotechnology.[151] Ecuador's new Constitution also features an array of environmental clauses, including the prohibition of genetically modified organisms, a reversal of the burden of proof in environmental harm cases, where the accused must demonstrate their actions did not cause harm, a mandate to interpret

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[148] TURK. CONST.
[149] DAVID SUZUKI FOUNDATION, https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf (last visited Apr. 15, 2024).
[150] *Id.* at 8.
[151] R. WOLFRUM & GROTE, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (2010).

environmental laws in favor of nature in cases of uncertainty, and a requirement to promote non-motorised forms of urban transportation, particularly through the establishment of cycling routes.[152] The challenge lies in ensuring that environmental rights are not only recognized in Constitutions but also backed by detailed and comprehensive provisions that facilitate effective implementation and enforcement.

Certain Constitutions go further by specifically mandating legislation, planning processes, or budgets aimed at ensuring adequate environmental protection. For example, Brazil's Constitution stipulates the necessity of a prior environmental impact study, to be made public, for the establishment of projects or activities that could lead to significant environmental degradation.[153] Argentina's Constitution requires the federal government to enact laws with a minimum budget allocation for environmental protection.[154] Similarly, Portugal's Constitution obliges the government to ensure that tax policies align with sustainable development and the preservation of the environment and quality of life.[155] These examples demonstrate how a handful of nations integrate comprehensive environmental provisions within their Constitutions, delineating specific environmental rights, procedures, and mandates to ensure the effective protection of the environment.

In light of international agreements, at COP26,[156] countries reached an agreement to prioritise the achievement of the 1.5°C limit, necessitating a peak in global emissions by 2025, a 50% reduction by 2030, and eventually

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[152] ECUADOR CONST. art. 395 §4, 397 §1, 401, and 415.
[153] *Id;* BRAZIL CONST. art. 225 §1 §§ V.
[154] *Id;* ARGENTINA CONST. art. §41 §§3.
[155] *Id;* PORTUGAL CONST. art. 66 §2 §§h.
[156] UNITED NATIONS, https://www.un.org/en/climatechange/cop26 (last visited Apr. 15, 2024).

achieving net zero emissions by 2050. As of November 2022, approximately 140 countries had announced or were considering net zero targets, encompassing nearly 90% of global emissions. However, these pledges have proven to be insufficient. Expectations were high that COP27[157] would secure stronger commitments for emissions reductions to align with the 1.5°C target. Unfortunately, only a small portion of the nearly 200 participating parties in the climate summit have updated their national climate targets to be in line with this goal. Most significantly, efforts to incorporate a commitment to phase out or at least reduce the use of all fossil fuels in the final COP27 agreement, the *Sharm el-Sheikh Implementation Plan*,[158] were hindered by oil-producing countries and high-emitting nations. India is highly vulnerable to the impacts of climate change and has consistently ranked among the most affected countries by extreme weather events in recent years.[159]

VI. Towards a Greener Constitution

Acknowledging the imperative to transition towards a more environmentally conscious Constitution, it is evident that the Indian Constitutional framework faces a host of pressing challenges. These challenges span a wide spectrum, encompassing issues such as hate crimes, competitive federalism, agricultural reform, and more. While these themes warrant thorough deliberation and statutory action, the prospect of amending the Constitution to imbue it with green and sustainable principles presents an entirely different domain that may

[157] UNFCCC, https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-key-takeaways-from-cop27 (last visited Apr. 15, 2024).
[158] UNITED NATIONS, https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries (last visited Apr. 15, 2024).
[159] GERMAN WATCH, https://www.germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_2.pdf (last visited Apr. 15, 2024).

require less deliberation and wider acceptance. The contention presented through the course of this article is the dichotomy of environment versus development at the cost of negotiating development via interpretation of specific provisions of the Constitution, not as ‘environmental’ provisions, but as ‘ecological’ provisions. We have already seen how global best practices supply enough guidance on establishing a ‘forward-looking’ sustainable Constitutional framework. We need to apply those guiding blocks in the Indian socio-economic-cultural context to secure an ecological Constitution for ourselves. In conclusion, the authors not only advocate for the imperative of ecological Constitutionalism but also advocate for changes aligned with 'ecological federalism.' Moreover, they emphasize the necessity of a comprehensive and participatory approach to Constitutional interpretation—one that incorporates the diverse needs and perspectives of all stakeholders. Ultimately, the call is for a paradigm shift from anthropocentric laws towards a stewardship approach, steering India towards a greener and more sustainable future.

Introspecting the Efficacy of 'Leniency Plus' in India in Light of the Recent Competition (Amendment) Act, 2023: Transplantation Gone Wrong?

Manoj Arvind P.*

Abstract

The Leniency Plus system has been brought into the Indian Competition Law regime to incentivise a leniency applicant (existing applicant) of an existing cartel, to provide information about a second cartel, which is not known to the Competition Commission of India (CCI). The US anti-trust system works on the principle of 'deterrence' through criminal sanctions under Section 1 of the Sherman Act, 1890. A similar model can also be seen in countries like the UK, Canada and Brazil. Rudimentarily, if an applicant while disclosing their involvement in a cartel to the CCI also gives information about the existence of another cartel so as to enable the CCI to form a prima facie opinion under Section 26(1) of the Competition Act, 2002, they can avail further reduction in penalty. In India, this works on a civil-penalty metric as opposed to the criminal deterrent system that exists in the US. In the US, if one applicant fails to disclose their involvement in another cartel, and if the other cartel is later found by the antitrust authorities, it would be considered as an 'aggravating factor' in determining penalties for the applicant. This 'penalty plus' factor is missing in the leniency plus regime in India. Furthermore, the omnibus question in the US jurisprudence also involves asking questions to witnesses as to whether they know of any other anti-competitive practice. Any attempt at lying during the same would be considered as 'perjury' with increased criminal sanctions. It is, therefore argued that both the 'penalty plus' and the 'omnibus question' fortify the efficacy of the amnesty plus regime in the US, and the recent transplantation of a similar system into the Indian competition regime, sans incorporating the aforementioned accessory elements, would not

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yield the desired effects. This proposition is advanced in this paper, through: i) A brief exposition of the background of leniency/leniency plus regime in India; ii) An analysis of the data (from 2012 to 2022) as to the CCI's tryst with the leniency applications to gauge the efficacy of the existing leniency regime; iii) Canvassing the foreign jurisdictions, to flag plausible problems in the transplanted graft in India and: iv) Conclusions and Recommendations to bolster the system in India.

I. Introduction

At the very outset, it is unequivocal that cartels constitute the most pernicious offence under any anti-trust regime in the world.[1] By and large, the powers of the anti-trust regulators (i.e. Competition Commission of India (CCI) in the instant case) are conspicuously hamstrung in collecting evidence for cartel violations.[2] For instance, in *MDD Medical Systems India (P) Ltd. v. CCI*,[3] the COMPAT acquitted the appellants owing to lack of evidence, stating that conviction cannot be sustained on the anvil of circumstantial evidence alone, thereby overturning the CCI's decision holding the Appellants guilty. Thus, the prosecution of the offenders for the same has always been a nightmare for the CCI. In this regard, the leniency policy is considered the biggest asset for the CCI in undertaking the prosecution of cartels. At this juncture, the recently-introduced leniency plus system, intends to incentivize the existing cartel members to disclose the existence of the second cartel, in order to get a further reduction in penalty.

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[1] Lubna Fairoze, *Cartelization in the Indian Competitive Market*, 3 INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES 3 (2016).

[2] Nisha Kaur Uberoi, *Investigation of Cartels: A Comparative Assessment of the Approaches Adopted by the Indian and EU Competition Regulators,* 1 NATIONAL LAW SCHOOL BUSINESS L. REV. 6 (2015).

[3] MDD Medical Systems India (P) Ltd. v. CCI, 2013 SCC OnLine Comp.

Section 46 of the Competition Act, 2002, explicitly provides for the leniency application in India. Under the banner of Section 46, while the Lesser Penalty Regulations were introduced in 2009 in India, the lesser penalty was granted for the first time only in 2017 in the *Brushless DC fans* case,[4] after nine long years from its introduction. Furthermore, the 'leniency plus' regime was introduced in India via the recent 2023 Amendment to the Competition Act, 2002, as an upshot of the Competition Law Review Committee Recommendations in 2019.

The Amnesty Plus regime, which was introduced in the mid-1990s in the US served as an inspiration for the said inclusion of the 'plus' regime in the extant leniency programme in India via the Competition (Amendment) Act, 2023. Furthermore, no study about the leniency regime can be made without factoring in the practical difficulties involved in probing the cartel offences. The leniency under the Competition Act is limited only to penalties and does not extend to immunity from prosecution.

As far as the precincts of the available literature are concerned, research has been conducted regarding the efficacy of the leniency and 'leniency plus' regimes in India,[5] but no comparative study has been made between them and also with reference to the US system.

Furthermore, the instant paper aspires to canvass empirically, the trends in the number of leniency applications received by the CCI under the leniency

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[4] *In Re:* Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, (2014) Case No. 03 of 2014 (Competition Commission of India).

[5] Anik Bhaduri, *Sweeter Carrots, Same Stick: Transplanting Leniency Plus into Indian Competition Law,* INDIAN L. REV. 26 (2023).

regime to gauge its efficacy, in order to evaluate whether the leniency plus regime would meet its intended object.

II. Chapters

A. Background of the extant leniency regime in India

It would not be an exaggeration to assert that the most vital contributing factor to the worldwide cartel investigations and prosecutions is the adoption of leniency programs in some form. Cartels impact the overall competitive nature of a market, jeopardising the welfare of consumers and other competitors existing outside the market. In India, cartels impact the economy by restricting the output up to 20%, hiking prices by around 10% of the final price.[6]

i. Leniency's tryst with cartels

Fundamentally, cartels can be understood as: *"any anticompetitive concerted practices (or arrangement), by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce".*[7]

The Competition Commission of India (CCI) is India's fair market watchdog, vested with the duty to prevent the incidence of cartels, *inter alia,* since they have adverse effects on the market dynamics per se, leading to an information asymmetry amongst the market players. Section 3 of the Competition Act,

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[6] Vincent S. Abraham & Catarina Marvao, *Leniency of the Competition Commission of India,* (Working Paper Presented at 7th National Conference on Economics of Competition Law Competition Commission of India March 4, 2022), https://www.cci.gov.in/public/images/economicconference/en/paper-on-leniency-of-the-competition-commission-of-india1663219827.pdf.

[7] OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels,* C (98)35/FINAL (1998), https://one.oecd.org/document/C(98)35/FINAL/en/pdf.

2002 *per se* prohibits any agreement, which has Appreciable Adverse Effects on Competition (AAEC).

The cartel agreements are presumed to have AAEC, the assessment of which requires the consideration of the factors set out under Section 19(3) of the Act. One main problem that surfaces here is that, proving the offence of cartel requires a significantly greater degree of evidence, which is nearly impossible for the CCI to obtain, given its hamstrung powers. Let alone proving, even the process of detection of cartels remains *de hors* the powers of the CCI.[8]

Exemplifying the standard of proof aspect, in the EU, for establishing the infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU), the "*sufficiently precise and coherent"* standard has consistently been maintained by the EC.[9] The said standard can be achieved only by the establishment of circumstances constituting the infringement, considering the difficulty in always obtaining direct evidence for the cartel offence.[10] In the Indian milieu, based on the CCI's previous decisions, the standard of proof for cartel offences is the same as that of civil offences, i.e., the balance of probabilities test.[11]

It is a universal rule that direct evidence holds more weightage than indirect/circumstantial evidence. However given the clandestine nature of cartels, circumstantial evidence is held admissible as can be evinced from the

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[8] Nisha Kaur Uberoi, *Investigation of Cartels: A Comparative Assessment of the Approaches Adopted by the Indian and EU Competition Regulators,* 1(1) NLS BUSINESS L. REV. 6 (2015).

[9] Case 29 and 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v.Comm'n, 1984 ECR 1679.

[10] Case T-332/09, Electrabel v. European Commission, ECLI:EU:T:2012:672.

[11] *In Re:* LPG Cylinder Manufacturers, (2012) Case No 1 of 2014 (Competition Commission of India) 11.

Cement Cartel case.[12] In the said case, it was held that if the circumstantial evidence exists so as to point towards the existence of cartels or anti-competitive practices, then the penalty can be levied.

To garner evidence and to sustain prosecution in cartel offences, the Commission has adopted various methods, like dawn raids and leniency programmes *inter alia.*[13] The leniency program, as mentioned under the Competition Act, fleshed out by the CCI (Lesser Penalty) Regulations, 2009, is the nub of the instant paper.

ii. ‘Leniency plus’- what is there to glean from the US?

Originally, the leniency plus system was introduced in the US two decades back by the Department of Justice (DOJ) in a bid to probe into international cartels.[14] . The said Amnesty Plus witnessed a transplantation in India, as ‘Leniency Plus’ system. This ‘plus’ element is not so common in the leniency programmes, globally. Substantial immunity can be obtained from penalties, since in the *Crompton* case,[15] a firm could secure a 59% reduction by virtue of “exemplary cooperation” with the authorities.[16] However, the said Amnesty Plus system in the US is not a standalone provision, rather its operation is supplemented by two other factors, i.e., Penalty Plus and the Omnibus question.

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[12] Builders Assn. of India v. Cement Manufacturers’ Assn., 2016 SCC OnLine CCI 46.
[13] CUTS International & NLUJ, *Study of Cartel Case Laws in Select Jurisdictions-Learnings for the Competition Commission of India*, COMPETITION COMMISSION OF INDIA (25 April 2008), https://www.cci.gov.in/images/marketstudie/en/docs1652440423.pdf.
[14] R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission* in THIRD ANNUAL CONFERENCE ON INTERNATIONAL AND COMPARATIVE COMPETITION LAW (2003).
[15] US v Crompton Corporation, 399 F.Supp.2d 1047 (ND Cal 2005).
[16] Marek Martiniszyn, *Leniency (Amnesty) Plus: A Building Block or a Trojan Horse?* 3(2) JOURNAL OF ANTI-TRUST ENFORCEMENT 391 (2015).

The first factor, i.e., Penalty Plus, acts as a stick to the carrot of reduced sanctions.[17] This implies that if a cartel member fails to disclose his participation in another cartel, that will be used as an aggravating factor in determining the penalty for the involvement in the first cartel itself. Essentially, 'penalty plus' is a flipside to the 'amnesty plus'. The second factor, i.e., omnibus question, involves positing questions to the witnesses asking if they are aware of any other anti-competitive practices, and any attempt at lying about the same will invite the charges of perjury, punishable with imprisonment for 5 years.[18] The said Omnibus question limits the circumstances, in which prohibited agreements can stay undetected. Thus, the efficacy of the amnesty plus programme in the US is bolstered by the penalty plus and the omnibus question which is absent under the Indian Competition Law.

iii. Contours of leniency and leniency 'plus' policy in India

As stated earlier, the leniency provision was originally enshrined under Section 46 of the Competition Act. This provision was subsequently fleshed out by the CCI through its exercise of powers conferred by sections 64(1) and 64(2)(ga), (gb) and (gc) read with sections 46 and 27(b) of the Competition Act, 2002, which engendered the CCI (Lesser Penalty) Regulations, 2009. The same was subsequently amended in 2017, and replaced recently in 2024.

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[17] Anik Bhaduri, *supra* note 5.

[18] Department of Justice, *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* (19 November 2008), https://www.justice.gov/d9/pages/attachments/2017/01/13/333756.pdf.

The 2009 Regulations have been recently repealed by the CCI (Lesser Penalty) Regulations, 2024, ushering into a 'leniency plus' regime. The said change was by virtue of the Competition Law (Amendment) Act, 2023.[19]

With the efficacy of the leniency regime being questioned, the Competition Law Review Committee (CLRC), in its comprehensive report[20] in 2019, recommended the inclusion of the 'leniency plus' regime in the Competition Act, following which, the Competition Law (Amendment) Act was effectuated in 2023, incorporating leniency plus regime under Section 46(4) of the new Act.[21] Generally, the cartel members would come forward to disclose their participation in the cartels if the investigation is afoot, or if there is a perception among the cartel members that others might deviate and report first to the authorities.[22] This is the law and economics angle to this issue.

In the realm of behavioural economics, cartel is an embodiment of the prisoner's dilemma, wherein the firm in a cartel is seized with two choices: whether to continue with the cartel or to rat out its co-conspirators.[23] The leniency regime seeks to incentivise the firms to cheat on their co-conspirators by positioning it in an incentive matrix. This is premised upon the "race to the Courthouse" phenomenon, wherein the firms race to make disclosures to fully avail the benefit of a reduction in penalty.[24]

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[19] The Competition (Amendment) Act, 2023, No. 12, Acts of Parliament, 2003, § 46(4).

[20] Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee* (July 2019), https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

[21] The Competition (Amendment) Act, 2023, § 46(4).

[22] Ayush Pandey & Shivendra Nath Mishra, *Leniency Regime in India: Recent Developments*, 5 INT'L J.L. MGMT. & HUMAN. 984 (2022).

[23] Christopher R. Leslie, *Trust, Distrust and Antitrust*, 82(3) TEXAS L. REV. 515 (2004).

[24] International Competition Network, *Anti-Cartel Enforcement Manual, Chapter-2: Drafting and implementing an effective leniency policy*, (April 2014),

Furthermore, leniency plus is a modified version of the leniency system, which seeks to bust multi-market cartels, and is based on similar economic reasons. Logically, a firm being investigated for its involvement in a cartel in a particular market A, has no incentives to report its involvement in another cartel in market B, and the leniency plus regime incentivises the firm to make disclosures even in these situations by granting further reductions in penalties for the firm. Notwithstanding its ostensible merits, the lack of advocacy for this programme will be canvassed in the forthcoming sections of this paper.

B. Efficacy of the Indian leniency programme in light of foreign jurisdictions: What the data has to say?

The leniency programme, as introduced in India via the 2009 Regulations, was left on the backburner till 2017, wherein 75% leniency was granted in the *Brushless DC Fans case*.[25] Furthermore, in the *Nagrik Chetna Manch* case,[26] allegations of several companies communicating before lodging the bids for tenders fixing the prices surfaced, and based on the value-added nature of the information given by the applicants, as well as the priority status accorded to the applications, the CCI gave 50% reduction in penalty. Still, a broad gander at the trends in the leniency applications will give some reflections on the flaws in the system.

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https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/01/CWG_ACEM_Investigative_Strategy_CH5-2021.pdf.

[25] CCI, *Cartel Enforcement and Competition*, (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_Cartel2018.pdf.

[26] *In Re:* Nagrik Chetna Manch, (2015) Case No 50 of 2015 (Competition Commission of India).

i. Reliance on the data

Ex facie, the lack of efficacy of the leniency regime can be evinced from the fact that only ten leniency orders were passed after ten years of the inception of the leniency programme in India.[27] *Per contra*, the US antitrust department, after revising its leniency policy in 1993, witnessed an average of one leniency application per month by 2003.[28] The EU witnessed a total of 21 decisions in 9 years from 1996 to 2005, which is astounding.[29] The main reason for the Indian leniency regime not performing up to the mark is the excessive discretion vested with the CCI in deciding the leniency applications, engendering uncertainty in the reduction in penalties, which needs to be resolved.[30]

Time frame	**Number of grants of leniency**		
	No. of Applications	**100 % reduction**	**<100% reduction**
2012-13	Nil	Nil	Nil
2013-14	Nil	Nil	Nil

[27] Karan Chandiok & Ruchi Khanna, *Taking a lenient approach to leniency*, INDIA BUSINESS LAW JOURNAL, 5 December 2019, available at, https://law.asia/taking-a-lenient-approach-to-leniency/ (last visited on Oct. 19, 2023, 5.55AM).

[28] OECD, Directorate for financial and enterprise affairs competition committee, *Roundtable on challenges and co-ordination of leniency programmes-Note by the United States*, DAF/COMP/WP3/WD(2018)33 (May 23, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/leniency_united_States.pdf.

[29] Wouter Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years-World Competition*, 39(3) WORLD COMPETITION 327 (2016).

[30] Aaditya Ranbir Sehgal, *Busting Cartels: The Indian Leniency Regime*, 8(1) NLIU L. R 47 (2019).

2014-15	Nil	Nil	Nil
2015-16	Nil	Nil	Nil
2016-17	1	Nil	1
2017-18(amended)	Nil	Nil	Nil
2018-19	6	19	28
2019-20	1	13	08
2020-21	Nil	Nil	Nil
2021-22	6	37	24

Table 1: Trends in the grants of leniency by the CCI from 2012-2022[31]

From **Table 1**, it can be seen that not even a single leniency application was filed with the CCI till 2017. Further, as of 2022, only 14 leniency applications(Refer to the column 'No. of Applications' in Table 1) have been received by the CCI, which is very minuscule.

Furthermore, the CCI's approach towards waiving the penalty was not uniform after the first leniency application was made. The evidence thus adduced via the leniency application is tested on the anvil of the *'significant*

[31] CCI, *Annual Reports*, (2012-2022), https://www.cci.gov.in/annual-report.

added value' standard. This entails scope for the CCI to subjectively decide whether the produced evidence is a significant value addition to the already existing evidence, gathered by the Director General (DG). The same has resulted in so much uncertainty, owing to the resultant inconsistency in the CCI's approach to granting a reduction in penalties.[32] The quantum of penalty differs between the cases, where the disclosure happens before the initiation of investigation,[33] and where the disclosure happens after the initiation of investigation, despite the informant being the first applicant in both the cases.[34]

The reason for this could be attributed to the enormous discretionary powers that the CCI is armed with. There is no guarantee for a particular reduction in penalties, since there are no laid-out yardsticks to determine the quantum of reduction in penalties. Furthermore, the term *"vital information"* in Regulation 4 of the Lesser Penalty Regulations, 2009 brews ambiguities, and there is a dire need to define the same.

A fortiori, in the period between 2012 and 2022, only fourteen leniency applications were received and processed by the CCI (Refer to Table 1), when compared to other jurisdictions which receive more than 10 annually. Exemplifying the inconsistencies in the CCI's approach in deciding the leniency applications, every leniency filing has merely been seen as a gesture

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[32] CARON BEATON WELLS & CHRISTOPHER TRAN, ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 140 (2015).

[33] *In Re:* Cartelization in respect of zinc carbon dry cell batteries market in India v. Eveready batteries India Pvt. Ltd. & Ors., (2016) Case No 02 of 2016 (Competition Commission of India).

[34] *In Re:* Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, (2014) Case No.03 of 2014 (Competition Commission of India).

of "good faith" while overlooking the satisfaction of the cardinal "vital disclosure" requirement, as can be seen in the *Dry Cell Batteries Case,* wherein in the event of no value addition, the second and third leniency applicants were given reduction in penalties.[35] Thus, it is evident that the said lack of standardisation and consistency[36] compounds the inefficiencies plaguing the leniency regime in India, which will be addressed at the end of the paper.

It is argued on this premise that while the leniency regime itself remains grossly under-utilized, the 'leniency plus' regime attaining its objectives is utopian, although the intent behind the introduction of the same is to provide a fillip in unravelling more and more cartels operating in the multi-market level.[37]

ii. Foreign jurisdictions: leniency regime fares better?

In advanced competition regulation regimes, like the US and the EU, leniency has become the quintessential tool in establishing a case of cartels. In the US, 90% of the fines levied on companies for antitrust violations were due to the assistance rendered by the leniency applications alone from 1996 to 2010.[38]

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[35] *In Re:* Cartelisation in respect of zinc carbon dry cell batteries market in India, *supra* note 32.

[36] Angela Dua, *10 Years of the Indian Leniency Programme: Lessons to be Learned from the US and EU Experience*, KSR COMMERCIAL & FINANCIAL LAW BLOG, 8 June 2020, available at, https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/06/08/10-years-of-the-indian-leniency-programme-lessons-to-be-learned-from-the-us-and-eu-experience-angela-dua/ (last visited on Oct.20, 2023, 9.34PM).

[37] OECD, Directorate For Financial And Enterprise Affairs Competition Committee, *The Future of Effective Leniency Programmes-Note by India* (2023), https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm.

[38] Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades,* (Address before the 24 Annual National Institute on White Collar Crime Feb 25, 2010), https://www.justice.gov/atr/fle/518241/download accessed 15 April 2024.

More than half of the probes into the international cartels happening at that time were initiated on the basis of the information given by the leniency applicants alone.[39]

On the other hand, in the EU, out of 57 cartel investigations, 53 cartels were established solely through the information furnished by the leniency applicants alone (i.e. 93%). This reaffirms the fact that law and economics run through incentives.[40]

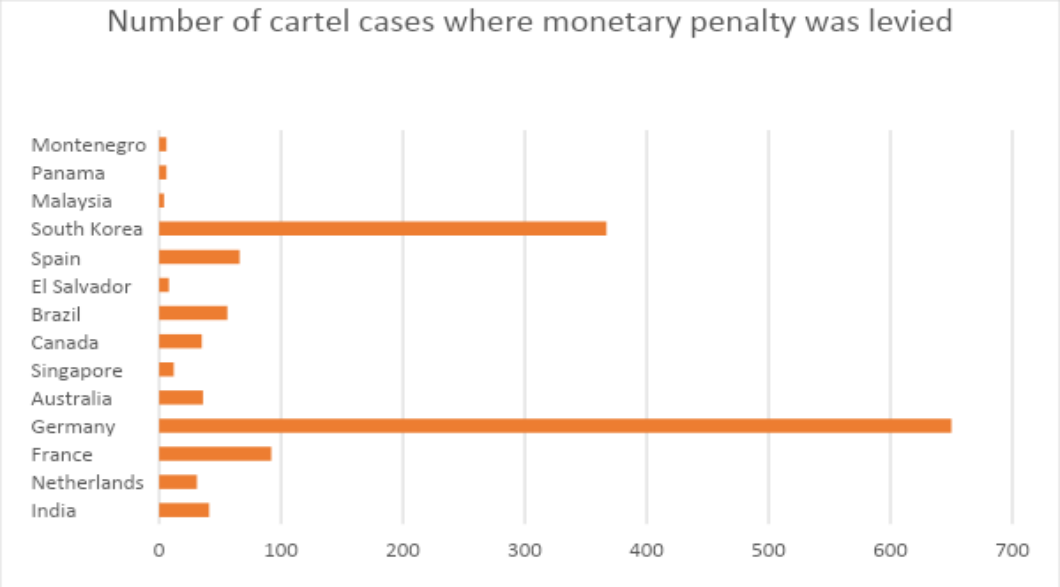

Table 2

Source: CCI, Cartel Enforcement and Competition Report (2018)[41]

[39] *Id.*

[40] O Dominte, D Serban & AM Dima, *Cartels in EU: Study on the effectiveness of leniency policy*, 8 MANAGEMENT & MARKETING 529 (2013).

[41] Cartel Enforcement and Competition, *supra* note 24.

From the above illustration, it is evident that the civil penalty metric system exists in many other jurisdictions like India. It is the general trend that the leniency/leniency plus system works less effectively in countries which have the civil penalty system for cartel offences when compared to the countries wherein the cartels are categorised as criminal offences.[42] In India, the current position regarding the standard of proof for cartel offences is that of "balance of probabilities".[43] Thus, in the author's opinion, making cartels a criminal offence in India would be counter-productive. Because the standard of proof required in criminal cases is the "proof beyond reasonable doubt", which is loftier than the "balance of probabilities" standard, as currently required for cartels being civil offences. It would impose more burden on the CCI to make out a case, which is undesirable for any prosecution.

The requisite level of 'deterrence effect' can be achieved through increasing the quantum of monetary penalties as given under Section 27 of the Competition Act, and can be seen from the EU example too.[44] The EU continues to impose administrative fines on the cartel participants, which is capped at 10% of the company's global revenue, and the perceived real and personal risk of sanctions, acts as a deterrent to some extent.[45] Although from an enforcement perspective, criminalisation of cartels may seem a better

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[42] Harshita Fatesaria, Sakshi Saran Agarwal & Shourya Bhansali, *Making a case of cartelisation*, SCC ONLINE BLOG, available at https://www.scconline.com/blog/post/2021/02/15/cartelisation/ (last visited on Oct. 19, 2023, 6.23PM).

[43] Rajasthan Cylinders and Containers Ltd. v. Union of India & Anr., 2018 SCC OnLine SC 1718.

[44] Ariel Ezrachi & Jioi Kindl, *Criminalization of Cartel Activity-A Desirable Goal for India's Competition Regime?,* 23 NLSIR 9 (2011).

[45] Ken Daly, *Cartels and deterrence–Creeping criminalisation and the class action boom*, 1 BLOOMBERG BUSINESS LAW JOURNAL 315 (2007).

option, the implementation of the same cannot happen in a vacuum, considering various jurisdictional challenges, posited by that.

Thus, on the whole, the efficacy of the leniency regime, as well as the leniency plus regime for that purpose, has been impaired by the incoherent yardsticks employed by the CCI in determining reductions in the penalty, given the highly amorphous character of the standards like "significant added value",[46] vital information and so on.

C. Transplantation of the 'leniency plus' system into Indian Competition Law regime: A shoddy attempt?

The reasons for the inefficiencies of the leniency regime are relevant to the prospective failure of the leniency plus system too. In 2019, the Ministry of Corporate Affairs (MCA) convened the Competition Law Review Committee to evaluate the current operation of the Competition Act, 2002 and to propose changes to the existing regime.

One such change proposed was the introduction of the leniency plus regime, which was inspired by the systems in the US, UK, Singapore and Brazil, which according to the Committee, *"may incentivize applicants to come forward with disclosures regarding multiple cartels…enabling the CCI to save time and resources on cartel investigation".*[47]

In the said report, the entire deliberation on 'leniency plus' was concluded shortly in three paragraphs, by making no reference to the Penalty plus or the Omnibus question, which are present in the US jurisprudence. It is agreed that

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[46] Competition Commission of India (Lesser Penalty) Regulations, 2024, Regulation 4.

[47] Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee*, 93-94 (July 2019), https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

the practice of looking at the competition laws of other jurisdictions to make changes to the domestic regime is not new, since countries like India have a very nascent antitrust jurisprudence.[48]

i. The success of transplanted laws?

Marked by the prevalence of multi-market, as well as multi-jurisdictional cartels, meetings and liaisons, happening across continents, the traditional incriminating documents are destroyed or stashed outside companies, the normal market behaviour being dexterously simulated, the task of unearthing conclusive evidence to sustain a cartel case is herculean. The leniency plus system is said to benefit both the sides, i.e. the CCI (Regulator) and the cartel members, since it helps the former in getting a reduction in penalties for cartel participants in cartels already under investigation, and the latter in conducting investigations within the limited resources.

Even the Indian Competition Act is heavily impacted by the EU and the US legal doctrines.[49] Nonetheless, as Waked argues, transplanted laws are seldom successful.[50] A successful transplant depends on the ability of the pre-existing legal machinery of the State in accommodating the transplant.[51] Clarity,

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[48] MICHAEL S GAL ET AL, THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (2015).

[49] Parliament of India, Parliamentary Standing Committee on Home Affairs, *93rd Report on the Competition Bill 2001*, (2002), https://prsindia.org/files/bills_acts/bills_parliament/2006/bill73_2007050873_Standing_Committee_Report_on_Competition_Bill__2001.pdf.

[50] Dina I. Waked, *Antitrust Enforcement in Developing Countries: Reasons for Enforcement and Non-enforcement using Resource-based evidence,* ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1638874.

[51] Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 3, 17 (1994).

fairness and certainty are vital for any leniency programme.[52]The success of the transplanted 'leniency plus' system in India is fraught with a lot of imponderables, which can be seen below.

ii. Problems and concerns

The CCI Chairperson in a National Conference, jubilantly claimed that *"the enforcement regime is now well-equipped to uncover cartels"*[53] by flagging the leniency programme put in place by the CCI. However, it is argued that the Indian Competition law has failed in properly incentivising the reportage of the cartel activity. It is vital to note that leniency under the Competition Act is confined to the penalties alone and does not extend to granting them immunity from prosecution. Furthermore, the same is left to the discretion of the CCI with no guiding yardstick.[54]

a) Article 20(3) violation?

The reason for a minimal number of leniency applications, as can be evinced from **Table 1** stems from the *modus operandi* of the CCI in granting leniency,[55] i.e., the CCI will evaluate the leniency application only after

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[52] Ashish Kumar Srivastava, *Cartel; Competition and Commerce,* 10 RMLNLU L. J 159 (2018).

[53] Press Information Bureau, *CCI organises a National Conference on Competition Law to celebrate the Azadi ka Amrit Mahotsav as part of Iconic Week of Ministry of Corporate Affairs in New Delhi* (June 11, 2022), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1833169 (last visited on April 22, 2024).

[54] Aroon Menon, *Reforming the cartel leniency regime in India,* BAR AND BENCH, available at https://www.barandbench.com/columns/reforming-the-cartel-leniency-regime-in-india (last visited on Oct. 22, 2023, 5.34 AM).

[55] Angela Dua, *10 Years of the Indian Leniency Programme: Lessons to be Learned from the US and EU Experience,* KSLR COMMERCIAL & FINANCIAL LAW BLOG, available at https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/06/08/10-years-of-the-indian-leniency-programme-lessons-to-be-learned-from-the-us-and-eu-experience-angela-dua/ (last visited on Mar. 12, 2024, 5.36 PM).

conviction of guilt and imposition of sentence on the applicant, which is constitutionally untenable, since it will be directly hit by Article 20(3) of the Constitution. Furthermore, Regulation 10 of the CCI Lesser Penalty Regulations, 2009 stipulates that the information has to be given via an affidavit, and thus the evidence is affirmed, which concomitantly leads to their conviction. The same requirement is transplanted as an "admission", which is required in a leniency application, as stated in Schedule I to the recent Lesser Penalty Regulations (LPR), 2024.[56]

The CCI is empowered under Section 46 of the Competition Act, 2002 to impose lesser penalties on the applicants, making "full and true" disclosures, pertaining to a cartel. As a slight detour, parallels can be gleaned from the concept of 'approver', which exists under Section 306 of The Code of Criminal Procedure, 1973 (CrPC). Under the said provision, the Court has powers to tender pardon in criminal cases, in the event of full and true disclosures.[57] The flipside to the leniency provision under the Competition Act, 2002 is that it is limited to the grant of penalties alone, and there is no immunity from prosecution of the applicants.

The same is compounded by the lack of consistency in the CCI's approach towards the grant of leniency. Contrasting from the treatment of 'approver' under the CrPC, where on becoming an 'approver', the status of an accomplice shifts from that of an 'accused' to that of a prosecution witness.[58]

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[56] Competition Commission of India (Lesser Penalty) Regulations, 2024, *supra* note 45 at Schedule I.

[57] The Code of Criminal Procedure, 1973, § 306, No. 02, Acts of Parliament, 1974.

[58] Aroon Menon, *Reforming the Cartel leniency regime in India*, BAR AND BENCH, available at, https://www.barandbench.com/columns/reforming-the-cartel-leniency-regime-in-india (last visited on Mar.30, 2024, 2.08PM).

Thus, unlike the status of an 'approver' under the CrPC, the leniency granted to the applicant under the Competition Act, 2002, does not reach *"both the punishment prescribed for the offence and the guilt of the offender."*[59] Since the aforementioned protection is not extended to the leniency applicants, the validity of the Regulations, when tested on the touchstone of Art. 20(3) mandate remains questionable.

Even in the US, the Fifth Amendment's privilege does not apply by and large to documentary evidence,[60] albeit Courts have recognised a parochial "act of production", which safeguards an individual, producing a document, when the very act of production itself is incriminating in nature. Such grave Constitutional implications, expostulate the adoption of the Leniency Plus Regime in India.

b) Rewards are uncertain

The next line of argument as to why the 'leniency plus' would not succeed in India is the aleatoric nature of rewards that come as a result of disclosures made to the CCI.[61] As elucidated earlier, the CCI's approach has always been unpredictable in granting leniencies, since it has granted leniency even though the information did not constitute any *"significant value addition"* in one case while no leniency was granted although cooperation and "significant value addition" were there in another.[62] In the game theory, if the participant firm in a cartel feels that it might not avail the benefits of amnesty plus, even if it

[59] Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866).
[60] Fisher v. U.S. 425 U.S. 391 (1976).
[61] Kirti Talreja & Abhishek Singh, *Leniency Regime in India: An incoherent approach of the CCI*, CENTRE FOR BUSINESS AND COMMERCIAL LAWS, available at, https://cbcl.nliu.ac.in/competition-law/leniency-regime-in-india-an-incoherent-approach-of-the-cci/#_ednref12 (last visited on Feb. 3, 2024, 7.56PM)
[62] *Supra* at note 44.

comes forward with the information, the preferred strategy for the firm would be to remain silent.[63] A look at the CCI's previous decisions becomes pertinent at this juncture.

In the *Brushless DC Fans case,*[64] where three undertakings were held liable for bid rigging, one of them was given a 75% markdown in the leviable penalty, while the penalty was not scrapped entirely for the first applicant in that case.

In the *Broadcasting service providers case,*[65] two companies, which formed the cartel, were given leniency. Hundred per cent leniency was given to the first applicant, while a meagre thirty per cent was given to the second applicant; despite the second applicant adding value to the investigation proceedings, defying the *sine qua non* of Section 46.

In the *Zinc carbon dry cells case,*[66] the CCI contradicted its own decision in the *Brushless DC fans case,* where it was laid down that mere cooperation would not suffice for the grant of leniency, rather it should be considered "in conjunction with" the value addition. In the instant case, 30% and 20% reduction in penalties for the first and second applicant were given respectively on the mere ground of "cooperation" in the absence of any value addition.

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[63] Christopher R. Leslie, *Antitrust Amnesty, Game Theory and cartel Stability,* 31 JOURNAL OF CORPORATION LAW 453 (2006).
[64] *In Re:* Brushless DC Fans, *supra* note 33.
[65] *In Re:* Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters, (2013) Case No 02 of 2013 (Competition Commission of India).
[66] *In Re:* Cartelisation in respect of zinc carbon dry cell batteries market in India, *supra* note 32.

Based on even a cursory reading of the CCI's past orders, as enunciated above, it is clear that both the standards of "significant value addition" as well as "cooperation" remain extremely vague, and unless these standards are set clearly, incentivisation of reportage of cartel activities is not possible. Furthermore, the lack of confidentiality provision in India still poses an impediment to the disclosures before the Commission. This was echoed in the *Re Alleged cartelization in the flashlight market in India*, in which it was held that the CCI may not issue final orders, which may lead to disclosures.[67] In lieu of the same, a high-level statement should be issued to ensure minimal disclosure.

c) Absence of whistleblower protection in India and the lack of incentives

The recent 2024 Regulations have added a new clause (f) in sub-regulation (1), which proscribes an applicant from giving any false evidence or omitting any material information. It further empowers the Commission to reject the application, in the absence of "full and true disclosure".[68]

The unsuccessful emulation of the US' handling of the leniency plus system by India can be attributed to that of unbridled discretionary powers vested with the CCI, laden with amorphous parameters, like *"vital disclosures", "any other condition*", which in turn discourage the undertakings from approaching the commission. *Per contra*, mature jurisdictions like the US and Australia

[67] *In Re:* Alleged cartelization in the flashlight market in India, (2017) Case No 01 of 2017 (Competition Commission of India).
[68] Competition Commission of India (Lesser Penalty) Regulations, 2024, *supra* note 45, at Regulations 3(3) and 3(5).

have well-carved-out provisions, wherein the undertaking which makes the disclosure first, alone will receive leniency.[69]

Practically, most of the cartel investigations in India are ubiquitously emanating from the tenders for supplies in the Public Sector Undertakings (PSUs), wherein the competitors enter into bid-rigging in a bid to eliminate competition for public procurement. Entities are discouraged from becoming a leniency applicant because of the concerns of being blacklisted by the PSUs and becoming unable to bid in future. The sheer lack of appropriate remedies to countervail the interests of these entities leads to the entities being disincentivised from becoming leniency applicants.

A fortiori, even the 2024 Regulations do not recognise an "individual" as a leniency applicant, who, albeit not involved in a cartel, has information about the cartel.[70] This points out the lack of whistleblower protection for those who come forward to make disclosures under the leniency provision. *Arguendo*, the existence of whistleblower protection alone would not suffice unless some reward or other monetary incentives are brought either in the Act or in the Regulations.

The Competition Law Review Committee (CLRC) in para. 10.2. of its Report in 2019, took the examples of other jurisdictions like the UK and the US etc., to buttress the incorporation of leniency plus regime in India.[71] Expatiating on

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[69] European Commission, *About the cartel leniency policy-European Commission*, available at, https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en (last visited on Feb. 2, 2024, 12.45AM).

[70] Competition Commission of India (Lesser Penalty) Regulations, 2024, *supra* note 45 at Regulation 2(c).

[71] Ministry of Corporate Affairs, *Report of Competition Law Review Committee*, GOVERNMENT OF INDIA (July 2019), https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

the afore-stated proposition, even in other advanced jurisdictions, the success of their leniency regimes is attributed to their reward schemes. For example, the Competition Market Authority (CMA) in the UK has recently hiked the reward to whistleblowers from the extant £100,000 to £250,000.[72] In Europe, Slovak Antimonopoly Office brought a "*cartel informant reward*" system for the first-comers in disclosing significant evidence on illegal cartel practices by which 1 per cent of the total fines imposed on the infringers is awarded to those making disclosures, capped at a maximum of €100,000.[73] Thus, a leniency plus system, unless dovetailed with the introduction of protection to whistleblowers and a rewards system, would not succeed in India.

d) Reduced deterrence compounded by elevated expenditure

The *raison d'etre* of anti-cartel enforcement is unequivocally the 'deterrence',[74] based on the previous CCI decisions. It is not the Author's argument to incorporate a criminal system to penalise cartels as that of the US; rather his argument is to incorporate an optimal fine system for cartel offences. The minimum optimum fine in order to ensure deterrence must *"equal the expected gains from the violation multiplied by the inverse of the probability*

[72] Competition and Markets Authority, *Blowing the whistle on cartels,* GOV UK, available at, https://www.gov.uk/government/news/blowing-the-whistle-on-cartels (last visited on Mar. 30, 2024, 3.51PM).

[73] MM Sharma & Ankit Singh, *CCI introduces Leniency "Plus" Regime in India-Will It Suffice?* MONDAQ, available at, https://www.mondaq.com/india/cartels-monopolies/1434322/cci-introduces-leniency-plus-regime-in-india---will-it-suffice#_ftn6 (last visited on Mar. 30, 2024, 3.55PM).

[74] Maruti & Company v. Karnataka Chemists and Druggists Association & Ors., Case No. 71 of 2013.

of a fine being effectively imposed."[75] When the profits from collusion surpass the quantum of penalties, no such self-reportage can be achieved. Thus, by the introduction of leniency plus, which is more generous towards the leniency applicants, they can even get away with zero penalties, thereby reducing the deterrence effect of the monetary penalties system itself.

Furthermore, the introduction of 'leniency plus' in India will engender an extra step in the CCI's adjudicatory procedure. For instance, when a firm in a cartel in one market gives information about the existence of another cartel in another market, the CCI would have to expend its resources to verify whether the given "information" constitutes "*significant value addition*", so as to determine whether the said informant is eligible for reduction in penalties. This extra adjudicatory step would have adverse impacts on the finances and manpower of the CCI.[76] *Arguendo,* the finances are taken care of, and there are no commensurate returns of this policy, since without the introduction of 'penalty plus' and the 'omnibus question' aspects of the US, a mere introduction of 'amnesty plus' (or) leniency plus would be otiose in the Indian scenario.

iii. Leniency Plus - negative impacts of a positively thought-out move

Arguably, the leniency plus tool is effective in multi-market settings, where an enterprise, muddled in anti-competitive practices in one market, has the likelihood to replicate the same collusive behaviour in the other markets, too,

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[75] Wouter PJ Wils, *Optimal Antitrust Fines: Theory and Practice,* 29(2) WORLD COMPETITION 183, 191 (2006).

[76] Aditya Bhattacharjea & Oindrila De, *Anti-Cartel Enforcement in India,* 5 JOURNAL OF ANTITRUST ENFORCEMENT 166 (2017).

paving the way for disclosure. The caveat is that the multi-market cartelists should have a considerable threat of detection in other markets while colluding in one market. The leniency plus loses its tooth if not for the said threat. This is where the 'carpet profiling strategy' of the US is recommended, through which a more targeted approach towards the companies and markets highly prone to collusion can be made.[77]

Furthermore, a study conducted by TS Somashekar and Praveen Tripathi subsuming omnibus data from 2009 to 2021,[78] brings in a shocking revelation that despite the leniency regime being in place since 2009, there is no 'race' to the agency i.e., the CCI), amongst the market players to disclose information. There is no evident 'shock' to *ex ante* expected returns of the cartels. While the individuals involved in leniency matters have always been consistently penalised, the CCI lacks consistency in deciding non-leniency cartel cases. The said lack of consistency and, consequently, the reduced deterrence thwart the realisation of the object of the regime.

It is argued, given the gross under-utilisation of the leniency regime (only seven cartels were discovered between 2009 and 2021), that the propensity for the success of leniency plus regime is so thin.[79] While the proponents of the leniency plus regime opine on the incentives offered to the LP applicants, the conspicuous aftermath is ignored. The 'leniency plus' system can entail a reverse effect of what it originally intended to effectuate. This might encourage the cartelists to create new cartels, which were non-existent before,

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[77] Amit K. Singh, *Amnesty Plus: The way forward for EU leniency policy?* 37(5) ECLR 193 (2016).
[78] TS Somashekar & Praveen Tripathi, *Cartel Leniency Programme in India-Why No Race Here?* 48 JOURNAL OF ANTITRUST ENFORCEMENT (2023).
[79] *Supra* note 24, Cartel Enforcement and Competition.

in a bid to get a reduction in the penalties.[80] Big cartels can be fragmented as many smaller cartels, leading to increased misuse of the leniency provisions. The plus tool might also incentivise the cartelists to carry out even more anti-competitive practices, let alone grant a reduction in the penalties.

The leniency plus regime bears no statistical backdrop, owing to its recency in origin. However, the study churned out by the CCI revealed that leniency applications were the source of only seven cartels discovered by the CCI, out of all cartel cases from 2009 to 2021.[81] Even in six of the seven instances, leniency applications were not the upshots of penalties imposed by the CCI, rather diverse external factors catalysed the leniency applications, including the publication of a report, entailing allegation of cartel activity by another government agency, failed acquisition, a corporate rebranding initiative and so on.

D. Conclusion And Way Forward

Based on the fourteen years of experience with the leniency regime, and its minimal invocation and its aid in detecting cartel offences, the leniency plus regime also would be of no difference. The leniency plus, which is inspired by Amnesty Plus in the US, does not work without the incorporation of the 'Penalty Plus' and the 'Omnibus Question' in the Indian regime.

Emphasising what has already been substantiated, making cartels a criminal offence at a single stroke, would not be an ideal solution to increase deterrence; rather it would increase the burden on the CCI to prove a case on

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[80] Swati Bala & Sativik Mohanty, *Leniency Plus: Excessive Generosity or a shiny armour in the Indian leniency regime?* LIVE LAW, available at, https://www.livelaw.in/articles/leniency-plus-excessive-generosity-or-a-shiny-armor-in-the-indian-leniency-regime-239099 (last visited on Feb. 2, 2024, 5.45AM).

[81] Cartel Enforcement and Competition, *supra* note 24.

a higher standard. The inconsistencies in the CCI's decisions, on a case-to-case basis, infuse uncertainties in the rewards, amongst the cartel participants. This makes them reluctant to come forward and make disclosures. The amorphousness in the "*Significant Added Value*" compounds the inefficiency of the leniency system in India.

Leniency Plus, as a concept, after its inception in the US in the 1990s, has undergone transplantations in the legal systems, traversing across various parts of the world. However, as far as India is concerned, its potential in busting cartels is questionable.

i. Bringing consistency in the CCI's approach in granting leniency plus

The CCI has often observed the EU jurisprudence to adopt internationally recognised standards to arrive at a just resolution, taking relevant evidence into consideration. For instance, the CCI took the EU's approach pertaining to information exchanges in the *Cement Cartel* cases during adjudication.[82] Unlike the EU[83] and the US,[84] the CCI has not published any guidelines enumerating the criteria on which the penalties will be calculated.[85] Thus, as of now, there are no tangible yardsticks for the CCI to grant leniencies, thereby necessitating uniformity in the CCI's procedures.

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[82] Builders Association of India v. Cement Manufacturers Association, 2016 Comp LR 983 (Competition Commission of India), ¶198.
[83] EU Guidelines on the method of setting fines, pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C 210/2.
[84] Charles R. Breyer, et.al, *United States Sentencing Commission*, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.
[85] Case T-53/03, BPB Plc v. Commission [2008] ECR II-01333.

Regulation 5 of the 2024 Regulations vests wider discretion with the CCI, in respect of deciding upon the reduction in monetary penalty. Besides the criterion of 'likelihood' of a new cartel being detected, the Commission can take into account 'any other factor' deemed germane by it. This phraseology is amorphous, and since, requires amendments.

The Author suggests an amendment in Regulation 5(3)(b) of the recent 2024 Regulations, adding grounds of *"quality and gravity of the evidence given by the applicant"* and *"the estimated significance of the newly disclosed cartel, measured in terms, as the affected volume of commerce in India, the geographical scope of the conduct in question, and the number and size of the co-conspirator enterprises and individuals"* in the provision This will channelise the CCI's approach, thereby ensuring uniformity.

ii. Bolstering the extant confidentiality provision

Looking at the confidentiality aspect in leniency applications, also rings a tocsin since the CCI has completely disregarded the confidentiality mandate given under Regulation 8 of the 2024 Lesser Penalty Regulations (i.e. Regulation 6 of the erstwhile 2009 Regulations) Despite this mandate, the CCI in its orders disclosed specific details about the information received as well as the names of certain customers *inter alia.* Unfortunately, in the *Nagrik Chetna Manch case,* the CCI held that *"Confidentiality does not extend to evidence obtained or collected by the DG, even if the evidence is obtained from a lesser penalty applicant."*[86] This lack of explicit confidentiality provision will not incentivise the leniency applicants to come forward and disclose to the CCI; instead will make them keep the information about cartels

[86] *In Re:* Nagrik Chetna Manch, *supra* note 25.

amongst themselves. To ensure incentivisation of the leniency applicants, through bolstering the confidentiality provision, Regulation 8(1)(a) of the 2024 Regulations can be amended to hold that "*the identity of the applicant*" shall be treated as confidential in the same manner as that of an informant under Regulation 35 of the CCI (General) Regulations, 2009. The Second and Third provisos to Regulation 8(1) of the 2024 Regulations, which provide for the grounds on which confidentiality of information can be compromised, also can be amended, so as to exclude the identity of the applicant from its purview, meaning, the applicant's identity cannot be compromised in any instance.

iii. Extend the benefits of leniency plus

With regard to the ambit of "*applicant*", entitled to avail the leniency plus benefits, Regulation 3 of the 2024 regulations can be amended so as to extend the benefits to all relevant individuals, such as current employees, former employees, whistleblowers *inter alia,* and it can be interlineated that the individual shall be treated in the same manner as that of an "*applicant*".The extant narrow scope as to who can be an "*applicant*" leaves many participants involved in the cartel outside the ambit of leniency provisions. This can be rectified by the expansion of the definition of an "*applicant*" as enunciated above.

Historically, following the spectacular success of the Corporate Leniency Programme in the US, many countries across the world tried emulating the same in their respective natural jurisdictions, which were substantially patterned after the US policy and thus, were materially similar on various fronts. However, there were some significant differences between the original US system and the transplanted grafts in various other jurisdictions, owing to the exclusion of several key aspects like the Penalty Plus in the grafts. This has historically been responsible for a system being successful in one

jurisdiction, while being counterproductive in another jurisdiction. The underpinning rationale of the adoption of the leniency programme itself gets frustrated, when the transplant is not proper.