Introduction

Environmental Laws and Development in India

Environmental laws are largely understood as a body of legal codes, statutes, case law, regulations and principles that are used to mediate the relationship between humans and nature. In India, environmental laws govern the protection, management and distribution of natural resources between what are framed as competing realms, such as between the economic and the sociocultural, between ecological needs and livelihood requirements, between the human and non-human and between present and future uses. Indian environmental laws are framed with competition and conflict at their core. Most times, the protective, managerial and distributive aspects of environmental laws are treated as technical matters to be decided based on costs and benefits. The laws fail, for most part, to note that nature is the material basis for the survival and well-being of all.

This volume unpacks environmental laws in India and outlines their development. It tries to understand the development of environmental laws in India by locating them within broader local, national and international sociopolitical and economic influences. More specifically, it seeks to establish the relationships between the last five decades of environmental law-making and practice in India and the institutional ideologies of developmentalism that have held sway during this period. This volume shows that the shifts in the political economy of the Indian state are reflected or even supported by the development of Indian environmental laws.
This book explores that the development and practice of environmental law in India can be understood as a domain of power through which actions of individuals and societies are controlled towards certain ends which are contingent, multiple and fluid. This field of power is dominated by four major actors who have exerted tremendous influence on Indian society through the exercise of environmental laws. These are the governments, courts, international environmental institutions and expert-based domestic regulatory institutions. The control exerted by these institutionalised actors is possible to trace as it is done through the use of statutes and governmental notifications, case law, legal principles and well-documented decisions—all of which are part of Indian environmental law. The chapters in this volume map the development and use of these legal instruments to regulate different kinds of environmental use.

The entities in this field of power are also acted upon. The forms and ends to which power is exercised by the above four sets of actors are also informed by the influence exerted on this field by economic, especially corporate entities and the demands for specific outcomes by social movements and affected communities. The influences exerted by them on institutional actors are difficult to capture as their efforts of lobbying and advocacy tend to be more diffused, episodic and not fully documented. These corporate and social actors are able to shape the workings of the formal institutions because the latter themselves seek to check each other’s dominance in the field of environmental law. The understanding of Indian environmental law as a domain of power is best exemplified by the emergence of highly contentious and contradictory legal frameworks to manage India’s lands, waters and forests. For example, the development of legal decisions and legislations on forest use and forest rights has involved courts, governments, experts, commercial entities and forest dwellers. These contradictions inbuilt into the legal framework make it nearly impossible to obtain any systematic outcomes.

The roles and functions of Indian environmental law are better understood when they are seen as political tools and not only as legal and regulatory instruments. The endgame in Indian environmental law is political resource distribution and as environment laws and principles are stretched in many directions by powerful stakeholders or interest groups. This puts environmental laws in the realm of resource politics. As most people who work with these laws know, environmental laws can be useful to protect community rights over the environment but all too often they have legalised resource grabs from the poor whose access to the law is very limited. The nub of environmental
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politics in India is captured in two lines written by Jairam Ramesh, the ex-environment minister, in his comprehensive record of state environmentalism under Indira Gandhi. He says, ‘Environmentalists worry about a single objective. Political leaders have to balance competing demands and choose, if not the most desirable, then at least the least undesirable option from among them.’¹ He wrote this in the context of Indira Gandhi’s decision to fell trees in Delhi to widen roads for the ‘Asian Exhibition’ in 1972. Years later, Ramesh himself offered this explanation for several decisions that he took as an environment minister.² This shows that our environmental regulations are meant to generate options.

The study and practice of environmental laws can benefit greatly if it is seen in relation to power relations, resource politics, and national and international political economy. The view of environmental laws as tools in power contests and negotiation rather than settled interpretation is critical to evaluate the possibilities and limits of working with them. This understanding helps to go beyond the narratives of institutional apathy or ignorance to explain legal or regulatory actions and inactions. This introduction provides a thematic review of the development of the political, legal and regulatory aspects of India’s environmental laws. It outlines some of the debates of the field and hopes to provoke many more.

ENVIRONMENTAL LAWS AND POLITICAL LEGACIES

Postcolonial India’s history of development is intertwined with the formulation, enactment and implementation of laws made specifically for the protection, management and regulated use of the environment in the process of economic growth. At the time of India’s independence, there existed several state and central laws, such as for forest reservation and land acquisition. Enacted by the British or by the princely states, the intent and stated objectives of these laws were not necessarily the safeguarding of the environment. In some instances, it was to allow for the extraction of revenue or timber or minerals. In other cases, it was to generate community labour to manage natural resources or to keep

communities from using specific areas or resources. The enactment of these laws often led to retaliatory actions such as protests or civil disobedience. These laws imposed on certain sections or entire communities caused immense impoverishment, land alienation, social conflict and environmental impacts.

The central government under the first Prime Minister Jawaharlal Nehru set up a command economy. Economic development was the objective of the government. According to Benjamin Zachariah, the independence movement had coalesced around the theme of India's freedom to develop economically. The constituent assembly debates had also voted for a strong centre to not only keep more partitions at bay but to realise this national economic ambition. During this period, between the 1950s and the 1970s, the central government was confronted by wars with Pakistan and China, famines and droughts, and high levels of poverty. To achieve national economic development, the government chose to bring more land under food production by constructing massive irrigation projects and taking up industrialisation. The postcolonial Indian state continued to use many laws that existed in the colonial period. The many land acquisition laws, of which the central law of 1894 (Chapter 8) was the prototype, were among them. These laws were deployed in selected regions to coercively take over private property for energy, industry, agriculture and irrigation projects. Commenting on the government priorities of this period, Professor Sivaramakrishnan observes that most policies upheld the needs of the national economy at the expense of the rural economy.

Indira Gandhi became the prime minister in 1966. Her governments from 1966 to 1977 and again from 1980 to 1984 can be seen as the period of ecological modernisation in India, where economic development was

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sought to be tempered by efforts in ecological protection. This period saw the enactment of two sets of laws through the parliament: the ‘green’ laws, such as the Wild Life Protection Act, 1972 (Chapter 6), and the Forest Conservation Act, 1980 (Chapter 3), and the ‘brown’ laws for the control of water pollution (1974) and the collection of water cess (1977) and air pollution (1981) (Chapter 4). The green laws were instrumental in her ability to take control of the sprawling estates of the erstwhile princely states and support the creation of protected areas (PAs), the symbol of ecological high modernism. The brown laws, which soon gained greater significance than the older legal provisions on ‘nuisance’ in the Indian Penal Code, were the government’s technocratic response to the problems caused by growing industrialisation and urbanisation. These laws signified that state environmentalism included urban areas and not just forest regions. Enacting these central laws through the parliament was no easy feat. States demanded their constitutional right to manage land and water. As Jairam Ramesh notes, the successful passing of these laws is a statement about Indira Gandhi’s skills of persuasion and political negotiation. By 1972, the Stockholm Declaration had brought about a global shift amongst the international community for environmental conservation. Indira Gandhi was the only prime minister besides the host to attend the conference in Sweden. Her speech that presented poverty and pollution as two sides of the same coin could have been a trenchant critique of the Western economic models of wealth creation that produced two public bads. Instead, it became a call to fight underdevelopment through population control and the use of technology.

There are two lasting institutional legacies of Indira Gandhi that go beyond the environmental statutes mentioned above. The constitution as it was adopted in 1949 did not mention the term ‘environment’. The constitution was amended in 1976 to introduce Articles 48A and 51A to the Directive Principles of State Policy under Part IV that obligated both the state and the citizens to protect and improve the environment. Several scholars have lauded this move as one of the earliest cases of environmental protection being

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included in the text of a constitution. But what bears remembering is that this was done in the tumultuous period of the Emergency under the leadership of Indira Gandhi, a period when political rights were suspended and government ruled by administrative fiat. This adoption of the environmental concern by the constitution under these political conditions was a step towards the securitisation of the environmental challenges as urgent and needing centralised and undemocratic measures.¹⁰

The second institutional legacy of Indira Gandhi’s environmental era is the creation of a department of environment and forests that became a full-fledged ministry by 1984. The department was first carved within the central Ministry of Agriculture. The ministry was fashioned as the expert, technical body, comprising bureaucrats and scientists and seen as eligible and equipped to take action on environmental matters (Chapter 2). The Bhopal gas tragedy of 1984 compelled the enactment of the Environment Protection Act (EPA), 1986. As discussed in Chapter 5, the clauses of the EPA vested this new ministry with powers to take the required measures ‘to protect and improve the environment’. This includes regulating industrial activities, delegating responsibilities to specialised agencies and creating standards for managing environmental quality. The EPA gave powers to the ministry to draft executive law in the form of notifications, circulars and orders. These do not require any parliamentary approval. Since then, the ministry has used its delegated powers widely to regulate almost all sectors of the economy.

By the 1980s, state-led development was slowly giving way to a new era of privatisation in India. Government control of production functions had created discontent among industrialists and social activists. Those who were in favour of liberalisation caricatured the economic system as the ‘license raj’. On the other hand, the government’s focus on extractive development with high social costs attracted opposition from Adivasis and other local communities. Large social movements emerged in response to the problems of land acquisition and poor or no rehabilitation of families evicted by dams and mines. Projects built in the earlier decades were revealing their environmental impacts, for example, irrigated lands of Punjab were already waterlogged and saline.¹¹


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By 1991, several mainstream production sectors were opened up to private entities and the government expected to step up from being a developmental agency to being a regulator of development. Privatisation of production sectors involved, on the one hand, the repealing of several laws for labour welfare and protection and replacing them with the Public Liability Insurance Act, 1991, which provides for compensation and relief for anyone affected by industrial injury and accidents. On the other hand, it involved the enactment of environmental regulations to purportedly manage the use of the environment by the growing private industry. Environmental laws became more elaborate to monitor and control industries and projects and manage their growing environmental fallout. Given that social movements were already active, it was imperative for the ruling government to take public concerns related to environmental and social impacts of projects seriously. A focus on the well-being of the environment or in a wider sense, of the people and the natural resources that they depended on, seemed urgent and necessary to sustain the legitimacy of the project of economic development. A slew of new environmental notifications and circulars offered this legitimacy. These legal instruments that targeted specific ‘high impact’ projects and particular geographies are discussed in Chapter 5.

By the late 1980s, the narrative of nature’s limits had been established and the concept of ‘sustainable development’ had emerged from international conventions related to the environment (Chapter 2). International forums and international aid institutions initiated and supported the development of an environment regulatory regime in India and many other liberalising countries to control the effects of private sector-led development. Scholarly work shows how international institutions such as the World Bank offered ‘packaged laws’ to many countries as part of their grants and loans for economic development. The World Bank worked closely with the environment ministry to set up the laws for regulating environmental impacts.

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Since the 1990s, we have seen the development of a number of environmental regulations. These regulations that are discussed in this chapter form the body of India's environmental law that is mostly used today. Even as the government developed environmental regulations as a means of resource management, environmental activism internationally and in India during this period crystallised around the discourses of legal rights over the environment itself. This articulation of rights over environmental resources was different from the right to a clean environment as understood by the extension of Article 21 or the constitutional right to life (Chapter 1). The populist discourses of resource rights shaped India's laws on biodiversity (2002), forest rights (2006) and right to fair compensation and transparency in land acquisition (2013). These laws were passed by the Indian Parliament and included the language of prior informed consent and benefit sharing. While the biodiversity law was passed as a requirement under the Convention on Biological Diversity (CBD) (Chapters 2 and 6), the laws for forest rights (Chapter 3) and fair compensation for land acquisition (Chapter 8) were drafted and passed under pressure from social movements. A water law (Chapter 7), framed within the water rights discourses that were developed through courts, is long due.\(^\text{14}\) It remains to be seen if this law will fill the gap by providing a single overarching framework for managing the multiple institutions and laws governing conservation and distribution of water. This articulation of individualised rights over a shared resource gained importance over rights to decentralised local governance of the environment at the levels of the gram panchayats, nagarpalikas or user groups.

During this period, the global discourses on governance of Protected Areas (PAs) took a 'community turn'. This was due to the work of thousands of wildlife ecologists, environmentalists and indigenous rights activists and the International Union for Conservation of Nature and CBD programmes on PAs. Indigenous communities demanded the space for land stewardship within national legal frameworks, and there was openness in the conservation community to accept that landscape-level conservation needed local people to take charge.\(^\text{15}\) It was also a time for innovative experiments to demilitarise

\(^\text{14}\) Shreehari Paliath, ‘Without De-bureaucratisation, We Cannot Solve India’s Water Problem’, IndiaSpend, 13 July 2019.

\(^\text{15}\) Ashish Kothari, Neena Singh and Saloni Suri, eds., People and Protected Areas in India: Towards Participatory Conservation (New Delhi: Sage Publications, 1996); J. Brown, A. Kothari and M. Menon, eds., ‘Special Issue on Local Communities and Protected Areas’, PARKS 12, no. 2 (2002).
lands and set up ‘peace parks’. Conservation projects were breaking out of their exclusionary models and aiming to be participatory. These efforts also touched Indian conservation laws in small but significant ways. The Wild Life Protection Act, 1972, got two new categories, which had limited and designated roles for local communities in their management (Chapter 6). But this openness to communities in wildlife area management was affected by the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The passing of this law to grant legal resource use rights to communities, most of who had lived in forests as ‘encroachers’ for years, polarised almost the entire conservation community in India.

A group of conservationists filed a petition for the constitutional review of the FRA in the Supreme Court in 2008. In an exceptional hearing of this case in February 2019, the Court first ordered that all those whose rights have been rejected under the law must be evicted. When it was clarified to the Court that there were inaccuracies in the rejected claims, the Court ordered all state governments to present the status of implementation of the FRA to the Court. More importantly, FRA does not have provisions for evicting forest dwellers if claims are rejected. The FRA and other instruments that legalise community rights to resources came through populist grassroots struggles, but they face the constant risk of being diluted. Scholars have referred to this as a process of negotiating a ‘compromise equilibrium’ between political elites and the struggling masses. For example, the central and state governments have successfully diluted the new land acquisition law to restrict benefits and consent procedures, as shown in Chapter 8. The forest department and the nodal ministry for the implementation of the FRA, the Ministry of Tribal Affairs, have been caught up in a decade-long ‘statute based’ tussle over the grant of forest ownership and use titles to individuals and communities residing in forest areas. This is discussed in Chapter 3.

Since 2005, various environmental statues have been amended, and this is, in part, the justification for this new publication. These amendments and reforms have been designed to achieve three objectives: (a) to incorporate the

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changed economic and technological contexts in which environmental laws operate, especially the changes caused by intensive private-led development in certain regions and sectors, (b) to factor in the effects and consequences of litigation and judicial pronouncements on environmental impacts and (c) to respond to the prevalent legal discourses on community rights over nature.

ENVIRONMENTAL LAW IN THE PUBLIC INTEREST

LITIGATION ERA

The era of judicial activism started in India in the 1980s. Justice S. Muralidhar observes that the general breakdown of rule of law during the Emergency years of 1975–1977 provoked the judiciary out of its usual ways. The post-Emergency years were a period of political instability at the centre, and the higher judiciary felt it important to step up its role of protecting the constitution.\(^{18}\) Articles 32 and 226 of the Indian constitution that allows citizens to directly approach the high courts and the Supreme Court through the writ jurisdiction is understood to be a flexible form of legal access to higher courts. However, since the 1980s, the courts innovated the judicial system radically by hearing a large number of cases on matters related to socio-economic rights through the route of the PIL (Chapter 2). The PIL emerged as a special class of writs. Divan and Rosencranz provide a useful classification of PILs and how they differ from other legal disputes between private parties.\(^{19}\)

Through PILs, the higher courts allowed petitions to be filed by individuals who were not directly aggrieved but represented the aggrieved public or by citizens seeking remedies against governmental actions, policies or abuse of power. Public interest litigants did not have to fit into the conventional definitions of *locus standi* of a petitioner. This was allowed with the view that justice was to be served to those classes or groups of society who could not approach the judiciary. The judiciary’s enthusiasm to admit PILs and its openness to turn complaints into writs and take up cases *suo moto* brought it much attention. The enactment of the Legal Services Authorities Act, 1987, and setting up of the National Legal Services Authority (NALSA) to provide
