Report of the National Consultation on

PROPOSED AMENDMENTS TO ENVIRONMENTAL LAWS IN INDIA

held on 18th July 2022

at

National Law School of India University, Bangalore

Organised by

INSTITUTE OF PUBLIC POLICY
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BENGALURU

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Background to the Consultation:

On 30th June 2022, India's Ministry of Environment, Forests and Climate Change (MoEF&CC) issued a series of public announcements on its website inviting public comments about its intent to amend the Water (Prevention and Control of Pollution) Act, 1974,[1] the Air (Prevention and Control of Pollution) Act, 1981[2] and the Public Liability Insurance Act, 1991[3]. A day later it issued another Notification, again only in its website, inviting comments on amendments the Ministry proposed to India's umbrella environmental law - Environment (Protection) Act, 1986.[4] It did not stop there. On 9th July 2022, the Ministry issued yet another notification inviting public comments to amendments it proposed to the Indian Forest Act, 1927[5]. All of these Notifications, which contained the text of the Bills proposing changes in existing law, were in English, and not in any of the Scheduled Languages of India - except in one instance when an Hindi translation was also provided.

Apart from the fact that the notifications were all issued only on the Ministry's website and in English, the commenting period for the first four laws was merely 20 days and in the case of the Forest Act three weeks. The notification instructed that responses would be received by email or post. There was no effort whatsoever by the Ministry to reach out across the length and breadth of India in any form – be it by local advertisements drawing attention to the amendments proposed, or by requesting state governments to reach out through its district administrations. There was absolutely no effort made at all to ensure that the linguistically, geographically, culturally, politically diverse populations, living in diverse biogeographic zones in a massive country, had even a remotely reasonable chance to fathom the implications of what was being proposed and be able to respond with even a cursory application of mind. In effect, the notifications served the purpose of a ritual online 'consultation', which has become a pattern with the Ministry in recent years.

In much the same way, on 16th December 2021 the Biological Diversity (Amendment) Bill, 2021 was tabled in the Lok Sabha without any prior public debate or consultation. This had drawn widespread criticisms and there were nation-wide calls for open, public and democratic consultations and debates. Opposition members in Parliament supported this demand in the Lok Sabha and forced India's Environment Minister Shri Bhupendra Yadav to refer it for review

[1] Online notice dated 30th June 2022 issued by Union Ministry of Environment, Forests and Climate Change on proposal to amend Water (Prevention and Control of Pollution) Act, 1974, accessible at: https://moef.gov.in/wp-content/uploads/2022/06/Public-Notice-CP-Water_compressed.pdf

[2] Online Notice dated 30th June 2022 issued by Union Ministry of Environment, Forests and Climate Change on proposal to amend Air (Prevention and Control of Pollution) Act, 1974, accessible at: https://moef.gov.in/wp-content/uploads/2022/06/Public-Notice-CP-Air_compressed.pdf

[3] Online notice dated 30th June 2022 issued by Union Ministry of Environment, Forests and Climate Change on proposal to amend Public Insurance Liability Act, 1991, accessible at: https://moef.gov.in/wp-content/uploads/2022/06/Notice-For-Public-Consulation-on-Prposal-for-amendment-in-the-Public-Liabity-Insurance-PLI-Act1991Hindi-English_compressed-1.pdf

[4] Online notice dated 1st July 2022 issued by Union Ministry of Environment, Forests and Climate Change on proposal to amend Environment Protection Act, 1986, accessible at: https://moef.gov.in/wp-content/uploads/2022/07/EPA-Bill_compressed.pdf

[5] Online notice dated 9th July 2022 issued by Union Ministry of Environment, Forests and Climate Change on proposal to amend Indian Forest Act, 1927, accessible at https://moef.gov.in/wp-content/uploads/2022/07/Notice-for-public-consultation.pdf

by a Joint Committee of both the Houses of Parliament. On being constituted, the Parliamentary Committee invited public comments on the Bill through major newspaper advertisements, and also extended the opportunity of a personal hearing to a cross-section of representatives from various sectors. Following this process, the Committee tabled its report in the Parliament on 2nd August 2022.[6] Even as this process was underway, it was rather disconcerting that the Ministry had chosen to rush through major amendments to all of the other laws it administers in the manner described.

(L to R) Bhargavi Rao, ESG, Asma Naseer, Editor, Salar-Digital Daily, Justice Sandeep Salian, Senior Civil Judge and Member Secretary, Bengaluru Rural District Legal Services Authority, Prof. Sony Pelliseri, NLSIU and Leo Saldanha, ESG

This approach which lacks any intent of engaging with the wide public, and also with State Governments and Legislatures, whilst amending existing laws, amounts to treating democratic decision making as a ritual and effectively sidesteps Constitutionally mandated federated system of governance. This is deeply worrying given changes proposed have far reaching and irreversible implications, and fundamentally alter the very characteristics of these environmental laws. Besides, the changes proposed would have a fundamental and probably irreversible bearing on India's environmental jurisprudence, especially given that environmental laws have a direct and fundamental bearing on fundamental rights of peoples of India, particularly natural resource dependent communities.

Responding to this worrying situation, Environment Support Group in collaboration with Institute of Public Policy and Centre for Labour Studies of National Law School of India University (NLSIU), Bangalore, organised a nation-wide half day hybrid consultation on the proposed amendments to India's major environmental laws at NLSIU campus on 18th July, 2022.[7] The workshop involved interventions from a retired Judge of the Supreme Court, Legal Scholars, Political leaders, retired Senior Bureaucrats, Environmental Lawyers, Journalists, Social and Environmental Activists, Academicians, etc., and provided deeper insights into implications of the proposed amendments. There was unanimous agreement that proposed amendments were regressive and that they must be comprehensively rejected. On the basis of this discussion and agreement arrived at, a statement was issued calling on the Ministry to "*Stop Destroying India's Progressive Environment, Forest And Biodiversity Protection*

[6] Seventeenth Lok Sabha report of the Joint Committee on the Biological Diversity (Amendment) Bill, 2021 tabled in the Lok Sabha and Rajya Sabha on 2nd August 2022, accessible at: http://164.100.47.193/lsscommittee/Joint%20Committee%20on%20the%20Biological%20Diversity%20(Amendment)%20Bill,%202021/17_Joint_Committee_on_the_Biological_Diversity_(Amendment)_Bill_2021_1.pdf

[7] *Fundamental Dilutions Of Environmental Laws And Jurisprudence Of India Proposed*, accessible at: https://esgindia.org/new/esg-opinion/fundamental-dilution-of-environmental-laws-and-jurisprudence-of-india-proposed/

Jurisprudence".[8] This statement has been widely circulated and endorsed, and is annexed at **Annexure A**. A discussion note[9] contextualising the consultation is annexed at **Annexure B**.

What follows is a report of the consultation.

[8] *Stop Destroying India's Progressive Environment, Forest And Biodiversity Protection Jurisprudence*, accessible at: https://esgindia.org/new/campaigns/moefcc-must-stop-destroying-indias-progressive-environment-forest-and-biodiversity-protection-jurisprudence/

[9] Leo F. Saldanha*, Need For Meaningful Extensive Review And Debate On Fundamental Changes Proposed To India's Environment Protection Act, 1986 And Related Laws,* Environment Support Group, 14th July 2022*,* accessible at: https://esgindia.org/new/esg-publications/policy-briefs/extensive-review-and-debate-indias-environment-protection-act-1986-and-related-laws-needed/

Summary Recommendations

The proposed amendments to all major environmental and forest protection laws:

1) Directly o**ppose long sustained progressive environmental jurisprudence of India**: From the time when the Government of India accepted the 1980 *Report of the Committee for Recommending Legislative measure and Administrative Machinery for Ensuring Environmental Protection*, the intent has been to protect wildlife, prevent pollution and protect forests and forest rights, for which environmental violations are considered extremely seriously as they affect life and livelihoods directly. The proposed amendments attack this long held tradition of promoting environmental conservation and human rights protection.

2) **Attacks Rights of victims of Industrial disasters, and rewards polluters:** The Public Liability Insurance Act was enacted in the wake of horrific crimes committed by Union Carbide and to correct the regulatory mechanism which failed to tackle the corporation. To propose weakening of this law, rather than strengthening it even more in light of the many disasters that have occurred subsequently, demonstrates the Ministry's intent: it does not want effective action against environmental culprits and instead is keen on promoting the interest of polluters.

3) **Comprehensively compromises international environmental leadership:** India has led the world from the time of the United Nations Conference on Human Environment, 1972 through to the United Nations Conference on Environment and Development, 1992 and beyond to promote sovereign control over natural resources and in advancing global environmental jurisprudence securing equal rights and equitable opportunities to live in a clean and wholesome environment. The Supreme Court of India and various High Courts, as also the National Green Tribunal, have played their due roles in further advancing such progressive environmental jurisprudence. MoEF&CC's proposed amendments cast a huge shadow on all of these progressions, and will result in a situation that puts India back by decades

4) **So called decriminalisation, a licence to pollute:** The decriminalisation of environmental offences pitched on the claim that the lack of timely and effective judicial decision making is sustaining such violations, and thereby the remedy lies in treating them as civil offences with fines is a better alternative, is fraught with various inconsistencies. The reality is that despite weak budgetary support, Pollution Control Boards, Forest Departments and Environmental Regulators are able to employ these criminal provisions to tackle corporate polluters. The amendments proposed will comprehensively weaken the very teeth necessary to advance protection of environment and human rights.

5) **Corporations escape, People suffer:** Colonial era laws are being extensively abused and are particularly employed to hurt rights of adivasis, and other natural resource dependent communities. Such laws need to be brought in step with evolving human rights standards. **Instead a** perverse logic is being promoted by MoEF&CC in claiming its so-called decriminalisation of environmental and forest protection laws is to improve quality of

protection of environment and human rights, when there is widespread evidence of the lack of sincere implementation of prevailing environmental regulatory standards being a major cause of environmental destruction

6) **Sidesteps judicial oversight over environmental violations:** The amendments promote across the board replacement of prevailing judicial oversight over environmental regulations with executive oversight. This is in contradiction with the very foundation of India's environmental jurisprudence which treats environmental violations on par with violation of fundamental rights.

7) **Legalises illegal dilution of environmental regulations by executive fiat:** Over time MoEF&CC has been diluting India's environmental protection regimes through a variety of circulars and office orders, which is fundamentally violative of statutory norms, as Courts have confirmed time and again. The proposed amendments will normalise such illegal orders and circulars.

8) **Subverting sovereign law making at the behest of foreign powers:** The proposed amendments follow in sum and substance the dictum of the 2009 MOU signed by MoEF&CC with United States Environmental Protection Agency, by which the latter provided the former with US$ 2 million to dilute India's environmental jurisprudence by turning environmental violations into merely civic offences. This controversial demand is now being promoted by the MoEF& CC unabashedly by way of the proposed amendments. Sovereign law making powers are thus being subordinated to the influence and financing from foreign governments and international financial institutions.

9) **Agitate against administrative law principles:** The proposed amendments are absolutely violative of the principles that govern administrative law which guarantee rule of law. The amendments constitute efforts that will substantially weaken environmental governance of India. This not only is bad in law, but it is extra-constitutional and sets a dangerous precedent which must be stopped post haste.

For all the above and other reasons detailed in this report, the proposed Bills must be withdrawn, was the unanimous opinion.

Welcome and Setting the Tone for the Consultation

Prof. Sony Pellisery, Director, Inst of Public Policy, NLSIU

Prof. Sony Pellissery, Director, Institute of Public Policy, NLSIU welcoming the participants to the consultation, said the proposed amendments require to be seen in the context of "two paradoxical global reports" that have come out in 2022. One is Yale University's *Environmental Performance Index*[10] in which India has been listed at the very bottom - at 180th position, and the other is the *Climate Change Performance Index*[11] where India is in 10th position out of 61.

Prof. Pellissery highlighted while India has been rated very poorly in the first report *vis a vis* its performance on securing air quality, protecting biodiversity, preventing forest loss, etc, the latter grants the country high scores on account of promotion of renewable energy as a means to tackle climate change. This paradox, he analysed, "on one side is due to technological changes and adoption of new methods, things that can (possibly) fix institutions by increasing its technological output" while "on the other when we are debating these environmental laws and procedures, there is only limited engagement, a limited consultation, that is brought to the institutions". He said three contestations emerge as a result: "contestations over the environment", "contestations of democracy" and "contestations for livelihoods".

Contextualising the proposed Amendments:

Leo Saldanha of Environment Support Group contextualised the need for the consultation by beginning with a focus on the *problematique* of the 20 days online commenting period proposed by MOE&CC for public commenting on proposed environmental reforms. He held that such hurried online opinion seeking is in gross variance of Principle 11 of the Rio Declaration[12] which lays down "free, prior and informed consent" is fundamental to participatory and inclusive environmental decision making. "How do we reach out to a country of 1.4 Billion which is so diverse

[10] Wolf, M. J., Emerson, J. W., Esty, D. C., de Sherbinin, A., Wendling, Z. A., et al. (2022). *2022 Environmental Performance Index*. New Haven, CT: Yale Center for Environmental Law & Policy, accessible at: https://epi.yale.edu/downloads. The report can be accessed at: https://epi.yale.edu/downloads/epi2022report06062022.pdf and a Press Release on India's EPI performance at: https://epi.yale.edu/downloads/epi2022indiapressrelease.pdf

[11] Jan Burck, Thea Uhlich, Christoph Bals, Niklas Höhne, Leonardo Nascimento, Jamie Wong, Ana Tamblyn, Jonas Reuther et al, *Climate Change Performance Index 2022*, Climate Action Network, German Watch and New Climate Institute accessible at: https://ccpi.org/wp-content/uploads/CCPI-2022-Results_neu.pdf

[12] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 3-14 June 1992, accessible at: https://www.cbd.int/doc/ref/rio-declaration.shtml

linguistically and communicate that the laws they have relied on for decades are all going to change fundamentally?", wondered Saldanha.

Referring to the Delhi High Court ruling in Vikrant Tongad case,[13] he pointed out that "the idea of law making" in a democracy is not limited to parliamentary debates and argued that proposed changes must "be debated across the country in ways that are intelligible at the ground level and where people are able to relate to the outcomes of that legislation". People should be free to mobilise, protest and dissent like the "farmers mobilised against the farm laws" and forced its repeal, he asserted.

Drawing attention to the Allocation of Business Rules[14] which requires designated ministries to administer laws allotted to them, he pointed out that the Ministry of Tribal Affairs as the nodal ministry of laws governing tribal rights over forests should be involved in any matter that impinges such rights. But this statutory requirement has been systematically and absolutely ignored by MoEF&CC in proposing changes to the forest laws, he pointed out. He recalled that similar exclusion of Tribal Affairs Ministry occurred when MoEF&CC proposed the Draft Forest Policy 2018 by which privatisation of forestry and forest management was promoted subverting guarantees to securing tribal rights as ensconced in the Forest Rights Act, 2006. Which had been strongly criticised by a Parliamentary Standing Committee[15]:

> "The Committee also observed that the Ministry of Environment, Forest and Climate Change on its own, should not have taken this initiative to bring about this policy or propose a policy without the Ministry of Tribal Affairs being fully in agreement. This is very clear in the Allocation of Business Rules, 1961. The Committee further observed that actually no stakeholders' consultations had been held while preparing this Draft Policy."

Saldanha pointed out that the value of environmental laws in India is in the acknowledgement of its intricate link to human rights and fundamental freedoms, which implicitly through the mechanistic of environmental law extends sufficient power to the individual to even hold a "regulatory agency as a violator" for non-performance of its statutory duties, and not merely the environmental violator. This system of citizen oversight and counter-checks was built into the

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[13] Order dated 30th June 2020 in *Vikrant Tongad vs Union Of India (Moefcc)*, W.P.(C) 3747/2020 & CM APPL.13426/2020, Delhi High Court, accessible at: https://indiankanoon.org/doc/170177749/ . In this ruling, the Court held that MoEF&CC proposing to rush through amendments to Environment Impact Assessment Notification 2006 while the nation was under lockdown due to first wave of COVID pandemic, could not go forward unless the draft Notification is translated into all Scheduled languages and sufficient opportunity is extended to the wide public to meaningfully engage with the process. The following is a relevant extract of the order:

> "...looking to the far reaching consequences of the public consultation process for which the draft notification has been published, we are of the view that it would be in aid of effective dissemination of the proposed notification if arrangements are made for its translation into other languages as well, at least those mentioned in the Eighth Schedule to the Constitution. Such translation may be undertaken by the Government of India itself, or with the assistance of the respective State Governments, where applicable. Such translations should also be published through the website of the Ministry of Environment, Forest and Climate Change, Government of India as well as on websites of Environment Ministries of all the States as well as those of State Pollution Control Boards, within ten days from today. This would further enable the public to respond to the draft within the period stipulated in this judgment."

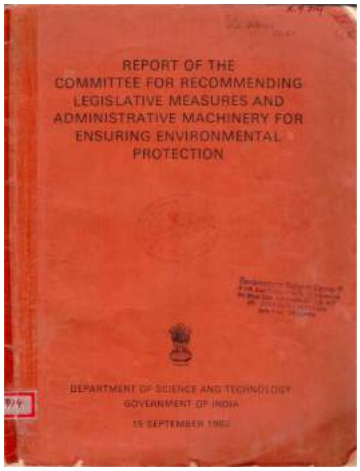
[14] Government of India (Allocation of Business) Rules, 1961, accessible at: https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeaobrules/english/1_Upload_1800.pdf

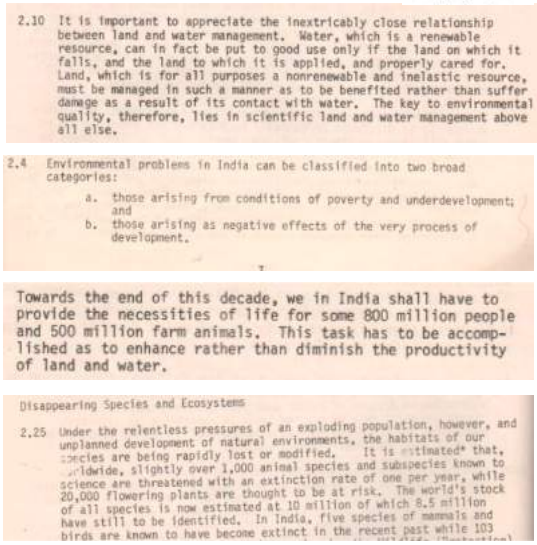
[15] See, 324th Report of Department-Related Parliamentary Standing Committee On Science And Technology, Environment And Forests on Status of Forests in India, February 2019, accessible at: https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/19/108/324_2019_9_12.pdf

basis of evolving environmental laws Saldanha highlighted, and is indicative in the "country's long history of trying to figure out how it negotiates its progress and development without hurting vulnerable communities". He pointed out that the first major effort to evolve environmental laws for India, which was by way of the 1980 N D Tiwari report,[16] had taken a year to formulate its recommendations, and that following nationwide field visits and public meetings.

This report, he said, shared a deep understanding of the implications of environmental and ecological health to human wellbeing and security, and helped shape India's position on matters environmental in the run up to the Rio Declaration very distinctively. And laid the foundation for the enactment of the Environment Protection Act 1986, which as a preparatory step for the Rio Conference had acknowledged the urgency of prioritising enviornemntal considerations with economic factors and admitted to the fact that there is already "massive degradation of forests due to expansion of agriculture, mining and industrialization."

Salient features of N D Tiwari Committee, 1980




2.10 It is important to appreciate the inextricably close relationship between land and water management. Water, which is a renewable resource, can in fact be put to good use only if the land on which it falls, and the land to which it is applied, and properly cared for. Land, which is for all purposes a nonrenewable and inelastic resource, must be managed in such a manner as to be benefited rather than suffer damage as a result of its contact with water. The key to environmental quality, therefore, lies in scientific land and water management above all else.

2.4 Environmental problems in India can be classified into two broad categories:

a. those arising from conditions of poverty and underdevelopment; and
b. those arising as negative effects of the very process of development.

Towards the end of this decade, we in India shall have to provide the necessities of life for some 800 million people and 500 million farm animals. This task has to be accomplished as to enhance rather than diminish the productivity of land and water.

Disappearing Species and Ecosystems

2.25 Under the relentless pressures of an exploding population, however, and unplanned development of natural environments, the habitats of our species are being rapidly lost or modified. It is estimated* that, worldwide, slightly over 1,000 animal species and subspecies known to science are threatened with an extinction rate of one per year, while 20,000 flowering plants are thought to be at risk. The world's stock of all species is now estimated at 10 million of which 8.5 million have still to be identified. In India, five species of mammals and birds are known to have become extinct in the recent past while 103

India's enthusiastic embracement of the concept of "sustainable development" advanced by the Brundtland Commission's[17] "*Our Common Future*" (1984), Saldanha explained, is embedded into the Environment (Protection) Act, 1986 and all other environmental laws, which in turn guarantee "States necessary resources to create their own ministries at the State level" so that this process is integral across the country. In fact, as a crucial part of this process

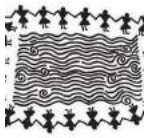
[16] N. D. Tiwari, *Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Environmental Protection*, Department of Science and Technology, Government of India, New Delhi, 1980.

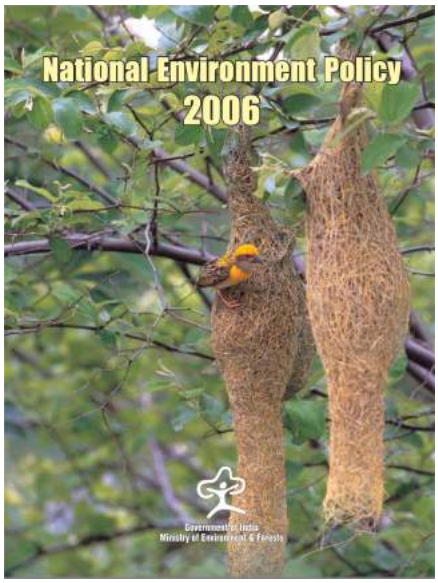
[17] *Our Common Future - Report of the World Commission on Environment and Development: Our Common Future*, 1984, accessible at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

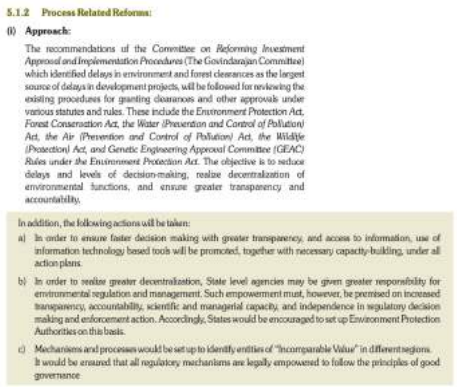
the concept of sustainability was embedded in the Constitution through major amendments in 1992 resulting in the evolution of Panchayat Raj and the Nagarpalika Acts. By which local governments "were also required to develop their own capacities to govern decisions relating to environmental and natural resources" as is specified in Article 243ZD/E[18] which requires District/Metropolitan Planning Committees to be set up to enable bottom up planning processes. India thus led the world by taking such progressive steps going into the UN Conference on Environment and Development (UNCED) at Rio de Janeiro in 1992. In stark contrast, the amendments now proposed to environmental laws were taking the country back by decades.

Saldanha also gave the example of the enactment of the Biological Diversity Act, 2002[19] which was preceded by movements and extensive public consultation by the Madhav Gadgil Committee. Similarly, wide-ranging people's movements demanding transparency and accountability in environmental decision making resulted in the 1994 EIA notification which provided "public direct access to shaping environmental decisions". When India was evolving such deeply democratic and participatory environmental jurisprudence, there was push back however, Saldanha stated. This was in the form of the World Bank supported "*Environmental Management Capacity Building Project*" which sought to streamline India's environmental regulatory systems to be aligned with parastatal led management, thus weakening democracy.

Key focus of the National Environment Policy, 2006







5.1.2 Process Related Reforms:

(i) Approach:

The recommendations of the Committee on *Reforming Investment Approval and Implementation Procedures* (The Govindarajan Committee) which identified delays in environment and forest clearances as the largest source of delays in development projects, will be followed for reviewing the existing procedures for granting clearances and other approvals under various statutes and rules. These include the *Environment* Protection Act, *Forest Conservation Act, the Water (Prevention and Control of Pollution) Act, the Air (Prevention and Control of Pollution) Act, the Wildlife (Protection) Act, and Genetic Engineering Approval Committee (GEAC) Rules under the Environment Protection Act*. The objective is to reduce delays and levels of decision-making, realize decentralization of environmental functions, and ensure greater transparency and accountability.

In addition, the following actions will be taken:

a) In order to ensure faster decision making with greater transparency, and access to information, use of information technology based tools will be promoted, together with necessary capacity-building, under all action plans.

b) In order to realize greater decentralization, State level agencies may be given greater responsibility for environmental regulation and management. Such empowerment must, however, be premised on increased transparency, accountability, scientific and managerial capacity, and independence in regulatory decision making and enforcement action. Accordingly, States would be encouraged to set up Environment Protection Authorities on this basis.

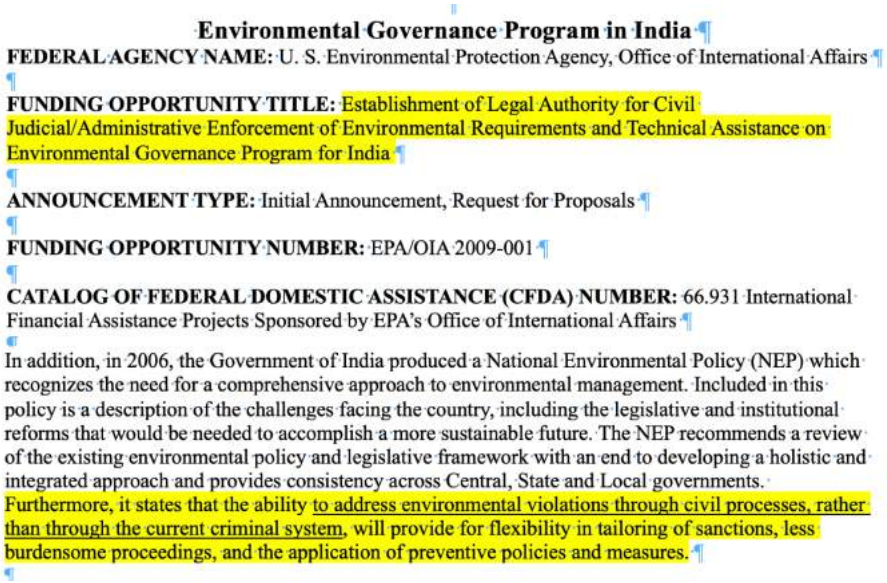
c) Mechanisms and processes would be set up to identify entities of "Incomparable Value" in different regions. It would be ensured that all regulatory mechanisms are legally empowered to follow the principles of good governance

An outcome of this was the 2006 *National Environment Policy* (NEP) which was formulated without much debate. Saldanha underlined that "the NEP was the first major push to shift environmental jurisprudence in India which was based on criminal jurisprudence to merely

[18] *The Constitution of India*, accessible at: https:/ /legislative.gov.in/sites/default/files/COI_English.pdf.
[19]The Biological Diversity Act, 2002 (Act No. 18 of 2003), accessible at: https://www.indiacode.nic.in/bitstream/123456789/2046/1/200318.pdf.

civil law. The idea that environmental violations have serious and irreversible impacts and thus effective environmental regulation requires both civil and criminal penalties in accordance with the severity of the violation, was being forfeited".

Alarmingly, he said, the MoEF (of that time) concluded an MoU with the United States' Environment Protection Agency to receive a US $ 2 million grant on terms requiring jettisoning of criminalisation of environmental violations in India's environmental laws and merely treating them as civil offences. By taking this grant, the Ministry agreed to gather key "stakeholders" and thought leaders (such as judges, senior regulators, corporate and civil society leaders, journalists and academicians) to be coached in the US to become the voice for unprecedented transition of India's environmental jurisprudence to "environmental civil judicial authority".



Environmental Governance Program in India

FEDERAL AGENCY NAME: U. S. Environmental Protection Agency, Office of International Affairs

FUNDING OPPORTUNITY TITLE: Establishment of Legal Authority for Civil Judicial/Administrative Enforcement of Environmental Requirements and Technical Assistance on Environmental Governance Program for India

ANNOUNCEMENT TYPE: Initial Announcement, Request for Proposals

FUNDING OPPORTUNITY NUMBER: EPA/OIA 2009-001

CATALOG OF FEDERAL DOMESTIC ASSISTANCE (CFDA) NUMBER: 66.931 International Financial Assistance Projects Sponsored by EPA's Office of International Affairs

In addition, in 2006, the Government of India produced a National Environmental Policy (NEP) which recognizes the need for a comprehensive approach to environmental management. Included in this policy is a description of the challenges facing the country, including the legislative and institutional reforms that would be needed to accomplish a more sustainable future. The NEP recommends a review of the existing environmental policy and legislative framework with an end to developing a holistic and integrated approach and provides consistency across Central, State and Local governments. Furthermore, it states that the ability to address environmental violations through civil processes, rather than through the current criminal system, will provide for flexibility in tailoring of sanctions, less burdensome proceedings, and the application of preventive policies and measures.

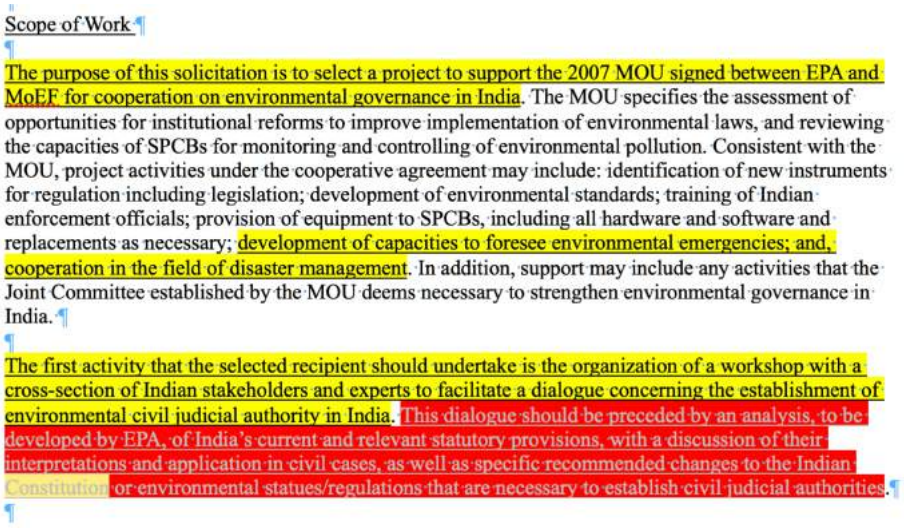
Extract of MoU signed by MoEF&CC with US EPA

This development indicated shockingly, Saldanha stressed, that the Indian Executive was susceptible to forfeiting sovereign control over law making by yielding to pressures from foreign powers. This called for extreme alertness, he said, especially given that a similar situation backs the proposed amendments which are promoted without any initiative in-country, and instead appear to be at the behest of national and international corporate powers who are possibly backed their governments. The manner in which the 'reforms' have been initiated suggest a well-coordinated effort is under way to ensure India's environmental jurisprudence is streamlined with weaker regimes of other countries.

Thereby, those guilty of environmental crimes would not suffer serious damage to their reputation and business, and importantly not have the threat of serving jail time for such offences. Saldanha reminded how in the Oleum Gas Leak case[20] the Supreme Court of India

[20] *M.C. Mehta And Anr vs Union Of India & Ors.*, 20 December 1986, 1987 AIR 1086, 1987 SCR (1) 819, accessible at: https://indiankanoon.org/doc/1486949/

had upheld the need for viewing environmental violations as serious crimes, even invoking the principle of absolute liability, not satisfied with mere strict liability. In contrast now the Government of India is investing efforts to whittle down environmental regulations in sync with expectations of foreign powers.



Scope of Work

The purpose of this solicitation is to select a project to support the 2007 MOU signed between EPA and MoEF for cooperation on environmental governance in India. The MOU specifies the assessment of opportunities for institutional reforms to improve implementation of environmental laws, and reviewing the capacities of SPCBs for monitoring and controlling of environmental pollution. Consistent with the MOU, project activities under the cooperative agreement may include: identification of new instruments for regulation including legislation; development of environmental standards; training of Indian enforcement officials; provision of equipment to SPCBs, including all hardware and software and replacements as necessary; development of capacities to foresee environmental emergencies; and, cooperation in the field of disaster management. In addition, support may include any activities that the Joint Committee established by the MOU deems necessary to strengthen environmental governance in India.

The first activity that the selected recipient should undertake is the organization of a workshop with a cross-section of Indian stakeholders and experts to facilitate a dialogue concerning the establishment of environmental civil judicial authority in India. This dialogue should be preceded by an analysis, to be developed by EPA, of India's current and relevant statutory provisions, with a discussion of their interpretations and application in civil cases, as well as specific recommended changes to the Indian Constitution or environmental statues/regulations that are necessary to establish civil judicial authorities.

Extract of MoU signed by MoEF&CC with US EPA

Highlighting recent in-country efforts to dilute environmental laws and jurisprudence, Saldanha pointed out that the proposed amendments are also heavily influenced by the 2014 *TSR Subramanian Committee*[21], the first major policy reform initiative set up by Narendra Modi soon after he became Prime Minister. This committee was set up with the intent of arriving at "recommendations to amend six major environmental laws", and the Committee rushed through this process and submitted a report based on select consultations held over a mere three months. Which report, Saldanha shared, "relied on the principle of utmost good faith" in corporations to do right, rather than relying on well settled principles of regulating their compliance with environmental laws and norms by statutorily established regulatory agencies.[22]

Due to widespread nationwide protests against the acceptance of this Committee's recommendations, a Rajya Sabha Parliamentary Committee[23] reviewed the process by which

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[21] *Report of High Level Committee to Review Various Acts Administered by Ministry of Environment, Forests and Climate Change*, Government of India, November 2014, accessible at: http://esgindia.org/sites/default/files/campaigns/press/tsr-committter-full-report.pdf

[22] Leo F. Saldanha and Bhargavi S. Rao, *A Non-trivial Threat to India's Ecological and Economic Security*, Environment Support Group, 2014, accessible at: http://esgindia.org/sites/default/files/campaigns/press/esg-critique-tsr-subramanian-report-dec-.pdf

[23] *High Level Committee Report to Review Various Acts Administered by Ministry of Environment, Forest & Climate Change*, accessible at: http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20S%20and%20T,%20Env.%20and%20Forests/263.pdf.

TSR Subramanian conducted the consultations as also the final recommendations of the committee, and summarily held about it as follows:

> "1. Considering the various objections as aforesaid and comments of the Ministry, the Committee finds that objections raised by members of civil society/NGOs/experts are prima facie valid and require serious reflection. The Committee is of the view that the period of three months allotted to the High Level Committee for reviewing the six environmental Acts was too short and that there was no cogent reason for hurrying through with the Report without comprehensive, meaningful and wider consultations with all stakeholders.
>
> 2. The Committee, therefore, recommends that the Ministry of Environment, Forest & Climate Change, instead of proceeding with the implementation of the recommendations contained in High Level Committee Report, should give due consideration to the views/opinion and objections raised by stakeholders including environmental experts. Some of the essential recommendations of the HLC have been doubted and would result in an unacceptable dilution of the existing legal and policy architecture established to protect our environment. Further, an impression should not be created that a Committee whose constitution and jurisdiction are itself in doubt, has been used to tinker with the established law and policy. Should the government wish to consider specific areas of environmental policy afresh, it may consider appointing another Committee by following established procedures and comprising of acclaimed experts in the field who should be given enough time to enter into comprehensive consultations with all stakeholders so that the recommendations are credit worthy and well considered which is not the case with the recommendations of High Level Committee under review."

In light of such categorical findings by a Parliamentary Committee, Saldanha concluded, the Ministry should have taken all care essential to conform with democratic norms of proposing amendments to environmental laws. Instead, it has chosen ritual compliance of public consultations and that about proposals that grossly dilute environmental jurisprudence that India that has evolved over four decades, much of which is based out of peoples struggles and environmental and social impacts suffered by millions.

Submissions of Participants in the Consultation

Ms. Usha Ramanathan, Legal Scholar, Cuttack

Usha Ramanathan analysed different aspects of amendments proposed to the Public Liability Insurance Act, 1991[24] (PLIA), stating at the outset that the law would become dysfunctional if proposed amendments to it were accepted by Parliament. There indeed have been gaps in the PLIA that need to be addressed, she said. But given that its enactment was in direct response to the horrendous consequences of Bhopal Gas leak, and Act was passed with the intention of extending "immediate relief to victims of such disasters", she argued that it was deeply problematic that the proposed amendment "do not cover disasters comprehensively" and victims are "left at the mercy of toxic tort". Thus highlighting the need for genuince reform of the law.

Explaining further, she said the "PLIA came into effect only in 1991. The companies dealing with hazardous waste were expected to get into insurance policies and pay premiums regularly. However, there was a problem with the model between 1991 and 1992 wherein the insurance companies protested saying that they would incur heavy losses in the said model as one cannot rule out repeat of these incidents. The repeated and smaller incidents of toxic torts also posed a threat to the insurance companies. Hence, they demanded a ceiling on the insurance claims for each episode. In 1992, the Environment Relief Fund (ERF) was introduced. The insurance company had to deposit an equal sum of money into the ERF for every insurance claim. In 2004 it was observed that the insurance companies made very few payoffs and were profiting from the scheme. The money collected in the ERF was not utilised for the right purpose, akin to what happened with the CAMPA funds. Companies wanted to become fund managers who collected these funds and charged a fee of 1%." This problematic situation needs to be addressed urgently she said.

Ramanathan further analysed that "the basic thing that any Government suggesting amendments would do is to see what has happened under the existing law over its history. There seems to be no such exercise conducted in this case and the intent has not been to make the Act functional". And she held that "for large companies dealing with hazardous waste, this penalty is peanuts". She concluded by vehemently criticising the proposed amendments to the law saying "For a law that has come out of a disaster such as the Bhopal gas tragedy, if the Govt. is thinking of decriminalisation rather than application of the law, it flags something is wrong. Decriminalisation will not work in PLIA. Only thing that is done right in the amendment is to prefix the compensation amounts and to adjust it against current inflation."

[24] Public Liability Insurance Act, 1991 (Act No. 6 of 1991), https://www.indiacode.nic.in/bitstream/123456789/1960/1/A1991-06.pdf

Dr. Vandana Shiva, Executive Director, Navdanya International, Dehradun

Dr. Vandana Shiva argued that the proposed amendments were a major setback to the peoples movements building towards environmental protection and biodiversity conservation. Recalling her role as an advisor to the Environment Ministry in the run up to the Rio Conference, she highlighted "the two treaties, UN Convention on Biodiversity (CBD)[25] and UN Framework Convention on Climate Change (UNFCC)[26], would have been very different without India's intervention. I remember clearly, how the US tried back then, as it does today, to create an arithmetic of loss and damages, which our environment Minister talked about as the arithmetic of genocide. It was said that one American is equal to 10 Chinese and 15 South Asians, and that is how loss and damages would be assessed". India's intervention in shutting down the US's arguments on "arithmetic of loss and damages" fundamentally "created grounds for not just human rights, but also the common but differentiated responsibilities of the polluters, the polluter pays principle, the precautionary principle, etc. that came out of the Rio Convention."

"The CBD from the US point of view, was going to be an access to the biodiversity of the third world. India played an important role in introducing elements that reshaped the framework. Article 3 that stresses on sovereignty, Article 8(j) which stresses on indigenous knowledge related to biodiversity given 80% of the it is in indigenous lands, (and) Article 93 on regulating GMOS, a clause that led to the biosafety, the Cartagena protocol" all of which shaped India's biodiversity law Dr. Shiva emphasised. Which law, she went on to argue, was already in the making much before the Rio Conference and stressed "India was way ahead of world in legislation. Our rules for GMOs, which are our biosafety laws[27], were written in 1989, three years after the Environment Protection Act". This type of awareness and pro-activeness, Shiva said, was "because we had socially conscious genetic scientists, such as Pushpa Bhargava, who were totally aware of the dangers". She further highlighted how the proposed amendments have dangerous and irreversible consequences to biodiversity conservation and protection of associated tradition knowledge. This transformation she held is for a particular change in context: "Back then, (the market capitalisation from biodiversity use) was only a 5 billion or 50 billion dollar industry that would go down the drain. Now (it is) a trillion dollar industry because it is not related to products, it is also related to intellectual property".

The current amendment is in sync with a global regression in protecting biodiversity she warned, and went on to state when "we define sovereignty, we define safety. While other environment laws are being dismantled, the Biodiversity Act, which was framed in the context of Convention on Biological Diversity (CBD) is being amended as well". While the 2006

[25] Convention on Biological Diversity, 1991, https://www.cbd.int/doc/legal/cbd-en.pdf/
[26] United Nations Framework Convention on Climate Change, https://unfccc.int/resource/docs/convkp/conveng.pdf
[27] https://biosafety.icar.gov.in/category/indianlawsandregulations/

Forest Rights Act[28] and the 1996 Panchayat Raj Extension to Scheduled Areas Act (PESA)[29] which is about environmental sovereignty, the Biological Diversity Act (BDA)[30] is a recognition of both rights, of biodiversity itself and the rights of custodians and protectors of biodiversity. They are the rights holders and the benefit claimants. In fact, our Act was created to prevent biopiracy which was starting to grow at that time and to assert the rights of communities. That's why we have community biodiversity registers and benefit sharing".

Shiva spoke of the threat there is also to federalism from the proposed amendments: "The original Act said that all benefit sharing would be through the approval of local bodies and the benefit claimers, who are the indigenous community. That sentence has been removed. Instead, now the negotiation will be with the biopirates who are taking our biological resources and with the (gross dilution of) National Biodiversity Authority which has an Executive appointed as Chairperson". All of which is deeply troubling, Shiva asserted, highlighting how "very similar changes (are being brought) to the Biosafety laws. (That when) our biosafety laws precede the commercialisation of GMOs and the international biosafety convention".

Such dilutions have been going on for a while now, she argued, sharing how the Food Safety Standards Association of India (FSSAI) replaced the Prevention for Food Adulteration Act, and that in November 2021 the FSSAI issued a notification in effect undoing environment laws applicable to food production. "Little agencies are acquiring the power to change laws which are evolved through a lot of debates and thoughtfulness" she assessed. "Similarly, the amendments to the Forest Act have led to continuation of the historical injustices that the act was trying to correct". She unequivocally stressed "we need strong laws particularly because the global setting right now is not just of massive deregulation. Even in terms of the loss of biodiversity and climate damage, the polluters (and extractors) have become super smart. They have realised there is a whole new profit in pollution itself (that can be made) by redefining the terms. So they cooked up in Glasgow 'the net zero idea' (by which) polluters will keep polluting but grab the resources of the non-polluters to be offsets and sinks. This land grab is happening very fast" she feared.

The most devastating aspect of the proposed amendment, Shiva said, is that it is "actually saying remove the word diversity which is the very heart of biodiversity". The current administration is aligned with the reckless exploitation of bioresources so that India's sovereign bioresources can be "turned it into a resource further exploited for profit". She concluded on a hopeful note asserting "we will stand together no matter what destruction happens. More than ever before, the ecological voice is relevant to the future of humanity", she affirmed.

[28] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, https://tribal.nic.in/downloads/FRA/FRAActnRulesBook.pdf
[29] The Provisions of the Panchayats (Extension to the Scheduled Areas) Act,1996, https://legislative.gov.in/sites/default/files/A1996-40.pdf
[30] The Biological Diversity Act, 2002 https://www.indiacode.nic.in/bitstream/123456789/2046/1/200318.pdf.

Hon'ble Justice Mr. V. G. Gopalagowda, Former Judge of the Supreme Court of India

Justice Mr. Gopalagowda expressed his strong disappointment and disapproval of environmental and pollution control regulatory authorities for their "half-hearted implementation" of India's environment, forest and biodiversity protection and pollution control laws and regulations. This situation persists, he said, "despite a series of judgments of the Apex Court, High Courts, the National Green Tribunal" who have pointed out in "judgement after judgement" that lack of care for environmental protection is adversely affecting the "health, ecology and the biodiversity of this country". He expressed concern that this paradigm of destructive development is being promoted "in the name of sustainable development".

Illustrating his concern that most developmental projects are promoted without appropriate social and environmental review and consents, Justice Gopalagowda held the "greatest polluters today are the local self-government and government agencies". He offered an example: "Bengaluru Development Authority goes on acquiring the lands in and around urban areas without taking environmental clearances, though it is mandatory according to the Section 3 of Environment Protection Act". And this praxis is widespread and not limited "only to Bengaluru Development Authority, even the Karnataka Industrial Development Board go on acquiring land without environmental clearances. This means there is blatant violation of the statutory provisions of the Environmental Protection Act".

About such an abysmal state of affairs in environmental governance Justice Gopalagowda said "the government is aware of and yet it wants to give up the penal clause" in environmental laws. Such dilution of criminal penal clauses, making environmental regulation merely a civil offence with a fine for environmental violations, Justice Gopalagowda said, amounts to "taking away the power from the judiciary and transferring it to the executive, such as the joint secretary of the government". And enquired if this is in consonance with and conformance to the "object and intent of (environmental and pollution control) Acts when the Parliament enacted them in 1974 (Water Act), 1981 (Air Act) and in 1986 (EP Act)?" He emphatically concluded that such "dilutions are not permissible in law. You should not do it. We must seriously object to these proposed amendments (which seek) to dilute and take away the penal provision of the sentencing. Environmental violations are a statutory offence. Statutory offence must be rigorously implemented". And declared that "proposed amendments are unconstitutional".

Prof. Rajeev Gowda, Former Member of Parliament (Rajya Sabha), Bangalore

Prof. Rajeev Gowda said he is "aghast that the government is planning to push through such massive changes (in environmental laws) with so little time for public consultations and for detailed exploration of possible impacts that these changes would have on environmental protection". This when "India has scored the worst in the entire world in terms of environmental protection".

He went on to explain his position: "The kindest thing I can possibly say about this decriminalisation of environmental laws is that it is appropriate in case of people who are grazing in protected areas, which are very minor infractions. But this larger approach (of decriminalising all environmental laws) seems to be very clearly intended at weakening environmental protection". He explained how reforms need to be advanced, so that they "actually induce good behaviour on the part of potential environmental violators". But taking away criminal penalties amounts to weakening environmental jurisprudence and stated the political party he belongs to, the Indian National Congress, is "opposed to weakening these laws".

Prof. Gowda further argued that the lack of holding anyone accountable for environmental violations based on criminal jurisprudence is essentially because of judicial delays and the complex systems in criminal law. This needs to be attended to. Instead, what is now being advanced, of treating environmental violations as civil offences, he found highly problematic and said that this creates processes in which "the valuing of the environmental damages (are) myopic" and that the "approach does not take into account the larger ecosystem services which are affected every time you see a virgin forest or anything like that, and pull it down".

For Prof. Gowda, the amendments are part of "government's collusion with the private sector, about their willingness to sell out our natural heritage and environmental resources to their cronies, who want to make a big buck". He further said that the fines that may be collected under civil law, which in itself has a complicated judicial procedure to establish guilt, "are going to be a pittance compared to the magnitude of profits that the project proponents routinely make'. He warned that the proposed system will derail environmental regulatory processes of India for "when a joint secretary is allotted a lot of these cases, they put the burden on the district administration. The deputy commissioner or district collector is a person whose office is overloaded with thousands of responsibilities and who will not be able to take action in a timely manner". Therefore, "we must look for solutions that provide timely responses such that, going forward, we can actually prevent the problem, rather than waiting for years for the damage done to be addressed either in the civil or the criminal justice system to work out a way to reverse the damage or to penalise offenders".

Replying to the much used argument that "not many criminal cases" against violators have been prosecuted, Prof. Gowda said it "reflects the weaknesses of the judicial system" which has made criminal justice "complicated" and "stringent". Criticizing the myopic approach of the government in valuing environmental damage, Prof. Gowda argued that "the approach does not take into account" the adverse effect on "larger ecosystem services".

On the Environmental Remediation Fund he commented that "we haven't seen the funds being utilised" and the "fines we are talking about under the civil systems are going to be a pittance compared to the magnitude of profits that the governments probably routinely make". He flagged other important issues that require attention such as making Pollution Control Boards effective, and not vesting responsibility on already burdened administrators like Deputy Commissioner or District Collector. Prof. Gowda concluded "we must look for solutions that provide timely responses".

Nikhil Dey, Mazdoor Kisan Kashtakari Sangathan, Rajasthan

Nikhil Dey argued that the pre-legislative consultative process should be "strictly adhered to" and "there should be at least a minimum of 30 days given for public consultations", and even that is too less a period in any case. The important idea is to make the pre-legislative process meaningful for which, he said, the "government should put out the potential impact" of the proposed amendments in terms of "social impact and financial cost and benefit". Such information would then provide the wide public reasonable information to debate and discuss pros and cons of the proposal, and in an intelligible manner.

Thereafter, Dey opined that comments and criticisms should invariably be followed with reasoning for rejection, and "the government should put a note out" explaining reasons for its decision. Such a note then needs to be put "before the Cabinet explaining why it was neither possible nor desirable" to accept and integrate such inputs. Further, a "summary of all comments, objections and suggestions should be placed on the Ministry's website" so the public has an opportunity to review the logic and rationale of the final outcome. Dey said this is not a desire of a few, but that this is required per a 5th February 2014 circular issued by the Secretary of the Union Ministry of Law and Justice (Legislative Department).[31] Thus, the manner in which MoEF&CC was promoting new laws or amending existing ones is clearly violative of this circular. "You cannot leave it to a few people to decide what to do and what not to do", Dey emphasised.

[31] Circular D.O. No. 11 (35)/2013-L.I issued on 5th February 2014 by P. K. Malhotra, Secretary, Ministry of Law & Justice, Legislative Department, Government of India to all Secretaries to the Government of India.

Sharing an instance of MKSS' work, he argued it was criminal to decriminalise environmental laws: "We have been dealing with silicosis from mining and various quarrying activities. Now in one district alone there are 1500 silicosis affected people who will die in the next 2-3 years. 1500 lives in one district, 20000-25000 lives in one state and we say that this is something that should not be brought in a criminal domain when it has everything to do with environmental impact of mining?" he asserted with exasperation. And asked "How can you not have criminalisation (of environmental violations) when you are literary murdering people in their twenties and thirties?"

Ms. Shomona Khanna, Advocate, Delhi

Shomona Khanna criticised the prevailing trend of tribunalisation in resolving environmental conflicts, damages and disputes, and said this is affecting fundamental rights as well. When "affected persons go to the court with a particular grievance, they are immediately told to go to the tribunal or elsewhere". Now the proposed amendments worsen the situation, with an executive officer of the Ministry appointed to attend to such matters which ought to be addressed only by judicial officers. "I have noticed that not only is there too much power given to this executive officer to prosecute offences and impose fines, but also the appeal process which would have ordinarily gone from a Civil Judge to a Judicial Magistrate, and then to a District Judge, is now going straight to the National Green Tribunal which is geographically not as accessible as the district level courts are to ordinary people".

Khanna went on to warn of the consequences of the proposed amendments: "When you give officers this kind of authority, these officers immediately are removed from the (oversight) power of the High Courts under Article 227, the power to supervise and exercise control over the lower judiciary. And those of us who are litigators and those of us in the legal profession recognise the importance of the fact that all lower courts, subordinate courts as they are called, are under the supervision of the High Courts. This is a very important factor that helps judicial officers to maintain their independence and independent decision making". Thus, she warned that the bureaucratisation of environmental regulation will result in a denial of justice.

Decriminalising environmental offences, Khanna pointed out, not only results in "the jurisdiction being shifted from Judicial Officers and the Judicial Magistrates to the Executive Magistrates" on the one hand, but the cause of environmental regulation is further weakened when it is "said there will be no imprisonment for these violations". She wondered "who are these people who are so fearful of the criminal law as far as environmental violations are concerned. According to the National Crime Records Bureau data,[32] the reality is that 80-90% of the environmental offence cases that are actually reaching the point of trial are cases relating

[32] NCRB: Crime in India, 2020, https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf

to cigarette smoking and tobacco use. There are not many serious cases under the environmental law regime."

Commenting on the "mythology" of the word decriminalisation, which has been repeatedly used post the proposed amendments, she questioned "Is decriminalisation happening? Because that would mean all these actions which have previously been described as crimes will have been removed from the definition of crimes". She clarified that in reality only the jurisdiction is being shifted from Judicial officers to Executive Magistrates and imprisonment removed from punishment. Referring to the NCRB data, Khanna pointed out that "there are no cases under the environmental regime" and hence she questioned "what exactly is the problem with the implementation of these laws that's trying to be solved by decriminalisation which is actually not decriminalisation at all".

Highlighting the problems faced by Adivasis due to prevailing forest laws, Khanna said that "natural and normal aspects of the lifestyle of forest dwellers and Adivasi communities have been criminalised", particularly due to the colonial era Indian Forest Act, 1927. This is because "Indian Forest Act actually vests with the forest guard and forest ranger, (who possess) completely untrammelled and completely oppressive powers in the criminal law domain. So there is a forest officer who is a guard or a range officer who has powers of search and seizure, has powers to arrest, has powers to put a person into custody, has powers to compound the offence, and all of this is done without the supervision of the Judicial Magistrate. No police officer in this country has this power and it is most unfortunate that after Independence the kind of amendments that were made to the Criminal Procedure Code to bring it in line with the Constitution of India and the Constitutional protections relating to the criminal jurisprudence, have never found their way into the Indian Forest Act." She stated that the problem with forest laws today "is not with regard to how many people are going to jail, it is with regard to the enormous powers given to the Forest officers inside a forest", highlighting that abuse of power in the criminal law domain is a serious issue that needs to be tackled frontally.

Khanna continued to highlight that when 'forests', which were a part of State list in the 7th Schedule until the mid 1970's, were brought into the Concurrent list, most oppressive amendments to the Indian Forest Act were brought through action of State Legislatures. "So we have State legislatures as in Gujarat, which say for any minor forest offence, you can be evicted from the forest. And there are other States (Bihar for eg.) which provide imprisonment terms of 1 year, 2 years, 3 years, even 5 years… and fines that go through the roof. And if you come to the Wildlife Protection Act, they go completely through the roof". Thus, she argued, that the proposal of MoEF&CC to decriminalise the Indian Forest Act "is actually not going to have effect on the ground because offences are governed by the definitions and the amendments which have been made by the State Legislatures", which are already draconian. The real threat from the proposed amendments is to federalism, Khanna argued: "Central government seems to be allocating more and more power to itself, and the State governments are just left to be the implementing agencies of the Central government".

Further, Khanna discussed centralization of environmental regulation wherein the Central Government by allocating more and more power to itself is bringing down the role of State

Government to merely that of an implementation agency. She added "they have left a lot of important substantive provisions in these proposed amendments to the Central government". With the lack of any guidelines for Executive Magistrate or SDM to "determine the value of the damages", she anticipated that constitutional validity of such power vested in them would be challenged in court. The proposed amendments are failing in the "basic rules of legislative drafting".

Commenting on the issue of Gram Sabha consent, she highlighted that this right has been "hard fought" and "has been an issue of struggle" for a very long time "between the Ministry of Tribal Affairs and Ministry of Environment and Forest at the Central Government". Referring to similar attempts to dilute Gram Sabha consent in 2015, Khanna recalls how the Ministry of Tribal Affairs stood its ground against the attempt to shift the whole responsibility of Gram Sabha consent to after stage two final approval for forest clearance. The Ministry of Tribal Affairs at that time had taken support of the Supreme Court decision in the Odisha Mining Corporation (Niyamgiri) case which upheld that "whether the community forest resources can be diverted for a non-forest use" is a power that "has to lie with the Gram Sabha". Khanna expressed disappointment at the inaction of the Ministry of Tribal Affairs in not challenging the MoEF&CC's actions eroding its powers. She asserted the need for meaningful local self-governance where Gram Sabhas are "active and empowered participants in the decision-making process about what happens with their resources and the nature of development that they want in their area". She added that these principles hold importance not just under the Constitution of India, the Forest Rights Act, and PESA, but are accepted as "international best practices in terms of climate change management."

She concluded "if we look at" the proposed amendments "together in an aggregate manner we are moving backwards in time" and hence "we need to combine the science of protecting the environment, with the internal logic of our Constitution".

Dr. Roy Laifungbam, CORE, Imphal, Manipur

Roy Laifungbam emphasized the role of public consultation over the proposed amendments and urged everyone to look into not just national but also global dimensions of the issues and concerns involved. He based this submission deriving from his engagements with the processes involved in drafting the Declaration of Rights of Indigenous Peoples[33] (UNIDRIP) and establishment of the UN Permanent Forum on Indigenous Issues[34] (UNPFII). "The issue before us", he argued, "is of a global dimension, primarily, though the laws and policies are domestic". Speaking as a campaignist for human rights from North East India he said, "from our

[33] United Nations Declaration on the Rights of Indigenous Peoples, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html
[34] the UN Permanent Forum on Indigenous Issues, https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html

perspective the process of public consultation addresses very key concerns of national and international dimensions" and that "it is totally inadequate. This raises the question whether the present government of India is truly serious in engaging the people of India in this exercise". He went on to add "we in the north eastern region and territories of India raise very deep concerns about this process of consultation. It does not reflect inclusive character (required of the process) at all. We therefore reject this present process", he asserted. He went on to "request the consulting members to collectively raise this fundamental question that we have raised".

He went on to add: "The process of consultations must be given at the least 6 (six) months, so that a maximum number of interested groups, communities, etc., may examine these revisions proposed. We would like to see a very realistic and sincere engagement process, a democratic process that includes as many of the stakeholders and communities and concerned peoples of India in this process. The procedure of giving just about 20 days to organise ourselves and examine such a large number of amendments is just not acceptable. We are still talking about global warming and climate change when we are facing a catastrophe and these amendments are going to make a huge difference on how our national government will address these issues."

Mr. Ritwick Dutta, Advocate, Delhi and Managing Trustee, Legal Initiative for Forests and Environment

Ritwick Dutta began by saying that the proposed dilutions in environmental jurisprudence are in step with similar processes underway through judicial action. He illustrated this: "Through a series of judgments, both NGT and the Supreme court have made it clear that you will have to take necessary approval from them before the start of the work". Thus highlighting the *problematique* in environmental jurisprudence, wherein the rational implementation of rule of law is subordinated to judicial opinions.

Specifying further, he explained that in the Alembic case[35], "in a way, the Supreme Court invoked its power as (highest judicial forum) saying though the High Court in that particular case was right in holding that without an EIA the factories could not proceed, keeping in view the investment made, the Supreme Court can condone violations and allow the unit to continue". Which begs the question, according to Dutta, on the value of building a strong environmental regulatory framework if this was to be diluted by the Supreme Court. He argued this is not an aberration but has become a norm, as is evident also from the Electrosteel[36] and

[35] Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors., https://www.livelaw.in/pdf_upload/pdf_upload-372030.pdf (Civil Appeal No. 1526 of 2016).

[36] Electrosteel Steels Limited v. Union of India (2021 SCC online SC 1247)

Pahwa plastics[37] cases. A serious problem with such jurisprudence, Dutta submitted, is that when there is no mention of *post facto* approval in the Environment Protection Act or EIA notification, the Supreme Court is mandating this and creating regressive precedents.

Another disturbing trend that has evolved over the past decade and more, Dutta said, is "a systematic dilution of environmental law" by altering the import of progressive laws and their provisions, by employing mere executive circulars and office memoranda. "For example, even with regard to the Forest Rights Act, the (statutorily mandated) consent provisions (by the Forest Rights Committees) were diluted through the mode of circulars, not through amendments to the law". Commenting on the irony of it all he said, "it's a relief that they are now coming out with an amendment to the law itself by stating that it's a dilution to facilitate ease of doing business". Similarly, there are dilutions in the composition of the Expert Advisory Committees by including "engineers, civil engineers, mining experts, as members of the forest advisory committee", and that despite the Supreme Court striking down orders issued years ago warning this amounts to trivialisation of the role of forest advisory committees, besides directing that these fora ought to include social scientists, ecologists, environmentalists, etc. In fact, he pointed out, there is no one who works with tribal communities in such decision making fora.

The dangers of the proposed amendments, Dutta emphasised, is that it is bureaucratising environmental decision making through appointments of 'adjudicating officers' thus making a mockery of the fundamental principle of jurisprudence: *Nemo iudex in causa sua* (Latin: one cannot be a judge in one's own cause). "So we are back to the British Raj in a way where it is no longer an independent Judiciary that will be adjudicating matters. It will be the officers of the government (who cleared the project) who will be adjudicating matters", Dutta expressed his frustration. However, he added, that a study of the statement of objects and reasons for almost all the proposed amendments reveal that "the government has been fairly transparent and I think one should give credit to them" for being up front about diluting fundamentally India's environmental jurisprudence! Simply stated, he asserted, "None of these amendments are aimed at either improving or protecting the environment, and to that extent their objects are very clear".

Dutta concluded by warning that the challenge is in ensuring these amendments don't go through. For which there is a need to organise public campaigns that can stop these dilutions from becoming law as, he highlighted, "most litigations that challenge such Amendments have not really succeeded", and pointed to "Wetland Rules litigation which is pending in the Supreme Court". However, he added on an hopeful note, efforts in the Supreme Court have seen "significant success when it comes to striking down office memorandums and other such executive actions aimed at dilution of environmental laws".

[37] M/S Pahwa Plastics Pvt. Ltd. & Anr. v. Dastak NGO & Ors (Civil Appeal No. 4795 of 2021), https://www.livelaw.in/pdf_upload/318-pahwa-plastics-pvt-ltd-v-dastak-ngo-25-mar-2022-413126.pdf

Mr. Venkatesh Shekhar , Former Chief Environmental Officer of Karnataka State Pollution Control Board, Bangalore

Venkatesh Shekhar shared his perspectives about the proposed amendments to the environmental laws based on his experience as an officer of the Karnataka State Pollution Control Board for 33 years. As he shared, he worked from the "base level all the way to the very top of the regulatory system". In his entire experience implementing pollution control and environmental laws, he said, the major support came from the fact that these laws were based on criminal jurisprudence. This put environmental violators in fear of the possibility that they would go to jail, and thus enforcing compliance was possible for environmental officers.

He shared how as a part of the Environmental Management Capacity Building[38] project funded by the World Bank, he was part of the delegation that visited USA where he was surprised to learn from environmental regulators of their difficulties in implementing the law. Several had shared with him the challenges of not being backed by criminal jurisprudence in punishing environmental violators who typically were large corporations. "The main difference in Indian law" he said, is that "criminalization of violations is key to enforcement".

The criminal jurisprudence backing environmental regulation is critical, he argued, because environmental violations result in an attack on fundamental rights, such as to life, clean environment, etc. Besides, "pollution results in killing life" as has been the case in Visakhapatnam and Bhopal gas leaks. He emphasised that "civil penalty and imprisonment is essential teeth to enforce environmental acts at the ground level". And concluded by asserting that "it is the duty of the Government to ensure citizens have good and clean environment". This is even more crucial as "pollution levels are increasing" and yet MOEF&CC is proposing dilutions of laws in blatant violation of "Article 252 of the Constitution of India" which requires the Union Government to take comprehensive responsibility for the current condition.

[38] See more details about the Environmental Management Capacity Building Technical Assistance Programme funded by the World Bank at: https://projects.worldbank.org/en/projects-operations/project-detail/P043728

Ms. Bhargavi S. Rao , Senior Fellow/Trustee, Environment Support Group, Bangalore

Bhargavi Rao began by stating that environmental laws, in her experience, have hardly been fully utilised to fight for environmental justice. Instead, she argued, they have been manipulated to "favour industries at the cost of ecological well-being". Commenting on the proposed decriminalization of environmental laws, Rao shared that when environmental laws are appropriately utilised, they are effective. As it was in the case of shutting down two landfills in Mavallipura, or in tackling toxic contamination of Kali river by polluting industries, in both cases ESG was able to rely on the fact that an environmental violation was a corporate crime. In the absence of such criminal provisions, advancing environmental justice would be very challenging, she argued. This will have a serious impact on ecologically fragile areas and on vulnerable communities. It is also because such criminal provisions exist now, that it was possible for ESG to force the Karnataka Biodiversity Board and National Biodiversity Authority to initiate criminal action against Monsanto for engaging in biopiracy whilst advancing the controversial B.t. Brinjal proprietary product, she argued.

Expressing concern about the problem of financialization benefiting industries at the loss of ecology, Rao referred to the Bangalore Water Supply and Sewerage Board Act, 1964[39] by which, drilling borewells without prior permission was banned, but later permitted with a payment of Rs. 2500/-. Such financialisation of a serious regulation ultimately benefited the real estate sector as they "were now able to drill 10 to 15 borewells in one parcel of land". But such lenience drastically depleted ground water aquifers and affected overall human wellbeing, she highlighted. Such instances must be carefully understood in the current context, particularly with the proposed amendments instituting Adjudicating Officers which, Rao argued, would result in gross dilution of the possibility of protecting nature and natural resources, and public interest.

Rao. further illustrated the problem of such legislative changes proposed by pointing to the powers vested with the District Commissioner in revenue laws which, she said, have been extensively used against the interests of natural resource dependent communities such as pastoralists and farmers. They have been extensively employed to take away their commons and farming lands, and even with manipulation of data. This was evident, she shared, in the diversion of 10000 acres of Amrit Mahal Kaval grasslands to the massive military-industrial-nuclear-energy complex, the so called 'science city', in which the Deputy Commissioner of Chitradurga district deliberately misrepresented dependency of pastoralists on the commons, thus justifying his decision to divert it. This has jeopardised the futures of communities in at least 60 villages who directly depended on the Kavals.

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Rao also drew attention to how waste and pollution could not be perceived as merely that emerging from manufacturing sectors and industry. And highlighted that a serious problem is evolving due to the widespread promotion of renewable energy, particularly utility scale solar and wind projects. "Sooner or later, all the solar PV panels would be decommissioned and the cost of its recycling is yet to be determined", she said. She also drew attention to recent findings of IPCC and NASA which warn that "solar radiation across southern and western India is not going to be the same" with increasing moisture content causing more cloud cover for longer periods due to global warming, and hence "installation of these solar parks may eventually turn out to be counterproductive". The prevailing reckless promotion of such renewable sources is resulting in a variety of unintended consequences and there is no acknowledgement of all these risks because MoEF&CC has claimed such projects are environmentally benign despite the 2014 finding of the National Green Tribunal in ESG's PIL[40] that is not the case and Ministry must revise its position.

In summary, Rao felt these amendments favour industries, are "making way for a variety of disasters to unfold sooner or later", that advancement of "public health and general wellbeing is definitely not in the framework of these amendments" and expressed worries that natural resource dependent people "will be bearing the brunt of this 'development' and the Adanis and Ambanis will just get away with profits".

Mr. Nitin Sethi, Journalist, The Reporters Collective, Delhi

"For governments, environmental forest clearance are like 'licensing systems', commented Nitin Sethi, responding to the environmental laws amendments proposals. The desire to centralise such licensing, particularly with the single window system, Sethi said, is filled with contradictions when compared with government's actions in other sectors. Ultimately "government seems to have provided the state government the final say on a forest clearance because they can, technically, if they were willing, withhold the clearance because of lack of forest rights consent, etc". Therefore, he emphasised, the proposed amendments to the forest law "was partly driven by the forest bureaucracy rather than a political desire to go this far". *De facto,* the Union and State governments have gotten away with forest clearances without consent already he observed. And that "this is something that several segments of the Government have asked, several parts of the industries have asked, for many years going back to the UPA era and it slipped past the political class till this point".

Sethi argued that "not all elements of the government and the political set up that supports it are in favour" of proposed amendments, and that "we have seen noise from them on it".

[40] Leo F. Saldanha vs. MoEF& CC and ors, Application 6 of 2013 before the National Green Tribunal, Southern Zone, accessible at: https://esgindia.org/new/wp-content/uploads/2019/05/ngt-challakere-all-orders-including-fina.zip

Which, he suggested, is an opportunity for "engagement perhaps pushing the government to relook" at these proposals. For, he argued, there is "still a chance of retrieving ground on this one by engaging with the State Governments". He also drew attention to how in the past "forest bureaucracy along with industrial lobby managed to get such changes done with or without political prior informed consent".

In any case, he added, "much of this ease of licensing always seems to spruce up before the general elections" and "have very little to do with real economic activity on ground". It has no correlation with economic activity picking up but seems to do "more with the rent seeking behaviour of political parties". Commenting further on the ease of doing business objective, he added, "I don't think there is any pressure on the government *per se* to ramp up capacities on any of the infrastructure sides. There are very low investments at that level and there is very low demand for credit. So, to me, this seems like a consequence of just licensing as a game, which is part of a political economy.".

Dr. M H Swaminathan, IFS (Retd,), Former Secretary (Forests), Government of Karnataka

Dr. M. H. Swaminathan recalled the strict functioning of environmental clearance when he was Secretary (Forests) of the Government of Karnataka, over a decade ago. The clearance process was so strict and it could take up to 4 years in some cases to divert forest land to non-forest purposes. He also added that "the rate of rejection was very high". This rigour was essential to protect forests, Dr. Swaminathan said, and highlighted the situation has grossly deteriorated now: "I've been observing the last 4-5 years the rate of clearance is very high". He shared that junior officers are under a lot of pressure as "they know if they don't clear forest diversion application in a week, they will be transferred". He expressed disappointment that "very rich biodiversity hotspots have been recommended for various projects". He added that "politicians are very happy" on getting all access to forest lands as they can promote industrial projects, roads or new ventures.

Expressing disappointment at the lack of consultation on the proposed amendments, he said "if the Government of India does not consult with stakeholders like NGOs and legal experts" then "they cannot expect miracles to happen in the field". He concluded by asserting that "the conversion of criminalisation to compounding cases as civil violations is literally the worst. It should not happen."

Dr. Narasimha Reddy Dhonti, Independent Researcher, Hyderabad

Dr. Narasimha Reddy expressed concern over the District Magistrate being proposed as Adjudicating Officer to implement pollution control and environmental management laws. This is an obvious case of conflict of interest being systematised, he argued. This is evident in water pollution in urban areas which is the outcome of oversight by the same level District Magistrate who will now adjudicate about their own violations.

Dhonti expressed concern that the role of District Magistrate was also being overburdened citing the example of Telangana where amendments to the Panchayati Raj and the Municipal Acts gave a lot of powers to the District Magistrate creating additional activity beyond their capacities. His concern was that with the added role of being Adjucating Officers, it is highly unlikely that environmental injustices would be addressed with due dispatch. Already, he highlights, District Magistrates are not able to give time or understand evidence of such problems as stone mining or more complex issues of pharma pollution. He stated "I don't think that the District Collectors have the bandwidth to adjudicate violations even if they are going to financialize the penalties".

Besides, Dhonti said, the inaccessibility of the District Magistrates as Adjudicating Officers will be a serious impediment for effective environmental regulation. This is particularly problematic if the Adjudicating Officers are senior officers, such as Joint Secretary or Secretary to the State Government. "Very senior officers", he argued, are "inaccessible to people" and hence "cannot be expected to adjudicate on behalf of ordinary people". Basically, he said, "they are trying to build more and more barriers to accessibility".

Dhonti also warned that this could be a schema for rushing through clearances of mega projects and highly controversial projects, such as "licensing on GMOs" which involve "a very big amount of money in the transaction". Besides, he expressed concern over how the powers of SPCB were being emasculated by the proposed amendments. That "even though they are not working, they still are a specialized regulatory agency". He concluded stating that there has to be widespread democratic debate on the proposed amendments and that "we have to now focus on how to expand this time for consultation".

Mr. Shripad Dharmadhikari, Manthan, Pune

Shripad Dharmadhikari in his brief comments emphasised the need to resist the proposed amendments, and to view such pressures to weaken India's environmental jurisprudence in the context of larger political developments, such as centralisation of power and weakening of federalism. He argued that even in the few cases where fines have been imposed against environmental violators, it has hardly deterred damage being done nation-wide to environment and human rights "with impunity". He called for a Joint Statement to oppose proposed changes.

Fr. Joe Xavier , Director, Indian Social Institute, Bangalore

Observing a general pattern, Xavier commented that "there is a growing movement to get things out of the purview of the judiciary and make it more bureaucratic and administrative in functioning". He drew attention towards the criminalization of tribal people and the indigenous communities when they oppose or protest against the corporate lobby while the "corporations will have lenient regulations". Xavier also highlighted how "citizen participation" in decision making is being brought increasingly under the purview of a "bureaucratic process" and without making such decisions "accessible to communities who would be primarily affected by changes". This aberration in law adversely affects even Constitutional entities such as gram sabhas, he pointed out.

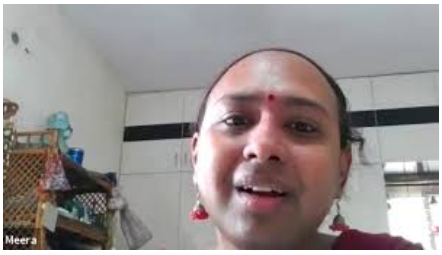
Voicing grave concern over the increasing vulnerability of adivasis in light of the "overall development paradigm", where their very actions of living are criminalised, Xavier conveyed "adivasis never go to the Court to fight for their rights" as they lack the means and resources. "The biggest danger", he concluded, is "that we are not really linking social justice, political justice, economic justice with strongly rooted environmental justice".

Mr. Ashok Sirimali, Convenor, Mines, Minerals and People, Ahmedabad

Calling for urgency to raise collective voice in support of tribal and indigenous community rights, Ashok Sirimali pointed towards the pattern of dilution of all indigenous communities rights, be they under the Panchayats Extension to Scheduled Areas Act, 1996; the Forest Rights Act, 2006; and also the Mines and Minerals (Development and

Regulation) Act, 1957[41]. He emphasised that the voice opposing dilutions in environmental jurisprudence needs to be raised with President Smt. Droupadi Murmu and also leaders of Lok Sabha and Rajya Sabha, of both ruling and opposition parties.

Ms. Meera Sangamitra, Convenor, National Alliance of Peoples' Movements



Referring to governance that is increasingly claimed as "Bulldozer Raj", Meera Sangamitra pointed out that it is "knocking off all pro-environment and pro-people laws and attacking democratic activists". She raised deep concerns over the centralization of power across sectors - education, environment, forest rights or farm laws, etc. and argued that "the whole environmental question also figures as part of this broader architecture of how everything is being weakened". She questioned "what does this kind of centralisation imply for our federal futures?".

Talking about executivisation and bureaucratisation, she gave the example of "how the farmers really fought against the disproportionate powers being given to the SDM" and similar patterns could be observed in other sectors as well. She emphasised that it is important "for us in the environmental movement, to be able to connect with other movements that are raising these very similar questions in terms of centralization and bureaucratization".

She underlined the importance of not only the immediate "central coordinated response" but also "long-term momentum" and "to have more State specific processes because that is where a lot of groups are able to engage". She cautioned that the "legal regime changing very fast" is "a challenge that we need to really work around". In conclusion, she suggested involving young environmental groups and engaging with political parties to "raise voices…in the face of all the repression that we are now facing".

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Prof. Babu Mathew, Adjunct Professor and Director, Centre for Labour Studies, NLSIU

Delivering brief concluding remarks, Prof. Babu Mathew remarked that the types of dilutions one now sees being proposed in environmental jurisprudence is all part of the policy of neoliberalism, in which profiteering has greater value than people and environment. He argued that "a new legal regime is replacing the old legal regime" and this is also developing "a form of new constitutionalism" which brings an end to the western liberal values of the Constitution, disregarding civil liberties and importing neo-liberalism which is also being legitimised by the judicial system. He called this process a "*de facto* erosion" and "*de jure* erosion" of constitutionalism and federalism and that these "are right around the corner". He concluded by calling for a deeply democratic and popular mobilisation of peoples across India against such dilutions and of the need to hold on to the progressive constitutionalism of India.

(Ms. Medha Patkar, Narmada Bachao Andolan and National Alliance of Peoples Movement, was unable to participate due to a weak internet connection.)

Annexure A: MoEF&CC - Stop Destroying India's Progressive Environment, Forest And Biodiversity Protection Jurisprudence - Statement

To:
Hon'ble Shri. Bhupendra Yadav
Union Minister for Environment, Forests and Climate Change
Paryavaran Bhavan
New Delhi
Hon'ble Shri. Ashwini Kumar Choubey
Union Minister of State for Environment, Forests and Climate Change
Paryavaran Bhavan
New Delhi
Shri Sundar Ramanathan
Additional Director/Scientist 'E'
MoEF&CC
Shri Ved Prakash Mishra
Director
MoEF&CC
Shri. Maneesh Kumar
Assistant Inspector General of Forests
MoEF&CC

Sirs,

The proposals of the Union Ministry of Environment, Forests and Climate Change (MoEF&CC) to amend environment, forest and biodiversity protection laws, and also laws regulating pollution control and public liability, is absolutely unconstitutional, anti-nature, anti-people, seriously compromises health and ecological securities of India, and must be immediately and entirely withdrawn.

The amendments proposed to the Environment Protection Act, 1986, Water (Prevention and Control of Pollution Act) 1974, Air (Prevention and Control of Pollution Act) 1981, Public Liability Insurance Act 1991 are opposed to the very purpose for which these laws were enacted.

The substantive amendments proposed to the Indian Forest Act 1927 and the Forest Conservation Rules constitute a frontal attack on the already fragile rights of millions of adivasis, indigenous peoples and other forest dependent communities. Their right to be integral to decision making about forests, guaranteed by the Forest Rights Act 2006, is sought to be sidestepped by these amendments. Undertaking such changes without involvement of the Union Ministry of Tribal Affairs is expressly barred by the Allocation of Business Rules 1961.

Sandur forest in the midst of the devastation caused by reckless and illegal iron ore mining

These, alone, are sufficient reasons for MoEF&CC to immediately withdraw all the proposed amendments.

Equally concerning and absolutely unacceptable is the arbitrary and non-inclusive manner in which the amendments are being hurried through:

- with merely three weeks of public commenting period.
- the announcement of such fundamental changes in environmental laws is made via MoEF&CC website with controversial and illegal stipulation that responses must be submitted via email.
- The Bills proposing amendments have been put out only in English, and on rare occasion in Hindi – not in any other Scheduled Language.

These too are sufficient reasons for MoEF&CC to immediately withdraw all the proposed amendments.

Such an approach to communicating with diverse peoples of India by the Union Government is irreverent of peoples' concerns, aspirations and anxieties, as also their due right to participate in decision making. The tectonic changes sought to be introduced, which will result in a massive regression in environmental and human rights jurisprudence of the country, is being undertaken in a manner that constitutes abject violation of the Pre-Legislative Consultation Policy that was brought into effect by the Union Ministry of Law & Justice on 5th February 2014.

The process smacks of absolute disregard for democratic and federated decision making:

- No effort whatsoever has been made to consult Local Self Governments, State Legislatures and State and Union Territory Governments.
- The shockingly brief commenting period suggests their opinions do not matter or are merely ritual.
- The emphatic suggestion by Prime Minister Narendra Modi that adherence to the Principle of Free, Prior and Informed Consent should be a cardinal guiding force in the transformation of any public policy and law, is discarded.
- These process by which these amendments are proposed is reminiscent of the *modus operandi* employed by the Union Government when rushing through Parliament Farm Laws, Citizenship Amendment Act and repealing of Article 370 – and without meaningful and sufficient public debate.

These also are further reasons for MoEF&CC' to immediately withdraw all the proposed amendments.

- Such online notices smack of absolute disregard for peoples' concerns over their futures in a country that is amongst the most bio geographically diverse in the world and whose population of 1.4 billion (140 crores) is amongst the most culturally, linguistically, politically diverse. This when: the country is reeling under unprecedented heat waves and floods, wrought by climate change.

- The proposal advancing decriminalisation of environmental violations clearly indicates that the intent is to promote 'Ease of Business' over human rights and environmental considerations. The grandstanding of the representatives of the Union Government in international forums, such as in the Climate Change talks, exposes their duplicity of not walking the talk.

Sylvan spaces such as the sacred grove of All Saints Church have been rescued from devastation of a station proposed by Bangalore Metro due to public action as environmental and land use regulators fail to protect over public spaces, memories and living

.

These Bills must also be withdrawn as:

- Changes they seek to bring in are opposed to the very purpose for which these laws were enacted over the past four to five decades and are will result in an highly centralised, arbitrary and deeply discriminatory regime of environmental governance.
- These changes will undeniably worsen the state of India's environment, biodiversity, and public health.
- Millions who now suffer due to the worsening state of India's environment, especially due to widespread pollution, will suffer even more.
- Pollution of air, water, soil and our bodies, of the food web, which is increasingly causing chronic ailments and is also a chief cause of morbidity, will worsen.

These are some more reasons for MoEF&CC to immediately withdraw all the proposed amendments.

In addition to the above, the following specific reasons demand withdrawal of all of these amendments:

1) **Opposed to long sustained progressive environmental jurisprudence of India**: From the time when the Government of India accepted the 1980 *Report of the Committee for Recommending Legislative measure and Administrative Machinery for Ensuring Environmental Protection*, and the laws to protect wildlife, prevent pollution and protect forests that were passed earlier, it has been a clear objective to ensure that environmental violations are considered extremely seriously for they affect life – not merely human but all living forms. Thereby, such violations deserve to be considered as crimes under the Indian Penal Code. The graded punishment introduced through these laws was with the intent of ensuring no slack can be tolerated in environmental governance. The fact that these laws were not implemented in their letter and spirit, and effectively adjudicated, does not imply it is the failure of the laws. It merely suggests failure on the part of MoEF&CC and the entire environmental and forest regulatory systems whose job it is to implement theme. That MoEF&CC now claims these amendments will improve environmental jurisprudence is perverse justification and must be unequivocally condemned.

The May 2020 Vizag Gas Leak occurred as a consequence of a series of regulatory and operational failures, all of which could have been avoided if there were transparent and publicly accountable environmental regulation of the facility.

2) Attacks Rights of victims of Industrial disasters, and rewards polluters: The Public Liability Insurance Act was enacted in the wake of horrific crimes committed by Union Carbide and the regulatory mechanism which failed to tackle the corporation. The resultant killing and maiming of lakhs was a key reason why the law was passed: it sought to provide quick remedy to those affected by such industrial disasters. To weaken such a law, rather than strengthening it even more in light of the many many disasters that have occurred subsequently, demonstrates the Ministry's intent: it does not want effective action against environmental culprits. Instead it

wants to go a further step beyond its prevailing half-hearted implementation of these laws to weaken them and protect the interests of polluters. The Ministry is thus working here against its very mandate.

3) **Comprehensively compromises international environmental leadership:** India has led the world from the time of the United Nations Conference on Human Environment, 1972 through to the United Nations Conference on Environment and Development, 1992 to promote a sovereign and global environmental jurisprudence which would ensure everyone on this planet has equal rights and equitable opportunities to live in a clean and wholesome environment. As a part of this process, India advocated adoption of the Precautionary Principle, the Principle of Intergenerational Equity, the Public Trust Doctrine, the Polluter Pays Principle, and importantly the Principle of Common but Differentiated Responsibility. The Supreme Court of India and various High Courts, as also the National Green Tribunal, have played their due roles in further advancing such progressive environmental jurisprudence. MoEF&CC's proposed amendments cast a huge shadow on all of these progressions, and will result in a situation that puts India back by decades

4) **So called decriminalisation, a licence to pollute:** Across various laws that MoEF&CC proposes to amend, the running theme is of decriminalisation of environmental offences pitched on the claim that lack of timely and effective judicial decision making is sustaining such violations, and thereby the remedy lies in treating them as civil offences with fines. This is not in the least sufficient grounds for decriminalising environmental laws. A close reading of the prevailing situation reveals that even though existing laws are not implemented effectively, the existence of the threat of criminal action against environmental violators serves as a serious deterrent, especially against corporate crimes. Despite weak budgetary support, Pollution Control Boards, Forest Departments and Environmental Regulators are able to employ these provisions, notwithstanding brute force and influence corporations wield in prevailing the political situation, because India's environmental jurisprudence relies on criminal jurisprudence. The amendments proposed are of such a nature that they will remove the very teeth that are necessary in regulation to protect India's environment and human rights.

5) **Corporations escape, People suffer:** A perverse logic is also being promoted by MoEF&CC by the manner in which it is undertaking such so-called decriminalisation of environmental and forest protection laws. While there is a strong case to attend to various that colonial laws that form the basis of forest laws, which are systematically employed to attack fundamental rights of adivasis, indigenous peoples, pastoralists, farming communities, etc., and these must be corrected with due dispatch, the proposed changes are of a nature that they weaken such provisions that when employed effectively can tackle corporate offences and protect forests, rivers, coastal commons, wetlands, etc. To replace these provisions merely with fines that in no manner compensates extensive damage caused, is clearly indicative that the Ministry is working hard to protect polluters over the fundamental rights of the peoples of India and its extraordinary biodiversity.

6) **Sidesteps judicial oversight over environmental violations:** It is also to be noted with grave concern that the amendments promote across the board replacement of prevailing

judicial oversight over environmental regulations with mere executive oversight. Such a move is absolutely in contradiction of the very foundation of India's environmental jurisprudence which treats environmental violations on par with violation of fundamental rights. That the Right to Life, which includes the Right to a Clean Environment, is now sought to be remedied through mere fines, and adjudicated by an Executive, demonstrates extraordinary complicity of MoEF&CC in promoting corporate and business interests. Moreover, this schema also proposes that the Executive who decides is not only far removed from reality, but is also the one who is already overburdened with multiple duties. This is particularly the case with the office of the Deputy Commissioner/District Commissioner/District Magistrate. Another deeply disconcerting aspect is that such executives are also those who have the mandate to promote mining/extraction, industrial and infrastructural developments which are the very activities that cause environmental destruction and create contestations. To place them in the role of adjudicators over environmental and forest violations, amounts to making them a judge in their own cause which is anathema in law. Yet, it is this model that the Ministry proposes to employ, dismissing the prevailing system of oversight by independent and autonomous judicial officers. Besides, there are proposals to centralise their appointments, which in effect make the process in transparent and unaccountable. It can well be imagined that this mechanism could result in widespread accommodation of corrupt officers post-retirement. Such a practice is more than likely to protect corporate interests over environmental and social justice causes, and consequences may well be imagined.

The devastation of water commons in urban areas epitomises the absolute lack of care of water and ecological securities of present and future generations. Irrigation tanks (lakes) have been built for millennia to harvest rain and reduce dependence on faraway rivers.

7) **Legalises ongoing illegal dilution of environmental regulations:** Over time MoEF&CC has been diluting India's environmental protection regimes through a variety of circulars and office orders. This has drawn severe criticism from the judiciary time and again. A close reading of the proposed amendments to environmental and forest protection laws with the systematic weakening employed through circulars and orders, reveals the current exercise is nothing but an adjustment of prevailing dilutions through statutory action. The outcome will be that our environment, forests and biodiversity protection laws will be so trained to be supportive of corporations, both Indian and foreign, and this will severely and irreversibly impact lives and livelihoods of millions across India.

8) **Subverting sovereign law making at the behest of foreign powers:** The proposed amendments also follow in sum and substance the dictum of the 2009 MOU signed by MoEF&CC with United States Environmental Protection Agency, by which the latter provided the former with US$ 2 million to undertake the following task: "The first activity that the selected recipient should undertake is the organization of a workshop with a cross-section of Indian stakeholders and experts to facilitate a dialogue concerning the establishment of environmental civil judicial authority in India. This dialogue should be preceded by an analysis, to be developed by EPA, of India's current and relevant statutory provisions, with a discussion of their interpretations and application in civil cases, as well as specific recommended changes to the Indian Constitution or environmental statues/regulations that are necessary to establish civil judicial authorities." (Establishment of Legal Authority for Civil Judicial/Administrative Enforcement of Environmental Requirements and Technical Assistance on Environmental Governance Program for India , cf. EPA/OIA 2009-001). The Ministry undertook this task, even as it already was promoting systematic dilution in how environmental violations would be treated, as with the National Environment Policy, 2006, an outcome of the World Bank sponsored Environmental Management Capacity Building Programme, a primary objective of which was to turn India's environmental jurisprudence based on criminal jurisprudence to one based on civil action as required by US EPA. This controversial shift is now being promoted by the Government of India unabashedly. It must shock every conscious citizen of India that sovereign law making powers are subordinated to influence and financing by foreign governments and international financial institutions.

9) **Agitate against administrative law principles:** The proposed amendments are absolutely violative of the principles that govern administrative law which guarantee rule of law. The amendments constitute efforts that will substantially weaken environmental governance of India. This not only is bad in law, but it is extra-constitutional and sets a dangerous precedent which must be stopped post haste.

For all the above reasons, we demand that the proposed Bills are withdrawn.

If MoEF&CC is truly keen to work to its mandate, then it must ensure that it works in a deeply democratic manner and to protect sovereign processes of law making – without keeling to influences from foreign and Indian corporations or to foreign governments and international financial institutions. It must work in a way that peoples of India, the Local and

State Governments, all the environmental, biodiversity management and forest protection agencies, along with the Biodiversity Management Committees and Forest Rights Committees, as also District/Metropolitan Planning Committees and their constituents, will be able to meaningfully and with essential dignity be able debate and discuss any of the proposals of the Ministry guided by processes contained in the Principle of Free, Prior and Informed Consent.

Signed:

Leo F. Saldanha Environment Support Group, and on behalf of Coalition for Environmental Justice in India
Prof. Babu Mathew, Adjunct Professor & Director, Centre for Labour Studies, National Law School of India University
National Alliance of Peoples' Movement
Prof. Rajeev Gowda, Ex- Member of Parliament (Rajya Sabha)
Prof. Sony Pellisery, Director, Institute of Public Policy, National Law School of India University
Medha Patkar, Narmada Bachao Andolan
Tara Murali, Architect, Chennai
Nikhil Dey, Mazdoor Kisan Kashtakari Sanghatan, Rajasthan
Sonu Yadav, Delhi Solidarity Group
Ashok Sirimali, mines, minerals and People
Ashok Chowdhury, All India Union of Forest Working Peoples
Bhargavi S. Rao, Senior Fellow and Trustee, Environment Support Group
Shripad Dharmadhikari, Manthan, Pune
Aruna Rodrigues, Lead Petitioner in PIL against GMOs in Supreme Court of India, Mhow, Madhya Pradesh
Joe Xavier, S.J., Director, Indian Social Institute, Bangalore
S. Janakarajan, retired Professoer from Madras Institute of Development Studies, Chennai
Friends of the Earth, India
Himanshu Thakkar, South Asia Network on Dams, Rivers and People
Willy, Indian Social Action Forum- INSAF
Narasimha Reddy Donthi, Joint Action for Water, Hyderabad
Vijayasingh Ronald David on behalf of COORG Organisation for Rural Development and National Adivasi Alliance
Ramnarayan, Ecologist, Uttarakhand
Rohit Prajapathi, Paryavaran Suraksha Samithi, Baroda
Viren Lobo, ABMKSS
Shruti, Anirudh Menon, Eshwarappa, Janani Suresh, Environment Support Group, Bangalore

Annexure B: Discussion Note on Implications of Proposed Amendments

Need for meaningful extensive review and debate on fundamental changes proposed to India's Environment Protection Act, 1986 and related laws

A discussion note by

Leo F. Saldanha[42]

From the early 1970s, when India's environmental jurisprudence took first steps with the enactment of Wildlife Act, 1972 and Water Act, 1974, environmental protection and the safeguarding of associated human rights have been prioritised over industrial and infrastructure development, and economic considerations. Statutory support was extended to ensure environmental violation was punished as a crime. In all subsequent laws, India built an environmental jurisprudence based on criminal jurisprudence. The intent was to ensure there would not be any laxity in matters environmental, be it by the public, corporates or regulatory agencies.

This long held tradition is now sought to be fundamentally transformed by the Union Ministry of Environment, Forests and Climate Change which proposes changes to the essential characteristic of India's environmental jurisprudence.[43] Bills proposing comprehensive amendments which if passed would decriminalise several environmental violations have been issued on 1st July 2022 for public comments which are due by 21st July 2022. The laws to be amended are: Environment Protection Act, 1986, and also the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Public Liability Insurance Act, 1991.

Laying a strong foundation for environmental jurisprudence:

A major foundation for the prevailing environmental jurisprudence was laid by the recommendations of the 1980 N D Tiwari Committee[44] which fore-staged environmental protection considerations as superior to economic imperatives. Various Supreme Court rulings have also

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[43] https://moef.gov.in/en/whats-new/

[44] *Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection*, Chaired by Mr. Narayan Dutt Tiwari, Minister for Planning & Deputy Chairman of Planning Commission of India, Department of Science and Technology, Government of India, 15th September 1980.

promoted this jurisprudence.[45] The passage of the Forest Conservation Act (1981) and India's enthusiastic participation in the Brundtland Commission on Sustainable Development (1984) set the stage for the enactment of Environment Protection Act, 1986 (EP Act) as an umbrella law. Unhesitant, the Indian Parliament considered it essential to promoting environmental protection and conservation objectives based on effective regulation backed by criminal jurisprudence. The horrific corporate crime of a deathly gas leak from Union Carbide factory in Bhopal in the early hours of 2nd December 1984 killing thousands in their sleep and injuring hundreds of thousands more for life, had only reminded the nation of the critical importance of taking environmental regulation seriously.

Following the enactment of the EP Act, in the run up to UN Conference on Environment and Development, 1992 at Rio de Janeiro, several environmental rules and regulations were issued by the newly formed Ministry of Environment and Forests, including those to tackle transboundary movement of hazardous waste, regulated GMOs, etc. In each and every one of them, graded criminal punishment was instituted to mitigate environmental violations along with civil liabilities. In conformance with the ratification of 1992 Rio Declaration and Convention on Biological Diversity, India's environmental governance regime was further fortified with the 1994 Environment Impact Assessment Notification (which for the first time acknowledge the due role of direct public participation in environmental decision making) and enactment of Biological Diversity Act, 2002 (which provided statutory protection to India's bioresources and associated traditional knowledge instituting fear of criminal action against violators, particularly those involved in biopiracy and bio-loot, be they small time poachers or mega corporations from India and abroad).

In the post liberalisation period, unprecedented industrialisation, expansion of mining, infrastructure development and urbanisation resulted. Hundreds of thousands of communities were impacted by this mega transformation. The importance of administrative and regulatory accountability was underlined with the enactment of Right to Information Act, 2005, and soon after by the historic recognition of the rights of adivasis and other forest dwelling/dependent communities by the enactment of Forest Rights Act, 2006. These reforms brought hope of bolstering environmental protection and advancement of human rights, even as there was nation-wide demands for ensuring appropriate budgetary support for environmental protection and strengthening regulatory systems and deep into local governments.

Weakening Environmental Regulation post liberalisation:

Barring exhortations of the critical importance of environmental protection in securing ecological and economic security of the country, very little had been achieved in terms of protecting India's rivers, forests, coastal commons, biodiversity, wetlands, etc. Struggles of hundreds of communities insisting on the implementation of environmental laws in its letter and spirit resulted and this gave rise to a new environmental

[45] The Polluter Pays Principle, Doctrine of Public Trust, Precautionary Principle, Principle of Free, Prior and Informed Consent, Principle of Ecocentrism, etc. are some examples of advancement of India's environmental jurisprudence through judicial interventions.

consciousness. Environmental crimes came to be systematically documented, as in the case of the *MoEF Suno*[46] [47]organised by Campaign for Environmental Justice, which demanded the Union Government step back from formalising dilutions proposed to the EIA Notification. These demands were ignored and the Ministry went on to comprehensively amend the notification and replace it with the prevailing EIA Notification 2006, which created a complex parastatal machinery that failed to address the key issues and concerns of environmental regulation – and which has been systematically diluted with further amendments which have confounded even the judiciary.[48] These dilutions followed a schema proposed in the pro-business Govindarajan Committee on Investment Reform (2002) which identified environmental regulatory systems as "bottlenecks" to India's economic growth.

Alongside, the National Environmental Policy 2006[49] was adopted without much public debate and legislative scrutiny. This policy initiated a movement away from well settled goals and principles of India's environmental jurisprudence – that of the country being pro-environment and pro human rights, to accommodating a pro-corporate agenda, especially with growing pressure from international investors and financial institutions. This was sought to be done by moving India's environmental jurisprudence away from criminal jurisprudence. The following are excerpts from the policy:

> p. 13: "The present environmental redressal mechanism is predominantly based on doctrines of criminal liability, which have not proved sufficiently effective, and need to be supplemented.
>
> Civil liability for environmental damage would deter environmentally harmful actions, and compensate the victims of environmental damage. Conceptually, the principle of legal liability may be viewed as an embodiment in legal doctrine of the "polluter pays" approach, itself deriving from the principle of economic efficiency. "
>
> p. 17: "Civil law, on the other hand, offers flexibility, and its sanctions can be more effectively tailored to particular situations. The evidentiary burdens of civil proceedings are less daunting than those of criminal law. It also allows for preventive policing through orders and injunctions.
>
> Accordingly, a judicious mix of civil and criminal processes and sanctions will be employed in the legal regime for enforcement, through a review of the existing legislation. Civil liability law, civil sanctions, and processes, would govern most situations of non-compliance. Criminal processes and sanctions would be available for serious, and potentially provable, infringements of environmental law, and their initiation would be vested in responsible authorities. Recourse may also be had to the relevant

[46] http://esgindia.org/new/campaigns/index-of-submissions-for-moef-suno-and-moef-chalo-13-14-november-2005/

[48] See this 333 page compendium by MoEF compiling all circulars, amendments, etc. to EIA Notification 2006 until 2018: http://www.indiaenvironmentportal.org.in/files/file/FINAL%20COMPEDIUM.pdf

[49] https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20190411103521431_National%20Environment%20Policy,%202006.pdf

provisions in the Indian Penal Code, and the Criminal Procedure Code. Both civil and criminal penalties would be graded according to the severity of the infraction."

In a broad sense, inefficiencies of the criminal law system was held out as a basis of shifting towards civil law in tackling environmental degradation and pollution. However, this shift was not given effect to in subsequent years. On the contrary, during the term of Jairam Ramesh as Environment Minister of India, substantial progress was achieved in fore-staging environmental decision making as core to public administration. This did not go well with the industries and commerce sectors who found environmental regulations suffocating industrial and infrastructure development and production of wealth from mining and exploitation of other natural resources.

The shift to Principle of Utmost Good Faith:

Over the past 7 years, it is widely noted that India's environmental jurisprudence directed by statutory mandate has witnessed substantial weakening. Prime Minister Narendra Modi's first major policy decision, setting up the TSR Subramanian Committee to propose changes to all environmental laws,[50] were widely critiqued as pro-business and anti-environment, as it relied on the Principle of Utmost Good Faith in industrialist, miners, infrastructure developers to safeguard environment and human rights.[51] The recommendations were kept in abeyance due to massive public protests. This was followed by the Environmental Laws Amendment Bill, 2015 which again was held back due to nationwide protests.[52] Thereafter was the attempt to dilute forest laws with the Draft National Forest Policy, 2018. Which too met with massive public resistance. The Parliamentary Committee on Environment and Forests even recommended the policy be shelved and to ensure that any change in forest laws was undertaken with due coordination with Ministry of Tribal Affairs in accordance with the Allocation of Business Rules.[53] Yet, attempts are on to weaken the Forest (Conservation) Act, 1981 and Forest Rights Act, 2006.[54] And then, there has been the comprehensive dilution of EIA Notification, which once more was pushed back by public pressure.[55]

Reversing a bleak prognosis:

India's environmental jurisprudence has been torn between the competing demands of prioritising environmental protection and securing economic progress. While there are several judgements that speak to the need for balancing development with environmental priorities, it is not necessarily an exercise that can be

[50] http://esgindia.org/new/events/media/press-release/access-the-complete-report-of-the-high-level-committee-of-ministry-of-environment-and-forests-and-climate-change-to-fundamentally-review-various-environmental-laws-of-india/
[51] See: INDIAN GOVERNMENT'S HIGH POWERED COMMITTEE REPORT ON REFORM OF ENVIRONMENTAL LAWS, accessible at: http://esgindia.org/new/events/media/press-release/indian-governments-high-powered-committee-report-on-reform-of-environmental-laws/ .
[52] See: Comment/Criticism Of The Draft Environmental Laws (Amendment) Bill, 2015, Circulated By The Indian Environment Ministry On 7th October 2015 For Public Comments., accessible at: https://esgindia.org/new/campaigns/comment-criticism-of-the-draft-environmental-laws-amendment-bill-2015-circulated-by-the-indian-environment-ministry-on-7th-october-2015-for-public-comments/
[53] See: Peoples Movements, Networks, Academicians, Researchers And Civil Society Organisations Reject The Draft National Forest Policy 2018., accessible at: http://esgindia.org/new/campaigns/peoples-movements-networks-academicians-researchers-and-civil-society-organisations-reject-the-draft-national-forest-policy-2018/
[54] See: MOEFCC Must Withdraw Consultation Paper On Amendments To The Forest (Conservation) Act., accessible at: http://esgindia.org/new/campaigns/forest-policy/moefcc-must-withdraw-consultation-paper-on-amendments-to-the-forest-conservation-act/
[55] http://esgindia.org/new/?s=EIA+Notification

easily rationalised. There is overwhelming evidence in the pollution flowing in every river and lake across the country, in the extensive degradation across the Western Ghats and the Himalayas - resulting in catastrophic impacts on human settlements, in the breakdown of our cities every time it rains or when there is an unrelenting heat wave, and in commons that are extensively encroached, diverted and polluted, that the state of India's environment is precariously hinged. The damaging consequences of such extensive degradation are irreversible and will seriously impede the country's socio-economic progress.

In such a scenario, it is important that the protection and conservation of India's natural resources, environment, forests and biodiversity, and of the commons, is considered critical to advancing ecological, socio-economic and public health securities in an inter-generational perspective. Besides, considering the massive impacts of climate change being suffered already, there is a critical need for moving beyond the principle of sustainable development to one of ecocentrism. For, in the end, it is not possible to achieve anything closely resembling human progress and stability in an unstable planetary condition.

It is also a matter of deep concern, especially in upholding the federal system of decision making, that the review of the draft Bills are not rushed through without deep debate and consideration by every Legislature across India, by Local Governments, environmental regulatory authorities, and crucially the public at large. It must be noted with grave concern that the notice inviting comments on the proposed amendments was put out on the Ministry's website on 1st July 2022 in English, and has not been made available in any of the Scheduled languages. Alarmingly, the commenting period ends on 21st July 2022. Such a rush to fundamentally amend fundamental environmental protection and pollution control laws is unprecedented..

Deep and due consideration of such realities is an essential prerequisite to reviewing and weighing the latest proposal to amend major environmental laws of India and turn their key enforcement provisions from criminal jurisprudence to civil law.

NOTES

This report was prepared by Shruti, Anirudh Menon and Janani Suresh of Environment Support Group team, with inputs from Vikas Balu, Kesiya Kattukaran, Kripa Krishna, Udit and Subhash who interned with the organisation. The report was edited by Leo F. Saldanha.

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The video recording of the Consultation are accessible at:
https://www.youtube.com/watch?v=IyaCM2c1tTk&ab_channel=ESGIndia
And
https://youtu.be/sX9LFXc-6EY

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