

The Environmental Rule of Law in India

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ABSTRACT

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This thesis offers a new conceptual framework—the environmental rule of law—to describe weaknesses in the development of Indian environmental law, and uses this description to critique the dominant discourse on environmental institutional reform. A secondary framework—fragmentation is also used to supplement the analysis of Indian environmental law.

Part I develops the conceptual framework of the environmental rule of law by considering the special challenges that the inherent polycentric and interdisciplinary nature of environmental law present for commonly understood rule of law values such as clarity, certainty and consistency. It also relies on Jeremy Waldron's conception of articulated governance to demonstrate that the rule of law is linked to the principle of separation of powers. This conception lays emphasis on the role of the three institutions of government—the legislature, the executive and the judiciary—in strengthening or weakening the rule of law. To determine institutional contribution to the rule of law, I develop three broad indicators to assess the legal quality of the instruments of each of these institutions of government. These indicators are: a) capacity of statutes to guide executive and judicial behaviour by goal-setting and balancing competing interests; b) the ability of the executive to make flexible yet reasoned decisions grounded in primary legislation; and c) the use of statutory interpretation and consistent standards of judicial review by the courts as they give effect to environmental rights and principles. Through the use of case studies in Part II that span environmental impact assessment, forest conservation, and indigenous rights, I demonstrate that the lack of adherence to these indicators produces a body of environmental law that is fragmented i.e. one characterised by multiple overlapping yet self-contained legal regimes with conflicting provisions and the absence of unifying norms.

In Part III, I use this understanding of fragmentation to critically analyse environmental legal and institutional reform proposals. I show that existing proposals address only the structure, rather than the process of functioning of the institutions of government. The rule of law framework that I develop also has potential for application to other areas of the law.

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TABLE OF ABBREVIATIONS AND SHORT FORMS

AIR	All India Reporter
CTC	Current Tamil Nadu Cases
CUP	Cambridge University Press
HC	High Court
KLT	Kerala Law Times
Mass	Massachusetts
MoEFCC	Ministry of Environment, Forests and Climate Change
OUP	Oxford University Press
SC	Supreme Court of India
SCALE	Supreme Court Almanac
SCC	Supreme Court Cases
SCC (Supp)	Supreme Court Cases (Supplement)
UK	United Kingdom
US	United States of America
W/P	Writ Petition

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CHAPTER ONE: INTRODUCTION

It is very difficult to frame a coherent narrative of environmental law and regulation in a country with the historical, political and social complexity of India. It is at once a country with a conservation ethic dating back to Emperor Ashoka in the 3rd century BC,¹ and one where environmental regulators failed spectacularly at preventing one of the world's worst environmental disasters in the Bhopal gas leak of 1984. On the statute books, modern rights-based laws for indigenous tribes jostle against lumbering colonial forest statutes, and in the courts, international environmental legal principles compete with hastily drafted executive orders for the judges' attention.

Contradictions like these strike at the identity of Indian environmental law. In this thesis, I portray Indian environmental law as a fragmented and therefore, poorly implemented, body of laws, rules, and judgments—it is characterised by multiple legal regimes that lack clearly discernible unifying norms. One of the reasons for this, I suggest, is the failure of the three institutions of government—the legislature, the executive, and the judiciary—to perform the roles that are expected of them in the development of Indian environmental law. This ultimately stems from a disregard for the rule of law, in particular, one of its organising principles—the capacity to guide behaviour,² and for the principle of separation of powers.³ The other reason for this fragmentation is also an unclear demarcation of roles, but in relation to Central and State authorities in India's federal system.

¹ Mahesh Rangarajan, 'India's Wildlife History: An Introduction' (Permanent Black 2001).

² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2009, 2nd edition) 214.

³ As explained in Part II of this thesis, I also rely on literature that recognises the inherent connection between the rule of law and the separation of powers. See Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54 *Boston College Law Review* 433.

I develop a framework to demonstrate how Indian legal instruments, whether in the form of statutes, executive orders or judicial decisions are weakening the rule of law. While this framework has potential for application to other areas of the law, I also examine whether certain special features of environmental law make it more appropriate to conceive of a distinctive ‘environmental rule of law.’ The development of this framework has two objectives, which are explained in this Introduction. The first is to fill a gap in the heavily court-centric Indian environmental legal scholarship. The second is to make a critically analytical contribution to the discussion on legal and institutional reform proposals that are being mooted to address India’s environmental challenges.

A. Situating the Thesis

1. Filling Gaps in Indian Environmental Legal Scholarship

India has a strong tradition of grassroots activism and civil society mobilisation around environmental issues, dating to village-level struggles against colonial forestry practices.⁴ There is a rich vein of anthropological, historical and political writing around this subject, with contemporary scholarship focusing on the impact of development projects on local populations, particularly indigenous peoples.⁵

There is an equally strong tradition of documentation of environmental violations by independent researchers, thinktanks and institutions that produce empirical reports spanning issues of conservation, biodiversity, industrial pollution

⁴ Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India* (OUP 2012).

⁵ See generally Mahesh Rangarajan, *Fencing the Forest: Conservation and Ecological Change in India’s Central Provinces 1860-1914* (OUP 1999); Thomas Weber, *Hugging the Trees: The Story of the Chipko Movement* (Viking 1988); Jean Drèze, Meera Samson and Satyajit Singh, *The Dam and the Nation: Displacement and Resettlement in the Narmada Valley* (OUP 2002); Oliver Springate-Baginski and Piers Blaikie, *Forests, People and Power: The Political Ecology of Reform in South Asia* (Earthscan 2007).

and climate change.⁶ Analyses of the most recent environmental developments are also regularly published in academic journals and magazines.

Together, these constitute comprehensive *factual* accounts of the manner in which environmental law is implemented in India, usually situated in the context of regulatory failure. However, analytical *legal* scholarship on the environment tends to concentrate on the contribution, and more recently, the limitations of the Indian higher judiciary. Courts, especially the Indian Supreme Court have played a very important role in the advancement of Indian environmental law, and early scholarship focused predominantly on its progressive jurisprudence.⁷

Much has been written about the creative expansion by the Supreme Court of the right to life under the Indian Constitution to include the right to a healthy environment.⁸ Similarly, the Supreme Court has been lauded for the procedural innovations devised by it in cases of environmental public interest litigation.⁹ However, the honeymoon period in this literature has now emphatically passed,¹⁰ and

⁶ Some of the most prominent of these include the Centre for Science and Environment, Centre for Policy Research, Kalpavriksh, the Legal Initiative For Forests and Environment and the Environment Law and Development Foundation.

⁷ Prafullachandra N Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984-1985) *Columbia Journal of Transnational Law* 561; GL Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions' (1991) 40 *International and Comparative Law Quarterly* 66; Claire L'Heureux-Dubé, 'Human Rights: A Worldwide Dialogue' in BN Kirpal (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000) 214, 223.

⁸ Michael R Anderson, 'Individual Rights to Environmental Protection in India' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 199; Gitanjali N Gill, 'Human Rights and Environmental Protection in India: Access Through Public Interest Litigation' (2012) 14 *Environmental Law Review* 200; Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (2nd edn OUP 2001).

⁹ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) Chapter 5; Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4 *Law, Environment and Development Journal* 375.

¹⁰ Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluted Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment' (2005) 17 *Journal of Environmental Law* 383; Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?' (2008) 16 *Review of European, Comparative and International Environmental Law* 274;

scholars have turned their attention to the activism of the Supreme Court, with particular concern for its legitimacy and competence as they study the impact of its judgments.¹¹

In this capture of the academic discourse by the benefits and dangers of an activist judiciary, there are two important areas that have not received adequate attention. The first is the role of *legislation* in the advancement of Indian environmental law; the second is a critical analysis of the *legal* reasoning employed by courts in environmental cases, distinct from their demonstration of procedural flexibility. Legislation is usually discussed only in *descriptive* accounts of Indian environmental law.¹² In most reform proposals, the expressive function of legislation¹³ and its potential to provide clear guidance to the executive and judiciary do not receive enough consideration, as I discuss later in the thesis. Instead, the amendment or enactment of environmental legislation is contemplated purely in an instrumental manner, only in so far as it is necessary to give statutory shape to, or confer a new power on, executive or judicial authorities. Even relatively more technical questions such as the need to harmonise and consolidate different sets of environmental laws and rules are rarely taken up.

Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 38 *Civil Justice Quarterly* 19.

¹¹ Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case and the Limits of Judicial Power' (2003) 28 *Columbia Journal of Environmental Law* 223; Shubhankar Dam, 'Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analysing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)' (2005) 13 *Tulane Journal of International and Comparative Law* 109; Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 *Journal of Environmental Law* 293.

¹² Kailash Thakur, *Environmental Protection Law and Policy in India* (Deep and Deep Publications 1997); PB Sahasranaman, *Handbook of Environmental Law* (OUP 2009); P Leelakrishnan, *Environmental Law in India* (LexisNexis Butterworth 2005).

¹³ See Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 2024 who describes this as its function in "making statements" as opposed to controlling behaviour directly.'

Even within the area of environmental legal scholarship that has received extensive treatment, i.e. the role of the judiciary, the approach remains largely consequentialist, a critique that a recent work¹⁴ extends to scholarship on public interest litigation in India in general. What this means is that the role played by the courts is evaluated on the basis of the *outcome* achieved in a particular case rather than the *legal process* employed. This critique is a step in the right direction, making a case for scrutinising the actions of courts in *legal* terms; it highlights how some of the procedural innovations for which the Supreme Court was initially praised have actually led to the ‘delegitimisation of legal procedure’ and ‘made it easier for courts to justify and overlook departures’ from basic statutory principles,¹⁵ thereby weakening the rule of law. While this work focuses on the procedural minutiae in the hundreds of orders and directions issued by the Supreme Court in public interest litigation cases, what remains missing from the literature is a critique of the Court’s substantive reasoning.

Accounts of the incorporation by the Supreme Court and the High Courts, and now the National Green Tribunal, of international environmental legal principles into domestic jurisprudence are largely uncritical,¹⁶ although upcoming work promises to address this gap.¹⁷ If the courts’ judgments are to be capable of providing guidance to the executive, it is also important to evaluate whether courts have clearly articulated

¹⁴ Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016).

¹⁵ *ibid* 26. This particular argument is made by the author in the context of criminal law and public interest litigation, but is one that also applies to environmental cases as I demonstrate in later chapters.

¹⁶ Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004); Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge Explorations in Environmental Studies 2016). But see Rajamani (n 10) and Michael R Anderson, ‘International Environmental Law in Indian Courts’ (1998) 7 *Review of European, Comparative and International Environmental Law* 21.

¹⁷ Shibani Ghosh (ed), *Analytical Lexicon of Principles and Rules of Indian Environmental Law* (2017) (publication in process)

the content of these principles or set standards for executive action. For the most part, however, the legal basis for the courts' judgments in environmental cases is not sufficiently analysed.

These are the two principal gaps that I aim to address in this thesis. The environmental rule of law framework that I develop in this thesis will focus on the appropriate role of *all three institutions of government*, moving beyond the traditional discourse on executive failure and judicial activism, and bringing attention to bear on the legislature as well. Additionally, since the framework is organised not only around the separation of powers, but also the capacity to guide behaviour, it requires legal instruments—laws, executive orders, and judgments—to be scrutinised for their clarity, coherence, and stability.¹⁸ Only a framework that addresses both these gaps in the existing scholarship is capable of meaningfully contributing to contemporary debates on environmental reform measures. The next section discusses the need for such reform and why existing reform proposals are unlikely to be adequate.

2. Critically Analysing Proposed Environmental Reform Measures

There is no doubt that India's environmental laws and institutions need repair. In 2014, India ranked 155th out of 178 countries in the Environmental Performance Index released by Yale University, the worst among other emerging economies.¹⁹ The indicator on which it fared particularly poorly was its ability to protect human health from environmental harm, a fact borne out in the 2015 inaugural report of the Centre

¹⁸ See Timothy AO Endicott, 'The Impossibility of the Rule of Law' (1999) 9 *Oxford Journal of Legal Studies* 1, where the author states that one of the requirements of the ideal of the rule of law is that 'laws must be open, clear, coherent, prospective, and stable.'

¹⁹ 'India Ranked 155th on Yale's Environmental Performance Index' *Business Standard* (27 January 2014) <http://www.business-standard.com/article/news-ians/india-ranked-155th-on-yale-s-environmental-performance-index-114012700970_1.html> accessed 14 March 2016.

for Science and Environment (a prominent public interest research and advocacy organisation) on the state of India's health.²⁰ The report demonstrated a strong correlation between failing environmental regulation and deteriorating public health.²¹

In contrast, the annual report (2014-15) of the Ministry of Environment, Forest and Climate Change ('MoEFCC') painted a blandly reassuring picture of the state of the Indian environment.²² For instance, a lay reader of the report would be left with the patently false impression that PM10 is the only air pollutant that ought to be a mild cause of concern.²³ For the most part, the report is unable to furnish comprehensive empirical data on several important indicators of pollution and degradation, and is largely a self-congratulatory litany of environmental protection measures taken by the MoEFCC.

This alarming disconnect between the actual state of the environment and its perception by the Government has important implications for the strengthening of Indian environmental law. For one, it reveals that the Government has clearly not engaged in constructive dialogue with other relevant stakeholders. Second, it also suggests that it is unlikely to undertake critical self-introspection about the functioning of its institutions. This might have the effect of weakening the quality of deliberations on environmental legal and institutional reform.

²⁰ Centre for Science and Environment, 'Body Burden 2015: State of India's Health' (2015).

²¹ Some of the key findings of this report are: a) air pollution is the fifth leading cause of death in India; b) 37.7 million Indians are affected by water-borne diseases annually and c) there is a worrying correlation between the incidence of cancer and pesticide residues in some States.

²² Ministry of Environment, Forests and Climate Change, 'Annual Report 2014-15' (Government of India).

²³ *ibid* 96.

Although there is little to distinguish the environmental record of past governments from each other, the stance of the current Government²⁴ bears out the above implications in a particularly troubling manner. So strong is the imperative to portray the environmental health of the country in a positive light that the MoEFCC recently announced that it would hire a professional social media consultant to combat the negative portrayal of the Government's actions on the environment.²⁵ The environment Minister also directed that the term 'diversion' of forest land be replaced in all official communications with 'reforestation', a euphemism to counter the criticism that the ministry was granting forest clearances too hastily.²⁶

In this kind of political atmosphere,²⁷ the strength of environmental laws and the independence of environmental institutions assume even greater importance. By all accounts, both of these appear to be failing. Flagrant violations of environmental regulations are regularly reported,²⁸ and the more vulnerable voices of local communities and indigenous tribes continue to be marginalised.²⁹ Nearly twenty years

²⁴ The current government took office on 26 May 2014 and is led by the Bharatiya Janata Party under Prime Minister Narendra Modi.

²⁵ Mayank Aggarwal, 'Environment Ministry's Response to Criticism: Social Media Experts' *LiveMint* (10 February 2016) <<http://www.livemint.com/Politics/DamAXMdwBb0maeqjL92DMP/Indias-environment-ministrys-response-to-criticism-social.html>> accessed 15 March 2016.

²⁶ Jay Mazoomdar, 'Don't Say 'Diversion' of Forest Land, Say 'Reforestation', Says Prakash Javadekar' *The Indian Express* (29 July 2015) <<http://indianexpress.com/article/india/india-others/dont-say-diversion-of-forest-land-say-reforestation-prakash-javadekar/>> accessed 15 March 2016.

²⁷ Kanchi Kohli, 'Is Environment Protection on Our Agenda At all?' *India Together* (5 June 2015) <<http://indiatogether.org/environment-protection-an-agenda-or-not-environment>> accessed 15 March 2016.

²⁸ For some recent examples, see 'Mining Trucks Already Start Violating Rules' *The Times of India* (12 November 2015) <<http://timesofindia.indiatimes.com/city/goa/Mining-trucks-already-start-violating-rules/articleshow/49750610.cms>> accessed 15 March 2016; Harveer Dabas, 'Industries Continue to Discharge Effluents Into Rivers Despite Ban' *The Times of India* (15 January 2016) <<http://timesofindia.indiatimes.com/city/meerut/Industries-continue-to-discharge-effluents-into-rivers-despite-ban/articleshow/50597146.cms>> accessed 15 March 2016.

²⁹ For examples of individual and systemic denial of public participation, see Kanchi Kohli, 'Ignoring the 'Public' at a Public Hearing' *India Together* (28 May 2014) <<http://indiatogether.org/irregularities->

after the Supreme Court intervened in unprecedented fashion to regulate Delhi's air pollution,³⁰ the city continues to have some of the worst air quality in the world. Violations of forest laws are par for the course despite close monitoring by a Court-appointed committee.³¹ Although the courts continue to be strong champions of environmental rights,³² the burden on these institutions is disproportionate and is creating a backlog of environmental cases.³³ The inevitable response to this continuing evidence of poor environmental protection is a call for regulatory and institutional reform.

Various reform proposals have been debated over the years, with some, like the creation of the National Green Tribunal,³⁴ ultimately being implemented. The current Government has also proposed steps to consolidate the sprawling set of environmental statutes and to restructure the authorities that implement environmental law.³⁵ However, apart from the enactment of the National Green Tribunal Act in 2010, there has been no comprehensive *legislative* reform measure since the spate of environmental laws and rules³⁶ that were passed in the wake of the 1972 United

in-parsa-coal-bock-public-hearing-environment> accessed 15 March 2016; 'Dilution of Forest Rights, Interference by Environment Ministry Unconstitutional' *Down to Earth* (20 March 2015) <<http://www.downtoearth.org.in/news/dilution-of-forest-rights-interference-by-environment-ministry-unconstitutional-49074>> accessed 15 March 2016.

³⁰ *MC Mehta v Union of India* 1997 (4) SCALE 4 (SP).

³¹For extensive documentation of the illegal diversion of forest land, see <<http://www.forestrightsact.com/corporate-projects/item/17>> accessed 19 March 2016.

³² Prachi Shrivastava, 'Odd, Even and Beyond: Courts Carve Out Environmental Jurisprudence' *LiveMint* (12 January 2016) <<http://www.livemint.com/Politics/V5IRBRjzBT6ubb2SNtMSJN/Odd-even-and-beyond-Courts-carve-out-environmental-jurispr.html>> accessed 15 March 2016.

³³ The Annual Report (2014-15) of the MoEFCC records 2556 pending cases before the NGT.

³⁴ The National Green Tribunal was constituted under section 3 of the National Green Tribunal Act 2010, which came into force on 18th October 2010.

³⁵ These are discussed in greater detail in Part III, chapter 8(D).

³⁶ These include the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986. These were followed by the Coastal Regulation Zone Notification, 1991 and the

Nations Conference on the Human Environment in Stockholm. As mentioned earlier, legislative reform is seen only as the *means* to restructuring the executive or the courts, rather than as a measure that has the intrinsic ability to strengthen Indian environmental law.

The neglect of the role of legislation in Indian environmental legal scholarship is also reflected in legal and institutional reform proposals. There is virtually no debate on the manner in which environmental values and principles can find statutory expression. Instead, reform proposals focus overwhelmingly on executive and judicial authorities and the relationship between them. In the attempt to address the concerns that have been raised in the literature regarding the legitimacy and competence of the courts, reform measures have also concentrated on recalibrating the balance of power between the executive and the judiciary, and on arming these institutions with greater technical expertise to solve environmental problems.

The result is a preoccupation in reform proposals with structure rather than process, in the sense that there is greater emphasis on the manner of appointment, composition, and expertise of statutory, executive and judicial authorities rather than on their use of *legal* tools to perform their functions.³⁷ Prominent empirical studies on such authorities also tend to focus on the lack of skilled expertise, sufficient manpower and financial resources that prevent these bodies from effectively carrying out their duties.³⁸ The literature is geared towards developing *quantitative*

Environment Impact Assessment Notification, 1994, both issued under the EPA, and both playing an important role in regulating development projects.

³⁷ For reform proposals that do call for more innovative instruments to strengthen the implementation of Indian environmental law, see Centre for Science and Environment, 'Filling the Blanks: A Discussion Paper on Strengthening Environmental Governance' (2014); Mahesh Menon, Manjeri Subin Sunder Raj, John Pendergrass, Teresa Chan, Valerie Pinkerton, 'Enforcing Hazardous Wastes Rules in India: Strategies and Techniques for Achieving Increased Compliance' (2014).

³⁸ Centre for Science and Environment, 'Turnaround: Reform Agenda for India's Regulators' (2009); Geetanjoy Sahu, 'Environmental Regulatory Authorities in India: An Assessment of State Pollution

benchmarks and indicators to evaluate the implementation of environmental law. Examples of such indicators include the number of environmental clearances granted³⁹ or the rate of compliance with conditions attached to environmental clearances.⁴⁰ There is no comparable attempt to develop *qualitative* benchmarks and indicators,⁴¹ especially not those that are capable of evaluating *legal quality*. By this, I mean that there is no systematic scholarly attempt to assess laws, rules, executive orders and judgments for their capacity to strengthen or weaken the rule of law.

In order to address this gap, the rule of law framework that I develop in this thesis specifically pays attention to the impact that the *process* of functioning of the three institutions of government, as expressed through their various *legal* instruments, has on the coherence of Indian environmental law. This framework is then used to inform a critical examination of legal and institutional reform proposals for Indian environmental law. Although a key concern of this thesis is to examine whether environmental law has unique features that require a special framework for analysis, some of the problems with the working of the institutions of government that are demonstrated in later chapters are also evident across other areas of law. The next section assesses the potential impact that the academic project undertaken in this thesis might have for legal and institutional reform in general.

Control Boards' (Tata Institute of Social Sciences 2013); Indian Institute of Management, Lucknow, 'Evaluation of Central Pollution Control Board' (2010).

³⁹ For an exhaustive, sector-wise analysis of environmental and forest clearances, see <<http://www.greenclearancewatch.org/>> accessed 19 March 2016.

⁴⁰ Kanchi Kohli and Manju Menon, 'Calling the Bluff: Revealing the State of Monitoring and Compliance of Environmental Clearance Conditions' (Kalpavriksh 2009).

⁴¹ In the context of environmental impact assessment, however, there is extensive documentation of procedural violations during public hearings or the incompleteness of environmental impact assessment reports. Independent researchers and activists regularly document such violations. One of the sources of such information is the Environmental Impact Assessment Resource and Response Centre: <<http://www.ercindia.org/index.php/home/erc-india>> accessed 19 March 2016.

3. Potential for Wider Application

One of the principal arguments that I make in this thesis is that Indian environmental law is fragmented, in so far as it is characterised by a multiplicity of laws that do not necessarily sit harmoniously with each other, and a multitude of authorities that are not always guided by common norms. The weak implementation of such laws is invariably one of the effects of such fragmentation. However, such fragmentation and poor implementation are not exclusive to Indian environmental law, although it might well be the case that environmental law has certain special features that make such fragmentation even more pronounced.⁴² These themes find resonance within debates on legal reform in other areas as well.

For instance, the Financial Sector Legislative Reforms Commission has emphasised the need for unifying norms by strongly recommending a move to principles-based regulation. This is seen as a necessary response to the gaps and overlaps in the financial regulatory architecture, the legacy of a ‘sequence of piecemeal decisions responding to immediate pressures from time to time.’⁴³ The weak implementation of the law because of the fragmented nature of authorities is also specifically indicted in a Parliamentary Standing Committee Report on the working of India’s drug regulatory system and its drug quality standards in particular.⁴⁴

⁴² Chapter 2(B).

⁴³ Report of the Financial Sector Legislative Reforms Commission, Volume 1: Analysis and Recommendations (Government of India 2013) 132.

⁴⁴ Department-Related Parliamentary Standing Committee on Health and Welfare, ‘Thirtieth Report on Drugs and Cosmetics (Amendment) Bill, 2009’ (Rajya Sabha Secretariat 2008).

In addition to these specific examples, the theme of fragmentation keeps cropping up in a wide range of sectors, from water resources⁴⁵ to data protection,⁴⁶ and from land reforms⁴⁷ to labour laws.⁴⁸ There is a tendency to view such fragmentation purely as a managerial/technical problem, in the sense that the creative merging and rationalisation of laws and authorities can tackle it. As I discuss in Part III of this thesis, this is precisely the manner in which the current Government conceives of the legal and institutional reform measures that are required to strengthen Indian environmental law.⁴⁹

However, as I argue in this thesis, fragmentation and poor implementation go deeper than structural problems with laws and authorities. One of the reasons for the loss of coherence in legislation, executive orders and judicial decisions within environmental law is the failure of the three institutions of government to perform the roles that are expected of them in maintaining the rule of law. If the problem, at its heart, is an institutional one, then it is more likely that the fragmentation that is mirrored in other areas of the law can similarly be traced to broader institutional concerns.

The environmental rule of law framework that I develop in this thesis may therefore be useful in informing legal and institutional reform proposals in other areas as well, after taking into account differences between environmental law and other

⁴⁵ Vandana Asthana and AC Shukla, *Water Security in India: Hope, Despair and the Challenges of Human Development* (Bloomsbury Academic 2014).

⁴⁶ Sreenidhi Srinivasan and Namrata Mukherjee, 'Building an Effective Data Protection Regime for India (Vidhi Centre for Legal Policy 2017), available at <<http://vidhilegalpolicy.in/reports-1/2017/1/16/building-an-effective-data-protection-regime-in-india>> accessed 31 January 2017.

⁴⁷ RS Deshpande, 'Emerging Issues in Land Policy' (India Resident Mission Policy Brief Series No. 16, Asian Development Bank 2007).

⁴⁸ Ministry of Labour and Employment, 'Report of the Working Group on 'Labour Laws and Other Regulations' for the Twelfth Five Year Plan (2012-2017)'.

⁴⁹ Chapter 8.

legal fields. For example, centralising drug regulatory functions, as existing recommendations appear to suggest,⁵⁰ may not necessarily solve the lack of coordination between drugs licensing authorities at the Central and State Governments. Instead, the rule of law framework developed in this thesis is more likely to suggest a response that will focus on strengthening the clarity of the law—the answer might lie in a better drafted statute that clearly demarcates the functions of the different drug licensing authorities, rather than in reorganising their structure at the Central and State level.

The manner in which this framework is developed and applied in this thesis is briefly explained in the next section, which outlines the scope of the thesis, describes its structure and elaborates on the methodology adopted.

B. Methodology and Structure

1. Scope and Methodology

The objective of this thesis is to offer a new conceptual framework to analyse Indian environmental law, one which takes into account the contribution of all three institutions of government, and which can meaningfully be applied to evaluate proposals for Indian environmental legal reform. These are the following choices that I have made in defining the contours of this project.

In the previous section, I stated that the rule of law framework that I develop has potential for other areas of the law. Yet, I choose to focus on Indian environmental law for two reasons. First, the disjointed set of multiple laws and authorities that characterise fragmentation are particularly prominent in Indian

⁵⁰ *Dinesh S Thakur v Union of India*, Writ Petition (Civil) No. 137 of 2016.

environmental law because of its inherent polycentric and interdisciplinary nature.⁵¹ The environment is integrally connected with a range of different subjects, which makes the lack of coherence among various laws even more pronounced.

Second, it is one of the few areas in Indian law where there is both a vast network of laws and a prominent body of constitutional jurisprudence. Similar constitutional jurisprudence marks the development of socio-economic rights like health, food and education,⁵² but without the same statutory framework that governs the environment. In contrast, extensive laws, rules and regulations, similar to the environmental framework, characterise the regulation of financial institutions, telecommunications, electricity and infrastructure. However, these areas lack the exclusive set of judicially developed principles that form an essential part of environmental law.

The environment, then, sits at the cusp of rights-based protection and regulatory laws. The manner in which these markedly different legal approaches are used by the three institutions of government to develop Indian environmental law makes for a particularly interesting case study. This may then form the basis for reform in other areas like health and education that similarly straddle the divide between rights and regulation, but do not yet have as developed a body of laws and jurisprudence as Indian environmental law.

The project that I undertake in this thesis is ambitious in its breadth because I offer an account of Indian environmental law, an area that includes within its ambit, subjects as diverse as thermal power plants, genetically modified organisms, tiger reserves, local community knowledge of biodiversity and bio-medical waste. It is

⁵¹ This is explained in greater detail in chapter 2(B).

⁵² Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Washington University Global Studies Law Review 1.

beyond the scope of this thesis to undertake an in-depth analysis of each of the regimes governing these areas. In fact, the very manner in which the rule of law framework is conceived requires an institutional approach to the law, where a close-up investigation of particular legal regimes is relatively less important.

Even with this broader approach, however, it is still impossible to comprehensively cover all the areas that fall under Indian environmental law. I restrict the scope of my enquiry to the regimes that govern environmental impact assessment (with specific reference to mining), forest conservation and indigenous rights to natural resources. I choose these areas because they are linked to core environmental statutes that make up the backbone of Indian environmental law, and also because they make up a significant bulk of environmental litigation,⁵³ thereby offering a wider range of material for analysis.

In so far as I assess the quality of environmental judgments, I limit the scope of this thesis to the Indian Supreme Court. I focus on judgments related to the illegal diversion of forest land, unauthorised mining in protected areas, and indigenous rights to forest resources. I choose these judgments because they complement the discussion in the other parts of the thesis, where I focus on the laws, rules and regulations governing these specific areas.

While the Court's treatment of environmental legal principles is one of the facets of its reasoning that I analyse, I do not claim to offer a definitive analysis of the judicial incorporation of international environmental legal principles into Indian law. This ought to form, and as mentioned earlier, in fact already is, the subject of a

⁵³ For a tabular presentation of Supreme Court environmental judgments between 1980 and 2010, see Geetanjoy Sahu, *Environmental Jurisprudence and the Supreme Court: Litigation, Interpretation, Implementation* (Orient BlackSwan 2015) Appendix.

separate academic project.⁵⁴ An analysis of High Court judgments would also have been very useful in fleshing out the central argument of this thesis, but I have excluded this because of the constraints of space. Moreover, an analysis of these judgments is also likely to throw up different questions about precedent and the manner in which High Courts follow Supreme Court judgments. To do this analysis full justice, I reserve it for a future project.

The ‘broad picture’ approach to the different legal regimes, judgments and institutions that I examine in this thesis is the distinguishing feature of the methodology that I adopt. Taking this step back is in fact critical to achieving the objective that I define. This is to offer a new framework to analyse Indian environmental law that will highlight weaknesses not previously deliberated, and thereby inform debates on institutional reform. This necessarily requires a different vantage point than if the objective were merely to thoroughly describe poor implementation in Indian environmental law, in which case, a deep dive into a particular area of Indian environmental law might have been more appropriate.

This framing of the objective has other influences on the methodology that I adopt. If the focus were to provide an exhaustive narrative of the manner in which environmental law is implemented, it would be incomplete without an empirical, socio-legal analysis of the different factors influencing its implementation. Some of these factors have already been discussed extensively in different strands of academic literature.

For example, political economy attempts to explain the tussle between environmental and developmental interests since the 1990s by situating it in the

⁵⁴ Ghosh (n 17).

discourse on liberalisation and globalisation.⁵⁵ Environmental historians provide an account of clashes between colonial forest legislation and the bureaucracy that administers it, on the one hand, and the rights of indigenous tribes to community ownership of forest resources on the other.⁵⁶ The failure of key public authorities to enforce environmental protection standards is explained by accounts of corruption and regulatory capture.⁵⁷ Socio-legal literature explores the impact that the ideological predilections of individual judges may have on the outcome of environmental cases.⁵⁸

These are all central to an understanding of the manner in which environmental law develops and is implemented. However, I rely on these only to provide context to an analysis of the legislative, executive and judicial instruments that form the real concern of this thesis. I deliberately focus on the ‘law’ in environmental law in order to bring the role of the three institutions of government in making, implementing, and interpreting it under greater scrutiny, thereby filling an important gap in the literature.

This is also why I rely on secondary literature to provide examples of irregularities in, and violations of Indian environmental law. I use case studies in Part II to illustrate the conceptual framework running through this thesis. These case studies also rely on existing empirical documentation of the environmental crises in different areas, and are not based on primary field research of my own. There are two

⁵⁵ Ajit Menon, ‘Situating Law: Adivasi Rights and The Political Economy of Environment and Development in India’, in Christoph Eberhard (ed), *Law, Land Use and the Environment: Afro-Indian Dialogues* (Institut Francais de Pondicherry 2008).

⁵⁶ Gadgil and Guha (n 4).

⁵⁷ Human Rights Watch, ‘Out of Control: Mining, Regulatory Failure and Human Rights in India’ (2012) <http://www.hrw.org/sites/default/files/reports/india0612ForUpload_0.pdf> accessed 2 June 2015; Colin Gonsalves, ‘The Bhopal Catastrophe: Politics, Conspiracy and Betrayal’ (2010) 45 *Economic and Political Weekly* 68.

⁵⁸ Sahu (n 53).

reasons for this. First, such primary research requires time and resources that the constraints of this thesis do not permit. Second, I use these case studies only to bolster my environmental rule of law framework, rather than to provide a definitive account of the working of Indian environmental law in a particular area.

The final methodological caveat that I must make relates to my treatment of concepts like the rule of law, coherence, and the separation of powers. This is a thesis that is concerned with the *working* of Indian environmental law, as expressed through different legal instruments. It is neither a thesis on legal philosophy that claims to offer extensive accounts of different conceptions of the rule of law⁵⁹ or the merits of different kinds of coherence theories,⁶⁰ nor does it adopt a multidisciplinary, empirical approach to developing quantitative indicators for the rule of law as recent efforts are attempting to undertake.⁶¹

It takes Decision 27/9 of the Governing Body of the United Nations Environment Programme ('UNEP')⁶² as its starting point—the 'first internationally negotiated document to establish the term 'environmental rule of law'.'⁶³ This thesis is an attempt to give content to this concept and to develop a framework to assess the legal quality of legislation, executive orders and judicial decisions that develop Indian environmental law. This may necessarily require subscribing to various aspects of different legal theories. I explain the extent to which such allegiances are forged later

⁵⁹ For an overview of these concepts, see Paul Craig, 'The Rule of Law' Select Committee on Constitution (6th Report 2007), Appendix 5.

⁶⁰ See Joseph Raz, 'The Relevance of Coherence' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995).

⁶¹ See the World Justice Project Rule of Law Index 2016 at <<http://worldjusticeproject.org/rule-of-law-index>> accessed 2 February 2017.

⁶² Decision 27/9: Advancing Justice, Governance and Law for Environmental Sustainability, UNEP/GC.27/17.

⁶³ See <<http://web.unep.org/environmentalgovernance/erl/who-we-are/overview>> accessed 2 February 2017.

in the thesis; the limited point that I am making here is that it is beyond the scope of this thesis to offer an entirely original and independent account of the rule of law and its content in *general*.

2. Argument and Chapter Structure

This thesis is divided into three substantive parts. In Part I, comprising chapters 2 and 3, I lay the groundwork by developing the primary conceptual framework of the environmental rule of law, and the secondary framework of fragmentation to describe the state of Indian environmental law. In chapter 2, I discuss the nascent developments around the concept of the environmental rule of law within the UNEP, and consider whether the nature of environmental law presents special challenges to maintaining the rule of law. This is linked to discussions in the literature about the identity of environmental law.

The next part of chapter 2 provides an overview of competing conceptions of the rule of law in general with the limited purpose of considering which of these is the best fit for environmental law in light of the earlier discussion on its special features. This is followed by a discussion of the principle of separation of powers in the Indian context, and its connection with the rule of law. I use Waldron's idea of 'articulated governance' that provides a separate rule of law justification for the separation of powers⁶⁴ to propose specific roles for the legislature, the executive and the judiciary in the development of Indian environmental law. These are then used as benchmarks against which Indian environmental law is analysed in Part II of the thesis.

However, a supporting framework—fragmentation—is also used for this analysis, and chapter 2 ends with an explanation of this concept. The first

⁶⁴ Waldron (n 3).

comprehensive academic treatment of fragmentation has its place in the literature on international law. Notwithstanding the differences between the international and municipal legal systems, the markers of fragmentation on the international plane—separate legal regimes and uncertain legal hierarchies—have potential at least as descriptive devices in the portrayal of the lack of clarity and coherence in Indian environmental law. I explain how this concept can be adapted to the domestic, Indian context by providing a general overview of legislative, executive and judicial processes in chapter 3.

I highlight certain features of these law-making, law-implementing and law-interpreting processes that contribute to the weakening of the rule of law and the breach of the separation of powers. For instance, I point to closed-off legislative processes without adequate consultative mechanisms as one of the factors that impede the clear articulation of legislative intent, thereby lessening the capacity of statutes to provide guidance to the executive. I also point to the lack of adequate scrutiny over delegated legislation and the discarding of procedural constraints in public interest litigation cases as background features of the executive and judiciary that are likely to have had an impact on the environmental rule of law.

In the second half of chapter 3, I combine this description of institutional processes with the benchmarks developed in chapter 2 to frame qualitative indicators that evaluate the legal quality of legislation, executive orders and judicial decisions. The question that I ask is: what features of these instruments determine whether the three institutions of government are appropriately playing their roles in maintaining and strengthening the environmental rule of law?

I suggest the following broad indicators for the different categories of legal instruments: a) the capacity of statutes to clearly guide executive and judicial action

by goal-setting and balance competing interests; b) the ability of the executive to make flexible yet reasoned decisions grounded in primary legislation; and c) the application of statutory interpretation and consistent standards of judicial review by the courts to give effect to environmental legal principles. In addition to these, there are several clarity-related indicators that also help determine whether the rule of law is being maintained across all legal instruments —the use of clear, unambiguous language; the extent of contradictory provisions; and the establishment of connections across overlapping instruments. As mentioned earlier, the conceptual framework on fragmentation is particularly helpful in fleshing out these clarity-related indicators. I end chapter 3 by discussing whether these indicators pose special challenges for Indian environmental law.

Part II, comprising chapters 4, 5 and 6 is an application of these indicators to select areas of Indian environmental law, with each chapter devoted to a particular legal instrument and its corresponding institution of government. Each of these chapters follows a similar structure—first, I provide an overview of broad, observable trends in the manner in which the environmental rule of law is being strengthened or weakened; then, I provide a comparatively more in-depth description through a case study, highlighting the fragmentation of Indian environmental law using the benchmarks and indicators developed in chapters 2 and 3 respectively. In chapter 4, I provide an overview of key statutory regimes, with emphasis on the minimal attention paid to legislative design, on their self-containment, and on the manner in which they clash with each other. I also highlight the largely *instrumental* use of legislation, i.e. as a vehicle for the creation of executive or judicial authorities, rather than as an expression of deliberative decisions about environmental and other interests.

Chapter 5 focuses on the executive. It demonstrates the lack of coordination across authorities and the piecemeal development of the law through the use of executive instruments, as evidence of the lack of coherence in Indian environmental law. This tendency to legislate through executive instruments is also highlighted as a breach of the principle of separation of powers. There is some overlap between chapters 4 and 5, as common case studies describing the implementation of the Forest Rights Act and illegalities in mining activities are used to demonstrate the fragmentation and poor implementation of Indian environmental law.

Chapter 6 is devoted to evaluating the quality of judicial reasoning and its impact on the coherence of Indian environmental law. First, I provide an overview of prominent judgments in the areas of forest conservation, mining and indigenous rights. I examine four key trends in these judgments that I argue are related to the environmental rule of law and the principle of separation of powers. Two of these are related to the indicator framed in chapter 3 as regards judicial decisions—one, the extent of reliance by the courts on the statutory framework; two, the consistency in the standards of review applied. The other trends—the appointment of expert committees as part of the decision-making process, and the kinds of orders and directions issued—provide insight into the exercise of executive powers by courts, and correspondingly, insight into the separation of powers in practice.

Next, I provide an in-depth description of a contemporary judgment at the intersection of conservation, mining and forest rights, and with important implications for the rule of law and institutional reform. I conclude the chapter with another detailed description of a case that highlights the fragmentation of Indian environmental law across judicial fora—in this instance, the higher judiciary and the NGT.

It is impossible to attempt a comprehensive narrative of Indian environmental law without taking into account the challenges to coherence and implementation that India's federal structure of government presents. In chapter 7, I first describe some general fragmentary tendencies of the Indian federal system, consider these in the particular context of the environment, and then conclude with a case study on the implementation of compensatory afforestation mechanisms across the country. Although the material in this chapter is not directly related to the concepts of environmental rule of law and separation of powers that run through the rest of the thesis, the loss of coherence described mirrors the indicators applied to the other chapters in Part II.

In this manner, Part II furnishes a useful insight into the underlying reasons for the fragmentation and poor implementation of Indian environmental law. This sets the tone for a discussion of environmental institutional reforms in Part III. Part II demonstrates that the weakening of the environmental rule of law can ultimately be traced to the roles assumed by the three institutions of government and as expressed through their legal instruments. It also demonstrates that the degree of adherence to the principle of separation of powers and federalism also have a role to play in the clarity and coherence of Indian environmental law.

This informs the critical analysis of environmental institutional reform proposals in Part III. In chapter 8, I evaluate proposals by government, civil society and academia to reform environmental institutions and authorities, and demonstrate that there is not nearly as much emphasis on process-related reforms as there is on re-organising the form and structure of authorities. I argue that these proposals fail to appreciate the *legal* reasons for the poor implementation and are likely to bring only superficial changes.

The conclusion summarises the key findings of the thesis and proposes a snapshot of practical environmental reform measures on the basis of the critique in chapter 8. I end by suggesting ways in which the research agenda of this thesis can be extended, particularly in relation to more modern approaches to the rule of law.

PART I: A CONCEPTUAL FRAMEWORK

CHAPTER TWO: CONCEPTUALISING THE ENVIRONMENTAL RULE OF LAW

A. Introduction

The contribution of this thesis is the development of a new conceptual framework—the environmental rule of law—that can be used to analyse the development of Indian environmental law. Part I lays the groundwork for this by attempting to define the content of the environmental rule of law and by developing indicators to assess the extent to which it is strengthened or weakened by the three institutions of government through their legal instruments. It also argues that the degree of adherence to these indicators determines the extent of fragmentation of Indian environmental law, where fragmentation refers to conflicts between multiple legal regimes that are self-contained yet overlapping, and crucially, are not unified by general norms.

In this chapter, I explore the origins of the concept of the environmental rule of law under the United Nations Environment Programme (‘UNEP’) and attempt to flesh it out in the context of existing conceptions of the rule of law. I also discuss the connection between the separation of powers and the rule of law, and develop the secondary framework of fragmentation. In chapter 3, I use these ideas to establish indicators that determine whether the three institutions of government, through their legal instruments, are performing the roles appropriate to them in the development of Indian environmental law.

In section B, I explore the nascent development of the environmental rule of law under the UNEP by studying the admittedly brief decisions and statements on the concept released by it. I conclude that the concept has potential for more meaningful development, and attempt to carry this forward by asking whether the nature of environmental law in general and Indian environmental law in particular present

special challenges to the environmental rule of law, focusing on one of the organising principles of the rule of law—the capacity to guide the behaviour of the executive and the judiciary. I suggest that the inherently polycentric and interdisciplinary nature of environmental law in general and the particular history of the development of environmental law in India must be taken into account while giving content to the idea of the environmental rule of law.

In section C, this specialised nature of the environmental rule of law is considered in the context of competing conceptions of the rule of law in general. I provide an overview of traditional theories—formal and substantive—on the rule of law. I use these theories and ideas to refine the concept of the environmental rule of law formulated in section B.

Section D adds another dimension to the idea of the rule of law by linking it to the separation of powers. I discuss Waldron's idea of articulated governance, which suggests that there is a rule of law justification to the separation of powers apart from the need to create checks and balances between the institutions of government. It suggests that there is a value in the legislature, executive and judiciary performing their respective roles, and that this value is linked to the clarity and certainty of the law, commonly accepted as rule of law requirements. It also provides an overview of the concept of separation of powers in the Indian legal literature.

Combining this conception of the rule of law and the separation of powers with the discussion in section B of the distinctive nature of environmental law helps conceive of the appropriate roles for the legislature, the executive and the judiciary in maintaining and strengthening the environmental rule of law. These constitute normative benchmarks against which indicators of the environmental rule of law can be established in chapter 3.

The chapter ends with the development of the secondary framework of fragmentation in section E, which is used to describe the state of Indian environmental law later in Part II. I introduce the phenomenon of fragmentation through the report of the International Law Commission⁶⁵ that forms one of the first and most comprehensive treatments of the subject. The report suggests the following characteristic features of fragmentation—the existence of multiple self-contained, specialised, yet overlapping regimes, the uncertain legal hierarchy of norms, and the loss of coherence. I also refer briefly to theories of coherence and to understandings of fragmentation in domestic legal systems in order to build a fuller framework of fragmentation to buttress the international law conception.

B. Environment and the Rule of Law

1. Origins

In 2013, Decision 27/9⁶⁶ of the Governing Council of the United Nations Environment Programme (‘UNEP’) established the term ‘environmental rule of law’ for the first time in an international document. The decision recognised that

the violation of environmental law has the potential to undermine sustainable development...and that the rule of law and effective governance play an essential role in reducing such violations.⁶⁷

It also called upon the UNEP to assist national governments in the development and implementation of environmental rule of law, some of the supporting features of which included ‘information disclosure, public participation, implementable and

⁶⁵ Report of the Study Group of the International Law Commission, ‘Difficulties Arising from the Diversification and Expansion of International Law’ A/CN.4/L/682 (13 April 2006) 11 (‘ILC report’).

⁶⁶ Decision 27/9: Advancing Justice, Governance and Law for Environmental Sustainability’ UNEP/GC.27/17.

⁶⁷ *ibid* [4].

enforceable laws, and implementation and accountability mechanisms including coordination of roles.⁶⁸

The 1st Africa Colloquium on Environmental Rule of Law held in 2015 released the Nairobi Statement that builds on some of the key elements of Decision 27/9. In particular, it recognises that predictability and dependability are the bedrock of a solid system of environmental governance, and that measures that may be taken to strengthen this include ‘establishing clear jurisdictional authority and effective coordination mechanisms.’⁶⁹ This is along the lines of the Putrajaya Statement issued in 2013 at the 1st Asia and Pacific International Colloquium on Environmental Rule of Law, that called upon the UNEP to encourage the development of ‘national standards and indicators on environmental rule of law.’⁷⁰

In chapter 3, I make an attempt to develop just such indicators. However, Decision 27/9 and the Nairobi and Putrajaya Statements are not particularly helpful for this exercise. It is perhaps unfair to expect hortatory declarations of this nature to perform an academic and analytical function. Although these documents clearly attach importance to the creation of a new concept i.e. the environmental rule of law, they are unable to explain the value that is added by its creation, independent of the rule of law in general. There is nothing in the Decision and the Statements that suggest that the environmental rule of law is anything other than the application of generally accepted rule of law concepts to the subject matter of the environment.

⁶⁸ *ibid* [5(a)].

⁶⁹ Nairobi Statement, para 5 <www.unep.org/delc/worldcongress/Portals/24151/Documents/nairobi-statement.pdf> accessed 15 March 2016.

⁷⁰ Putrajaya Statement, para 4 <www.unep.org/delc/worldcongress/WorkshopsandEvents/ThePutrajayaStatement/tabid/132340/Default.aspx> accessed 15 March 2016.

Instead, to the extent that the concept is defined at all in these documents, it is explicitly linked to the content, rather than the form of the law, suggesting that the environmental rule of law belongs to the category of substantive conceptions of the rule of law.⁷¹ For instance, the environmental rule of law is specifically linked to the goal of sustainable development, but the documents do little work in explaining how traditionally understood rule of law values like clarity and certainty can play a role in fulfilling this goal. The Nairobi Statement, observes as a matter of fact that:

Environmental rule of law is a necessary means for the wise stewardship of Africa's wealth, for reconciling competing uses over natural resources, for avoiding conflict, for addressing the effects of climate change and pollution, for dealing with illegal wildlife trade and other environmental crimes and for providing each and every African with equality in terms of environmental protection.

However, there is not much by way of explanation regarding what components of the rule of law are required to achieve these goals. There is emphasis placed on reducing the violations of environmental law, on increasing transparency and accountability, strengthening access to justice and ensuring the establishment of an independent and impartial judiciary. Although environmental rights are not explicitly recognised as part of the rule of law, the Nairobi Statement does state that 'without environmental rule of law, and the enforcement of legal rights and obligations, environmental governance may be ineffective, arbitrary, subjective and unpredictable.' These last four characteristics also provide a glimpse of the ideal of the rule of law that these statements are calling upon countries to achieve.

On the whole however, the concept of the environmental rule of law, as advanced by the UNEP is too broad and vague to be of utility as an organising concept for this thesis. A significant way in which it is deficient is its failure to consider whether the nature of environmental problems and therefore environmental

⁷¹ For a fuller discussion of the difference between formal and substantive conceptions of the rule of law, see chapter 2(C).

law presents any special challenges to the advancement of the rule of law. I address this question in the next paragraphs.

2. The Distinctiveness of Environmental Law

In this section, I discuss the interdisciplinary and polycentric nature of environmental law. First, I explain what I mean by these terms. Next, I explore why these characteristics are relevant to the rule of law. Finally, I consider the implications that these characteristics have for the role of the institutions of government in developing environmental law.

The interdisciplinary nature of environmental law reflects the ‘need for environmental lawyers to develop a range of different types of expertise.’⁷² Naturally, this is necessitated by the very nature of environmental problems that straddle a range of disciplines from anthropology to economics, from public health to zoology. In India, recognition of this interdisciplinary nature is manifested through an emphasis on technocratic expertise, both in the form that environmental legislation takes, as well as in the treatment of environmental problems by courts.

The major pollution control statutes, conservation laws as well as the notifications governing environmental impact assessment and the regulation of coastal zones all set up expert boards, authorities or committees that are vested with crucial decision-making powers. With the exception of the Forest Rights Act,⁷³ and to a

⁷² Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Material* (OUP 2013) 17. See also Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlame, ‘Maturity and Methodology: Starting a Debate About Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213.

⁷³ Clauses (e) and (f) of s 4 of the Act empowers village-level bodies called Gram Sabhas to take measures for the protection of wildlife, forests and biodiversity, including the preparation of conservation and management plans for community forest resources.

certain extent, the Biological Diversity Act,⁷⁴ technical expertise receives overwhelming precedence over local knowledge or even civil society participation.

This privileging of expertise at the expense of public participation is a theme that has resonance in environmental regulation the world over.⁷⁵ It has implications for the rule of law in the following ways. First, it encourages the proliferation of expert bodies, creating multiple sources of authority, weakening the stability and predictability of the law, both of which are standard rule of law values. Secondly, it creates parallel narratives about environmental law, distancing local knowledge from official discourse. As will be described in the next section, the history of forest and wildlife conservation law in India exhibits precisely this tension between the paternalism of expert opinions and the lived experience of local communities.⁷⁶ These parallel narratives weaken the capacity of the law to guide behaviour, and thereby the rule of law.

Similar tensions between technocratic opinions and community knowledge also surfaced with the promotion of large-scale development projects by the Indian Government that had significant environmental consequences as well as far-reaching livelihood impacts on local communities. Prominent examples of this include agitations around the Narmada Valley Project⁷⁷ and more recently, protests against the

⁷⁴ Biological Diversity Act, 2002, s 24.

⁷⁵ Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press 2005); Karin Backstrand, 'Civic Science for Sustainability: Reframing the Role of Experts, Policy-Makers and Citizens in Environmental Governance' (2003) 3 *Global Environmental Politics* 24; James Fine and Dave Owen, 'Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning' (2005) 56 *Hastings Law Journal*.

⁷⁶ Vasant Saberwal and Mahesh Rangarajan (eds), *Battles over Nature: Science and the Politics of Conservation* (Permanent Black 2003) 245.

⁷⁷ Amita Baviskar, *In the Belly of the River: Tribal Conflicts Over Development in the Narmada Valley* (2nd edn OUP 2004); Judith Whitehead, *Development and Dispossession in the Narmada Valley* (Longman 2010).

Kudankulam nuclear power plant.⁷⁸ When such projects have been challenged in court, the inevitable judicial response has been to set up expert committees. Courts have invariably deferred to such expert opinion. The exception is in the case of infrastructure projects, where the pro-development arguments of the State hold sway, even in the face of contrary expert recommendations.⁷⁹

At the root of this deference is the framing of environmental law and problems as interdisciplinary in nature. In the Indian context, this interdisciplinarity has become synonymous with expertise, with the result that environmental law presents challenges for the rule of law in the following ways. For one, there are *separate* ideas, among different stakeholders, about the objectives of environmental law, and as these ideas clash, they have an impact on the law's implementation. Additionally, in the context of the judicial advancement of environmental law, its interdisciplinary nature has had the effect of encouraging *piecemeal* managerial solutions to environmental problems, rather than compelling courts to lay down consistent norms about the relative weight to be accorded to different kinds of expertise and knowledge.⁸⁰ This necessarily has an impact on the predictability of the law, another rule of law staple.

This effect of the interdisciplinary nature of environmental law must be factored into institutional reform. Institutions ought to create room for the interaction of varying expertise and opinions, rather than allowing one to dominate the others. In Part III, as I critically analyse reform proposals, I demonstrate that Indian environmental institutions are still very much conceived as repositories of specialised

⁷⁸ Krithika Ramalingam, 'Kudankulam: Ready to Produce Power?' *India Together* (4 April 2013) <<http://indiatgether.org/kudankula-environment>> accessed 11 March 2016.

⁷⁹ Sahu (n 53) 12.

⁸⁰ Chapter 6(B) (2) and (3).

expertise, rather than as fora that encourage deliberation between different points of view.

The term ‘polycentric’ is used in the same sense in which Lon Fuller first employed it in his essay on the ‘Forms and Limits of Adjudication’.⁸¹ Fuller used it to refer to problems that were considered unsuitable for traditional adversarial adjudication because of the complicated, competing and interconnected interests involved. He argued that the resolution of these problems through a bipolar system could have unforeseen consequences or ripple effects.

Environmental problems are inherently polycentric,⁸² and as a critique of the Supreme Court’s activism in environmental cases suggests, the judicial treatment of such polycentric environmental problems has also had unintended consequences.⁸³ Although Fuller’s article was limited to the difficulty that polycentric problems pose for the *judicial* resolution of disputes, it is evident that this polycentric nature presents a challenge for the legislature and executive as well.

If legislation is to have the capacity to guide behaviour regarding the resolution of polycentric issues, it must straddle the line between providing a clear solution for the problem at hand, while retaining the flexibility to deal with the unanticipated effects of such solution later. Such legislation must also be mindful of its interaction with other legal regimes governing aspects of the polycentric issue that are not directly related to the environment. It is in this sense that the coherence and coordination referred to in the UNEP documents ought to be conceptualised while developing an environmental rule of law framework.

⁸¹ (1978) 92 Harvard Law Review 353.

⁸² See Elizabeth Fisher, ‘Environmental Law as ‘Hot’ Law’ (2013) 25 Journal of Environmental Law 347.

⁸³ (n 11).

Similar coordination with other authorities under other legal regimes is required of the executive while dealing with polycentric environmental issues. This also requires the executive to recognise its limitations in terms of jurisdiction, competence and expertise, a feature of institutional functioning that is also required by the interdisciplinary nature of environmental law discussed earlier. The judiciary, at least in India, has been adept at developing flexible tools of procedure to address complex polycentric problems; however, as I mentioned earlier, recent work on public interest litigation (for which most of these procedural tools have been developed) suggests that this abandonment of legal formalism in the interests of tackling a polycentric dispute has had an adverse impact on the rule of law. This aspect is discussed in greater detail in chapter 3.⁸⁴

This section demonstrates that the interdisciplinary and polycentric nature of environmental law present a challenge to the capacity of the law to guide behaviour, and therefore to the rule of law. Since these features of environmental law are integrally connected with questions of expertise and credibility of the institutions of government, they also raise questions for the manner in which the separation of powers ought to operate in the context of environmental law. The next section discusses the particular history of Indian environmental law with the same objective i.e. the impact that this ought to have on framing the environmental rule of law.

3. The Peculiarities of Indian Environmental Law

In this section, I describe two distinctive features of Indian environmental law that ought to be taken into account while developing an account of the environmental rule of law for application to the Indian context. First, I describe its historical context, and

⁸⁴ Chapter 3B(3).

the co-existence of different statutory regimes with contrasting objectives, especially in the context of forest conservation, as an example of the lack of clarity and certainty in the law. Second, I discuss the strongly court-driven development of Indian environmental law and consider whether this might have stunted legislative and executive development of the law, although this point is more pertinent to the discussion on the rule of law and separation of powers in section D of this chapter. I use examples to illustrate my points, although a more in-depth discussion of these distinctive features takes place in Part II.

Indian environmental law is characterised by parallel regimes that exercise jurisdiction over similar issues, but that have been created with different objectives. Nowhere is this more evident than in the case of the many statutory regimes governing forests in India, and within these regimes, than in the contrast between the Indian Forest Act, 1927 ('Indian Forest Act') and the Recognition of Scheduled Tribes and Other Traditional Forest-Dwellers (Recognition of Forest Rights) Act, 2006 ('Forest Rights Act').

The Indian Forest Act is a product of the colonial administration in British India, and their treatment of forests as a source of revenue.⁸⁵ This is made explicit in the preamble of the Act which states that it is intended to consolidate the law relating to forests and to regulate the transit of forest produce as well as the duty leviable on it. The vesting of proprietary rights over forests in the Government of the day was accomplished through the legislative demarcation of zones in the form of reserved forests⁸⁶ and protected forests.⁸⁷ Within these zones, local communities, including

⁸⁵ Ramachandra Guha, 'Forestry in British and Post-British India: A Historical Analysis' (1983) 18 *Economic and Political Weekly* 1882; Rangarajan (n 5).

⁸⁶ Indian Forest Act, s 3.

⁸⁷ Indian Forest Act, s 29.

indigenous forest-dwellers, could no longer exercise their traditional rights over forests and forest produce.⁸⁸

The Forest Rights Act was enacted in 2006 as a means of redressing this ‘historical injustice’.⁸⁹ The Act vests individual and community rights to own, occupy and manage forest lands and resources in traditional forest-dwellers, thereby taking a step towards reversing their exclusion since the colonial era. Clearly, the objectives of the Indian Forest Act and the Forest Rights Act are sharply at odds with each other. Nevertheless, the former continues to exist on the statute books side by side with the recent and more progressive legislation.

The authorities that administer both laws are the same. State Forest Departments that have built up entire administrative machineries premised on Government control over forests now find themselves having to participate in a process that requires them to cede this control to the very communities that they have exercised authority over in the past. This clash of statutory regimes and entrenched bureaucratic control has proved to be an obstacle in the implementation of the Forest Rights Act.⁹⁰

Although the friction between parallel, but competing regimes is strongest in the case of the Indian Forest Act and the Forest Rights Act, similar tensions characterise the implementation of forest conservation law and wildlife protection law

⁸⁸ S 26 of the Indian Forest Act sets out a list of acts prohibited in such forests. For a fuller account of the alienation wrought by colonial law and policy, see Ramachandra Guha and Madhav Gadgil, ‘State Forestry and Social Conflict in British India’ (1989) 123 *Past and Present* 141.

⁸⁹ Forest Rights Act, preamble.

⁹⁰ See also Rakesh Agrawal, ‘No Rights to Live in the Forest: Van Gujjars in Rajaji National Park’ (2014) 49 *Economic and Political Weekly* <<http://www.epw.in/journal/2014/1/reports-states-web-exclusives/no-rights-live-forest.html>> accessed 8 March 2016; Arvind Khare, ‘Let’s Not Miss the Wood’ *The Hindu* (27 June 2015) <<http://www.thehindu.com/opinion/op-ed/lets-not-miss-the-wood/article7358626.ece>> accessed 8 March 2016. See also chapter 4(E)(1).

in general. These manifest as conflicts between State Forest and State Revenue Departments, one of which is ‘mandated to *conserve* resources’, while the other has a ‘mandate to *use* resources.’⁹¹ One of the legacies of colonial rule is the creation of a powerful civil administrative service, and its culture of officialdom is an important one in which to situate the operation of Indian environmental law.

This is because recent trends in environmental legislation and regulation in India towards decentralisation inevitably have the effect of pitting officials in the Indian bureaucracy against local institutions and communities. Apart from the Forest Rights Act that empowers village-level Gram Sabhas⁹² to manage and conserve forest resources, the Biological Diversity Act 2002 (‘the Biological Diversity Act’) requires local communities to be consulted before approvals for the commercial utilisation of biological resources are granted.⁹³ Under the draft Solid Waste Management Rules 2015, the role of the informal sector, especially scrap dealers and waste-pickers, has been formally recognised for the first time.⁹⁴

These are all commendable attempts to involve local stakeholders in environmental law-making and implementation. However, these newer provisions must co-exist with older statutes that were designed for the exercise of executive control rather than public participation. Both during colonial rule and in independent India, the State has assumed the role of guardian of the environment, a view confirmed by the Indian Supreme Court through its recognition of the doctrine of

⁹¹ Saberwal and Rangarajan (eds) (n 76).

⁹² A Gram Sabha is defined in s 2(g) of the Forest Rights Act as ‘a village assembly which shall consist of all adult members of a village.’

⁹³ Biological Diversity Act, 2002, s 24

⁹⁴ Satwik Mudgal, ‘A Clean Country in the Offing With New Solid Waste Rules’ *Down to Earth* (30 November 2015) <<http://www.downtoearth.org.in/blog/a-clean-country-in-the-offing-with-new-solid-waste-rules-49484>> accessed 8 March 2016.

public trust.⁹⁵ The authority wielded by the bureaucracy over environmental issues is a product of this role of the State.

As this role is challenged, albeit tentatively, by legislation and regulation that recognises the rights of non-State actors in enforcing environmental law, regimes with different objectives and institutional cultures must interact with each other. The uncertainty that this clash between diametrically opposed legal regimes produces ought to be taken into account while conceptualising the environmental rule of law.

Another distinctive feature of Indian environmental law is the ever-expanding role of the Supreme Court in its development, sometimes in breach of the principle of separation of powers. In India, the body of judge-made environmental law is as significant as statutory environmental law, and is a combination of the development of the common law on torts⁹⁶ and a progressive interpretation of the right to life in Article 21 of the Indian Constitution.⁹⁷

The Supreme Court, in particular, has created an important body of jurisprudence by incorporating and applying important international environmental legal principles into Indian law. These include the polluter pays principle,⁹⁸ the precautionary principle,⁹⁹ the principle of sustainable development,¹⁰⁰ the principle of inter-generational equity¹⁰¹ and the doctrine of public trust.¹⁰²

⁹⁵ *MC Mehta v Kamal Nath* 1997 (1) SCC 388 ('*Kamal Nath*').

⁹⁶ CM Abraham and Sushila Abraham, 'The Bhopal Case and the Development of Environmental Law in India (1991) 40 *International and Comparative Law Quarterly* 334.

⁹⁷ (n 8).

⁹⁸ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.

⁹⁹ *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715 ('*Vellore Citizens' Welfare Forum*').

¹⁰⁰ *Vellore Citizens' Welfare Forum* (n 176) [10]-[14].

¹⁰¹ *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149.

The Court combined this lofty exposition of environmental principles with an extraordinary degree of involvement in matters usually left to executive policy making.¹⁰³ As mentioned earlier, the institutional problems created by this role of the Court have been discussed extensively in the academic literature. More recently, there is also scholarship that attempts to bring rigorous academic analysis to bear on the reasoning in the court's judgments, and finds it coming up short.¹⁰⁴ This combination of judicial activism and poor reasoning, a characteristic feature of Indian environmental law, makes it important from the point of view of the rule of law, for the following reasons.

It creates a distinct imbalance in the coherent development of the law, with the judiciary playing a disproportionate role in advancing it. As valuable as this contribution is, it has been accused of paralysing legislative and executive interventions that might arguably have been better suited to addressing a particular environmental problem.¹⁰⁵ For example, in one of the Court's most important decisions on forest conservation,¹⁰⁶ it created a new definition of 'forest' despite (and perhaps, because of) the many different definitions that already existed in Central and State legislation. Although this decision has been hailed for drastically transforming forest conservation in India,¹⁰⁷ it has also had some unintended effects because of the Court's usurpation of legislative and executive powers.

¹⁰² *Kamal Nath* (n 95).

¹⁰³ See nn 10 and 11.

¹⁰⁴ Ghosh (n 17).

¹⁰⁵ Shyam Divan, 'A Mistake of Judgment' *Down to Earth* (30 April 2002) <<http://www.downtoearth.org.in/blog/a-mistake-of--judgment-14470>> accessed 10 March 2016.

¹⁰⁶ *TN Godavarman Thirumulpad v Union of India* AIR 1997 SC 1228 ('*Godavarman*').

¹⁰⁷ Ritwick Dutta and Bhupender Yadav, *Supreme Court on Forest Conservation* (Universal Law Publishing 2005).

The redefinition of forest by the Court¹⁰⁸ was positive in so far as it brought within the protection of forest conservation laws those physically forested lands that had not been legally notified as such. However, in the bargain, it ignored another historical misclassification. There exist large tracts of land that have traditionally been cultivated by indigenous populations, but which were nevertheless notified as reserved or protected forests by the British under the Indian Forest Act, an anomaly that persisted after independence.¹⁰⁹ In its enthusiastic assumption of the role of saviour of India's forests, the Court failed to take into account these historical claims of indigenous populations. Arguably, the legislative process might have arrived at a more nuanced definition of forest. In fact, it did ultimately require legislation in the form of the landmark Forest Rights Act to recognise these claims.

This peculiarity of Indian environmental law creates conflict and inconsistency, as in the above instance, where the judicial interpretation of forest stood considerably at odds with statutory definitions and administrative classifications. This makes the rule of law and the separation of power a relevant framework in this context because it helps think about an appropriate role for the judiciary in the development of Indian environmental law. As one academic commentator notes, weak judicial reasoning has already 'resulted in faltering development of environmental jurisprudence, imprecise rights, poorly articulated principles, and idiosyncratic application of both rights and principles.'¹¹⁰ While

¹⁰⁸ The Court held that 'The word 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise...' *Godavarman* (n 106) [4].

¹⁰⁹ Sharachandra Lele, 'A 'Defining' Moment for Forests' (2007) 40 *Economic and Political Weekly* 2379.

¹¹⁰ Lavanya Rajamani, 'The Precautionary Principle in the Indian Courts: The Vanishing Line Between Rhetoric and Law' in Ghosh (n 17).

developing indicators in chapter 3, it is important to keep in mind these failings of the judiciary that have created an inconsistent body of environmental law.

Historical context and court-driven development of the law are therefore the two defining characteristics of Indian environmental law that ought to be taken into account while developing an environmental rule of law framework. The polycentric and interdisciplinary nature of environmental law in general has already been remarked upon earlier. In the next two sections, these features are considered in the context of more general elements of the rule of law under different theories, as well as in the context of separation of powers.

C. Competing Theories of the Rule of Law

The objective of this section is to provide an overview of different conceptions of the rule of law in order to arrive at a consensus of elements that can suitably form part of the environmental rule of law framework, and also to consider the challenge to these elements from the distinctive features of environmental law described in the previous section. The most prominent distinction between various accounts of the rule of law is the difference between formal and substantive theories. There is already a vast amount of literature analysing the distinctions between these theories,¹¹¹ and I do not make any claim in this thesis to offer justifications for or choose between these theories. The limited purpose of this section is to present the elements of the rule of law in some of the most prominent theories and consider these in the context of the distinctiveness of environmental law.

¹¹¹ For an overview of these theories, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 1; See also Richard H Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1 (developing a historicist, formalist, legal process and substantive ideal types of the rule of law); Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781.

Of the formal theories of the rule of law, the most prominent is the one propounded by Joseph Raz.¹¹² Very simply, Raz's conception of the rule of law is not concerned with the content of the law. The rule of law, if it is to serve a useful function as an analytical concept, according to Raz, ought not also to require that the law be a good law. While values such as justice, equality, dignity and human rights may be desirable qualities for a legal system, these may be explained by other political and legal theories. In this sense, the rule of law adds only a 'negative value' to a legal system.

The two literal aspects of the rule of law, according to Raz's model are that one, people should be ruled by the law and obey it and two, that it should be capable of guiding the behaviour of its subjects. He then goes on to provide a non-exhaustive list of principles that can be derived from this basic conception. The principles that relate to the nature of laws are as follows: a) laws should be prospective, open and clear; b) laws should be relatively stable; and c) the making of particular laws ought to be guided by open, stable, clear and general rules. The other principles require an independent judiciary, observance of the principles of natural justice, review powers in courts to ensure adherence of parliamentary legislation and administrative action to the rule of law, and easy access to the courts.

Raz, however, does write about another virtue of the rule of law, albeit one that is also content-neutral. He states that '[c]onformity to the rule of law is essential for securing whatever purpose the law is designed to achieve.' However, this is restricted to achieving the direct rather than the indirect purpose of the law. As Raz says, 'if the direct purposes of the law are not to be frustrated it must be capable of

¹¹² Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edition, OUP 2009).

guiding human behaviour, and the more it conforms to the principles of the rule of law, the better it can do so.’

This conception of the rule of law stands in contrast to Dworkin’s substantive conception of a rights-based rule of law.¹¹³ This version does not distinguish between the formal rule-book version and the substantive conception of the rule of law.¹¹⁴ It understands the law on the rule-book as recognising moral and political rights which may then be enforced by courts. Another strongly substantive conception of the rule of law may be found in Sir John Laws’ account of the role of the courts in protecting fundamental human rights.¹¹⁵ The work of Lon Fuller must also be noted in this regard, in particular, the connections that it draws between the rule of law and morality.¹¹⁶

Fuller prescribes eight standards that principles must comply with in order to be acceptable as laws: capable of general application; communication to the people to whom they are directed; prospective; limited delegation of the duty to clarify the law to enforcement agencies; consistency or freedom from contradictory mandates; demanding standards of action that are not impossible; observance of previously announced norms or some version of *stare decisis*; and congruence or ‘consistency between the actions of those called upon to enforce its commands and the verbally prescribed norms.’¹¹⁷ Although Raz distinguishes Fuller’s account of law and

¹¹³ Craig (n 110) 7. See also ‘The Rule of Law’ Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/rule-of-law/>> accessed 6 February 2017.

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 8.

¹¹⁶ Lon Fuller, *The Morality of Law* (Yale University Press 1969).

¹¹⁷ This summary of Fuller’s principles can be found at Edwin Tucker, ‘The Morality of Law, by Lon L. Fuller’ (1965) 2 *Indiana Law Journal* 270.

morality from his formal conception of the rule of law, there are elements related to clarity, certainty and stability that are similar to the principles suggested by Raz.

In fact, such elements generally find a place in most accounts of the rule of law. For instance, Lord Bingham also proposes a series of sub-rules that make up the rule of law¹¹⁸—these include the intelligibility, clarity and predictability of the law; the determination of legal right and liability by the application of law and not discretion; equality in application; the protection of fundamental human rights; speedy resolution of disputes; the exercise of powers by the executive reasonably, in good faith, and for the purpose for which the powers were conferred; fairness; and finally, compliance with obligations in international law. Thus, although this version of the rule of law retains the basic elements of Raz's model, it goes a considerable way towards explicitly establishing substantive normative conditions for the fulfillment of the rule of law.

This is by no means an exhaustive account of the many different conceptions of the rule of law that exist in the literature. As I have already stated in the Introduction, since this is not a thesis on legal philosophy, I am not in a position to weigh the comparative merits of these theories. The limited objective of this overview is to obtain a general sense of some of the more commonly accepted elements of the rule of law and to consider whether the distinctive features of environmental law pose a special challenge to them.

Whether one subscribes to the formal or substantive conception of the rule of law, even the preliminary survey of different theories above suggests that there are certain elements that form part of most conceptions at a minimum. These are elements like clarity, certainty, predictability and stability. The interdisciplinary and polycentric

¹¹⁸ The Right Honourable Lord Bingham of Cornhill KG, House of Lords, 'The Rule of Law' (The Sixth Sir David Williams Lecture 2006).

nature of environmental law described in the previous section would appear to pose some threats to these rule of law values.¹¹⁹ The interdisciplinarity of the subject can make environmental law more complex and less intelligible and accessible to its various subjects. The clarity of the law is thereby weakened.

Its polycentric nature is capable of having a destabilising effect on the law—it becomes impossible to legislate exhaustively for the different kinds of issues that are integrally connected to environmental ones, with the effect that greater discretion may be vested in the executive. The greater the subjective power vested in the executive, the greater the uncertainty or predictability of the law.

Both these features of environmental law therefore lessen its capacity to guide behaviour or at least require special attention to be paid to statutory design or the articulation of environmental principles if these are to be clear enough to provide directions to the judiciary and executive while simultaneously allowing them the flexibility that is required to deal with particular environmental problems.

As for the substantive conception of the rule of law in the context of environmental law, as already demonstrated, the declarations under the UNEP explicitly establish a connection between the rule of law and the attainment of the sustainable development goals. Environmental law must have an objective, and for it to be a *good* environmental law, there must necessarily be some normative conceptions of the role and purpose that environmental law is intended to serve.

However, it is not the place of this thesis to prescribe what these objectives ought to be. The objectives of environmental law can differ wildly depending upon the particular ideology of environmentalism (or not) in which it is rooted. This could

¹¹⁹ For instance, it has been argued that the ‘characteristics of a post-liberal society...have profound implications for the traditional attributes of the rule of law’. See Craig (n 110) 6 citing Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press 1976). See also B Tamanazha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004).

range from a commitment to deep ecology¹²⁰ to the more prosaic objective of sustainable development. The widespread incorporation of environmental rights in national constitutions also suggests that a rights-based conception of the environmental rule of law might not be amiss. This is especially the case in the context of Indian environmental law, which has a strong tradition of Court-driven and rights-based advancement of environmental protection.

I cannot prescribe which of these substantive versions ought to inform a conception of the environmental rule of law; nor, like Raz's formal conception, do I necessarily think that it is the rule of law that must be used as an analytical device to determine what a good environmental law ought to look like. However, whatever be the vision of environmental law that is adopted, it is possible to conceive of appropriate roles for the three institutions of government in advancing this vision while adhering to minimum rule of law tenets like clarity and certainty. What these appropriate roles are is constrained by the interdisciplinary and polycentric nature of environmental law, as also the principle of separation of powers that is discussed in the next section.

D. The Principle of Separation of Powers and the Rule of Law

The previous section helped recognise some core rule of law values like clarity, consistency, predictability and stability. However, in a thesis that is concerned less with legal philosophy and more with the actual working of environmental law, it is important to go one step further and ask: how are these values expressed in the law? This in turn, requires a closer examination of the legal instruments that make up the law—statutes, executive orders and judicial decisions. The manner in which each

¹²⁰ Murray Bookchin, *Deep Ecology and Anarchism: A Polemic* (Freedom Press 1993).

institution of government operates to produce such legal instruments therefore becomes relevant to a discussion of the rule of law, and it is in this context that I briefly discuss the principle of separation of powers in this section.

Although the principle is widely used in the jurisprudence of the Indian Supreme Court, it has not really received rigorous academic treatment in Indian political theory. In *Keshavananda Bharti v Union of India*,¹²¹ the most seminal decision on constitutional law laid down by the Supreme Court, the principle of separation of powers was held to form part of the basic structure of the Indian Constitution, which means that the Constitution cannot be amended to do away with this principle. Since then, it has largely been used by the Court in decisions that concern the power of the judiciary to review and strike down legislation¹²² as well as in the context of a string of cases that are concerned with the independence of the judiciary from the executive.¹²³

The Indian Constitution does not itself articulate an express separation of powers; judges have instead found this principle given expression through provisions on judicial review under Articles 32 and 226 of the Constitution, which guarantee the protection of fundamental rights. In the Indian context, the primary justifications for the principle are derived from the need for checks and balances and to guard against the excessive concentration of power in one branch of government. No express or implied connection between the separation of powers and the rule of law has been made so far.

¹²¹ (1973) 4 SCC 225.

¹²² *IR Coelho v State of Tamil Nadu and Others* AIR 2007 SC 861; *AK Behra v Union of India* (2011) 1 SCC (LS) 101.

¹²³ For a fuller discussion of the separation of powers in this context, see Arghya Sengupta, 'Independence and Accountability of the Indian Higher Judiciary' (D.Phil Thesis in Law, University of Oxford 2014).

Support for this connection has been made by Waldron, who argues that:

The rule of law is not just the requirement that where there is law, it must be complied with; it is the requirement that government action must, by and large, be conducted under the auspices of law, which means that, unless there is very good reason to the contrary, law should be created to authorize the actions that government is going to have to perform. This usually means an articulated process of the sort we have been talking about, so that the various aspects of law-making and legally authorized action are not just run together into a single gestalt.¹²⁴

Waldron goes on to set out a ten-part process through which the law is articulated. This includes deliberation by legislative representatives on a clear set of formulations, their communication to, and internalisation by people and firms, and the resolution of issues related to compliance in courts, where resolution takes place in ‘terms of how the norms that were communicated to the people are to be understood and how it is to be related to the rest of the law.’¹²⁵ The various stages of this ten-part process, according to Waldron, correspond to different rule of law values like ‘clarity, promulgation, the integrity of expectations, due process.’¹²⁶ He argues that there are serious violations of the rule of law when any of these steps are omitted, as they will be if there the principle of separation of powers is breached, and functions that ought to have been performed by one institution are instead taken over by another. As Waldron puts it, ‘to insist on being ruled by law, is among other things, to insist on being ruled by a process that answers to the institutional articulation required by Separation of Powers.’¹²⁷

Apart from the rule of law values that are preserved by such articulated governance, I would additionally argue that there is value in each institution of

¹²⁴ Waldron (n 3) 457. See also Paul Verkul, ‘Separation of Powers, the Rule of Law and the Idea of Independence’ (1988) 30 *William and Mary Law Review* 301.

¹²⁵ Waldron (n 3) 458.

¹²⁶ *ibid.*

¹²⁷ *ibid* 459.

government performing the role that it was designed and designated to perform also because of concerns regarding its competence and therefore its legitimacy. In the context of environmental law, with its interdisciplinary and polycentric nature, this additional justification for respecting the separation of powers becomes even more important.

The history of Indian environmental law, with its judicial activism, described in the previous section, also demonstrates that this need to establish the link between institutional competence, separation of powers and the rule of law—as orders and directions in environmental cases continue to be poorly implemented on the ground, thereby weakening the rule of law, it becomes important to consider whether one of the reasons for this failure is the encroachment by the judiciary on the functions of the legislature and the executive.

If there is a rule of law value to the principle of separation of powers, expressed in the form of a need for articulated governance, the next question that logically follows is: what is the appropriate role for each institution of government in developing environmental law in a manner that conforms to rule of law requirements of clarity and certainty, keeping in mind the polycentric and interdisciplinary nature of environmental law? If the legislature makes laws, the executive enforces them, and the judiciary interprets them, I propose the following roles for them in relation to the rule of law—benchmarks for the development of environmental law that will be supplemented by the articulation of indicators in the next chapter.

The legislature can ensure respect for the rule of law by clearly articulating statutory objectives. A more substantive conception of this role might also make some claim about the nature of the statutory objective, as well as of the manner in which the legislature ought to agree on the values that ought to find expression in its legal

instruments. Given the polycentric nature of environmental law, the clear articulation of objectives will also require some priority-setting or balancing of competing interests. Complexity in the legal language employed in the statute ought to be avoided as far as possible, notwithstanding the fact that the interdisciplinary nature of environmental law may tend to make it more dense.

The executive can maintain the rule of law by making decisions within the limits of the powers conferred on it by the legislature. These decisions ought to derive their authority from the values and principles articulated in environmental statutes and their reasons ought to be communicated to the subjects of the law. Unless powers to frame rules or regulations are specifically conferred on executive authorities, the principle of separation of powers ought to be respected by refraining from laying down rules of general application while ostensibly making individual decisions.

Finally, the judiciary ought to strengthen the rule of law by exercising legal reasoning that is grounded in legislative articulation. Again, a substantive Dworkinian conception of the rule of law would also encourage the application of environmental legal principles that are a good fit with the best theory of environmental rights and justice. It is beyond the scope of this thesis to suggest what such a theory ought to be; suffice it to say that the application of legal principles ought to derive support from the articulation of legislative intent. Additionally, the polycentric and interdisciplinary nature of environmental law do not lend themselves easily to adjudication, and the judiciary ought to be mindful of the limitations of its expertise and competence while deciding such case.

In Part II of this thesis, I demonstrate that the failure of the institutions of government to perform these roles contributes to the fragmentation of Indian environmental law. The next section explains what I mean by fragmentation.

E. The Secondary Framework of Fragmentation

1. The Evolution of Fragmentation in International Law

In this section, I first explain the origins of fragmentation on the international plane, where it first received comprehensive academic attention. Fragmentation, as it is understood in other jurisdictions is also considered, with the objective of developing a secondary framework of fragmentation to analyse Indian environmental law in Part II. Fragmentation, as a phenomenon on the international plane, first received academic attention in the work of Wilfred Jenks, who noted that:

...law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.¹²⁸

The problems that this separate development of legal regimes created for the unity of international law were identified as a subject deserving consideration by the International Law Commission ('ILC') at its 52nd session in 2000, when it incorporated a study on the 'Risks Ensuing from the Fragmentation of International Law' as part of its long-term work programme. In 2002, the emphasis of the study shifted to 'Difficulties Arising from the Diversification and Expansion of International Law' and the ILC presented a report on this at its 58th session in 2006.

The problem that this diversification poses, according to the ILC, is a loss of coherence in international law. As specialised treaty regimes develop, each with their own rule-systems, they conflict with each other and deviate from the general

¹²⁸ Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 403.

principles of international law.¹²⁹ This presents problems at two levels of abstraction. First, there are practical legal and technical difficulties created by the conflict between these separate, proliferating systems. These in turn, give rise (according to some commentators), to a higher order challenge created by ‘conflicting jurisprudence’ and the ‘erosion of general international law.’¹³⁰

Globalisation has meant that in addition to the existence of traditionally separate legal branches such as international trade law, human rights law or environmental law, each of these areas itself displays a further degree of specialisation, and therefore fragmentation. For example, an international climate change lawyer must contend not just with the United Nations Framework Convention on Climate Change (‘UNFCCC’) and its associated Protocols, but also with the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity, the Convention to Combat Desertification and the Ramsar Convention on Wetlands.¹³¹ Apart from this obvious specialisation, the next section discusses what makes such regimes separate and independent, and why this creates an uncertain legal hierarchy in international law.

2. Separate Legal Regimes

There are at least three different aspects to the idea of the separateness of legal regimes on the international plane that find mention in the ILC report. Although the ILC report itself does not categorise these different aspects, I find it useful to group

¹²⁹ ILC report 11.

¹³⁰ *ibid* 12.

¹³¹ For a fuller account of the interaction of different regimes and institutions in the context of international climate change law, see Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar 2014).

them under the following heads: a) separation by subject-matter and geographical reach; b) separation by internal norms; and c) separation by interaction. I explain what I mean by this grouping below.

The most obvious way in which international legal regimes are separate from each other mirrors the classification of different branches of municipal law. Different areas of practice and study within national legal systems deal with different subject-matter—arbitration, human rights, intellectual property, labour, so also in international law. However, the distinction between different subject areas is not always easy to draw¹³² and creates difficulties when the same set of facts forms the subject-matter of different legal regimes, as an example in the ILC report illustrates. A case concerning the environmental effects of a nuclear facility at Sellafield in the UK was raised under three different legal regimes and in three different fora—the United Nations Convention on the Law of the Sea (‘UNCLOS’), the United Nations Convention on the Protection of the Marine Environment of the North-East Atlantic (‘OSPAR Convention’) as well as the European Community and Euratom treaties.¹³³ Resolving which of these regimes applies to a situation of this nature is one of the concerns of the ILC report.

The above example also demonstrates that separateness, and correspondingly, multiplicity is not just a matter of different subject areas. It is also a function of the geographical jurisdiction of the regime in question. The UNCLOS is a global treaty regime open to all State parties, while the OSPAR Convention and the European treaties are obviously regional. Regional treaty regimes and dispute resolution fora

¹³² See chapter 2(B)(2) where I describe the impact of the inherently polycentric and interdisciplinary nature of environmental law on fragmentation.

¹³³ ILC report 12 [10].

have been steadily proliferating and the contribution of this ‘regionalisation’ of international law to fragmentation has also been recognised.¹³⁴

Thus, regimes can formally be differentiated on the basis of subject-matter and territoriality. However, given the fluidity of the boundaries between different subject areas, such regimes inevitably overlap in their *practical* application, and it is this clash between their theoretical development as independent regimes and their actual operation that contributes to fragmentation. The ILC report captures this particular conceptualisation of fragmentation when it states that each regime is separate and specialised because it ‘comes with its own principles, its own form of expertise and its own “ethos”’,¹³⁵ which influences the manner in which it interprets a set of facts.

It is this specialised ethos that I had in mind when I stated that individualised internal norms were one of the ways in which the separateness of international legal regimes is manifested. In the case involving the Sellafield nuclear facility, the ILC report quoted the Arbitral Tribunal under UNCLOS in order to explain what it meant by a regime having its own ‘ethos’. According to the Tribunal, this meant that even the *same* rules could be applied by different institutions under different regimes in different ways because of ‘differences in the respective context, object and purpose, subsequent practice and *travaux préparatoires*.’¹³⁶

Some of the most common examples of regimes that are separate because of their different ethos are the international legal regimes on the environment, human

¹³⁴ Gerhard Hafner, ‘Pros and Cons Ensuing From Fragmentation of International Law’ (2004) 25 Michigan Journal of International Law 849, 850.

¹³⁵ ILC report 14 [15].

¹³⁶ *ibid* 13 [12].

rights and international trade.¹³⁷ This ethos influences not only the legal operation of the regime in question, but also helps ‘constitute the social domains on which they act.’¹³⁸ Institutions under these special regimes seek to advance their own interests and objectives through their own special interpretation of the general law.¹³⁹ It is this deviation from, and dilution of the general law that contributes to fragmentation.

Finally, the third manner in which separateness, and therefore fragmentation is manifested is through the manner of interaction of different legal regimes. The ILC report remarks on this communication-related aspect of fragmentation when it notes that ‘specialised law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields.’¹⁴⁰ Regime interaction is also a major theme in the literature on fragmentation,¹⁴¹ with contemporary scholarship, focusing on developing institutional mechanisms to respond to isolated law-development processes.

Self-containment is the distinguishing feature of such regime interaction and may take two forms. One of these features is the failure to establish substantial

¹³⁷ Hafner (n 134) 852. See also Thomas Cottier, ‘Trade and Human Rights: A Relationship to Discover’ (2002) 5 *Journal of International Economic Law* 111; Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (OUP 2009).

¹³⁸ Andrew TF Lang, ‘Legal Regimes and Regimes of Knowledge: Governing Global Services Trade’ (2009) LSE Law, Society and Economy Working Papers 15, 1,2. <https://www.lse.ac.uk/collections/law/wps/WPS2009-15_Lang.pdf> accessed 23 March 2016. For example, the author notes that international environmental law ‘structures the way we know the ‘global commons’’, while international economic law ‘helps to construct and project shared ways of imagining the ‘global economy.’’

¹³⁹ Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553, 559. The authors remark that human rights lawyers, trade lawyers, specialists in the law of the sea and *lex mercatoria* practitioners all develop ‘novel normative practices in order to advance their special causes.’ For an account of the ‘biases and preferences within regimes’ that ‘reflect the collision of fundamentally contradictory rationalities’ see Andreas Fischer-Lescano and Gunther Teubner, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 991.

¹⁴⁰ *ibid* 11 [8].

¹⁴¹ See Margaret Young (ed), *Regime Interaction in International Law: Facing Frgmentation* (Cambridge University Press 2012).

interlinkages in related treaty texts. For example, it has been suggested that rules on forestry projects as part of the Kyoto Protocol's Clean Development Mechanism might not adequately protect biodiversity and land degradation, thereby conflicting with obligations under other multilateral environmental agreements.¹⁴²

The second is the lack of coordination and communication between treaty bodies under a 'coherent governance framework.'¹⁴³ The interaction between the UNFCCC and the World Heritage Convention furnishes a useful example of this lack of interaction.¹⁴⁴ Despite petitions to the World Heritage Committee to take specific steps to mitigate climate change, the Committee has restricted itself to measures at specific heritage sites only, while deferring to general mitigation obligations under the UNFCCC.¹⁴⁵

3. Uncertain Hierarchies

According to the ILC report, fragmentation creates normative conflicts that ultimately lead to a loss in the coherence of international law. The report does not strictly define the term coherence, but uses it in the last section to point out the connection between the coherence of a legal system and its predictability and legal security.¹⁴⁶ Other writers refer to 'legal unity' and identify a threat to international law from

¹⁴² Harro van Asselt, 'Dealing with the Fragmentation of Global Climate Governance: Legal and Political Approaches in Interplay Management' (2007) Global Governance Working Paper 30, 4. <www.glogov.org/images/doc/WP30.pdf> accessed 23 March 2016.

¹⁴³ Tadanori Inomata and Jean Wesley Cazeau, 'Post-Rio+20 Review of Environmental Governance Within the United Nations System' (Joint Inspection Unit 2014) JIU/REP/2014/4.

¹⁴⁴ See Margaret Young, 'Climate Change Law and Regime Interaction' (2011) 5 Carbon and Climate Law Review 147.

¹⁴⁵ *ibid* 152.

¹⁴⁶ ILC report 248 [491].

fragmentation because of the lack of ‘conceptual-doctrinal consistency, the clear hierarchy of norms and the effective judicial hierarchy’ that are usually considered the hallmark of national legal systems.¹⁴⁷

In more general legal theory, coherence is also understood as the requirement that ‘the multitudinous rules of a developed legal system should ‘make sense’ when taken together’ and that where a system is characterised by specific sets of rules, these ought ‘to be consistent with some more general norm.’¹⁴⁸ If coherence is therefore understood to refer to a sort of general normative consistency (both internal to a legal regime and also across regimes, within a legal system), the question that follows is: in what ways does fragmentation, particularly the different kinds of separateness identified above, have an impact on the coherence of the law?

The ILC report answers this by identifying four kinds of conflicts that dilute the coherence of the law.¹⁴⁹ These are conflicts between: a) special and general law; b) prior and subsequent law; c) laws at different hierarchical levels;¹⁵⁰ and d) laws and their normative environment.¹⁵¹ The term ‘conflict’ itself can be interpreted in different ways. In one sense, it simply refers to the invalidation of one law by another, but it may also refer to ‘relative’ priority, where one law is temporarily set aside to

¹⁴⁷ Andreas Fischer-Lescano and Gunther Teubner (n 139) 1002.

¹⁴⁸ Neil McCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) Chapter VIII, ‘The Requirement of ‘Coherence’: Principles and Analogies’.

¹⁴⁹ ILC report 16 [18].

¹⁵⁰ *ibid* 167 [327]. This refers to the informal hierarchy that international law has developed to reflect the superiority of some norms over others. These superior norms are *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations. Article 103 gives precedence to obligations under the Charter over obligations in other international agreements.

¹⁵¹ ILC report 208 [413]. In this section, the ILC report observes that the characterisation of relations between different regimes as incompatibilities of conflicts depends upon the extent to which these rules are interpreted as contributing to a ‘shared systemic objective.’

allow the other to influence interpretation.¹⁵² The ILC report uses it in the broadest sense possible to refer to ‘different ways of dealing with a problem’,¹⁵³ with the degree of difference between these ways determining the loss of coherence.

More nuanced frameworks have also been developed to understand relations between the different regimes that characterise fragmentation. These frameworks extend beyond relations between different laws to relations between different institutions and actors.¹⁵⁴ Fragmentation has been classified into three categories—‘synergistic’, ‘cooperative’ and ‘conflictive’ depending upon the degree of integration among the different norms, institutions or actors.¹⁵⁵ Synergistic fragmentation sets out ‘effective and detailed general principles’ that guide rule-making and other institutional processes, cooperative fragmentation is marked by more loosely bound rules and principles, while conflictive fragmentation refers to contradictory and unrelated sets of norms.¹⁵⁶

Frameworks like this are helpful in establishing the connection between fragmentation and a loss of coherence. The ILC report focuses more on developing techniques to resolve the different kinds of normative conflicts that it identifies, rather than on describing the problems that such conflicts present for the coherence of international law. Even so, some of these techniques shed light on the nature of the problem posed by fragmentation.

¹⁵² *ibid* [19].

¹⁵³ *ibid* 19 [25].

¹⁵⁴ Frank Biermann, Philipp Pattberg and Harro van Asselt, ‘The Fragmentation of Global Governance Architectures: A Framework Analysis’ (2009) 9 *Global Environmental Politics* 14.

¹⁵⁵ *ibid* 19.

¹⁵⁶ *ibid* 20-21. The example that the authors provide of conflictive fragmentation relates to access and benefit sharing of genetic resources under two different regimes—the Convention on Biological Diversity and the Trade-Related Aspects of Intellectual Property Rights under the World Trade Organisation.

For instance, the report demonstrates the manner in which normal treaty-interpreting processes and methods of legal reasoning can be applied to the conflicts created by fragmentation. The standard rule of treaty interpretation—*lex specialis derogat lege generali*—is recommended to resolve conflicts between general and special law. The power of this interpretive rule to resolve conflict is dependent on the degree of ‘concreteness, clarity and definiteness’ that its application brings to the normative environment.¹⁵⁷

This emphasis, especially on clarity and definiteness, brings out the links between fragmentation and the rule of law. The loss of coherence is not the automatic product of a fragmented legal system. Specialised regimes and multiple courts may well display some degree of integration. However, as the above discussion demonstrates, this integration depends upon clarity and certainty. In a fragmented system, the multiplicity of laws and institutions is not by itself, determinative of the loss of coherence. Instead, answers to the following questions are crucial: What is the extent of inconsistency between overlapping laws? Is there sufficiently clear and authoritative guidance to resolve this inconsistency? Do separate regimes and institutions exhibit normative consistency in arriving at a mutually compatible understanding of the law?

Uncertain hierarchy among regimes makes each of these questions more difficult to answer, thereby demonstrating its close link with coherence. Separate regimes and uncertainty in hierarchy are therefore two essential features of fragmentation, in so far as a fragmented system is understood as one that poses risks for the unity and integrity of the law.

¹⁵⁷ ILC report 64 [119].

This section demonstrated that fragmentation in international law is characterised by conflicts between multiple legal regimes that are self-contained yet overlapping and are not unified by general norms. The next sections consider the treatment that fragmentation has received in domestic contexts.

4. Fragmentation in Municipal Legal Systems

In this section, I discuss whether the version of fragmentation developed and described in this thesis has received the same kind of academic attention in other jurisdictions in the context of environmental law as well as more generally, and the kinds of responses that have been proposed to address it because the responses themselves throw light on the nature of fragmentation. Perhaps the closest comparison can be made with a 2012 research project on the State of UK Environmental Law ('UKELA report').¹⁵⁸ This project addressed concerns about the clarity, coherence and accessibility of UK environmental legislation that had an impact on the rule of law. Parts of this thesis, especially chapters 4 and 5, mirror some of the observations and findings of the UKELA report. For instance, the report identifies the following as contributors to legislative complexity—'idiosyncratic historical development of legislation', 'overlapping legislative requirements', 'a reluctance to consolidate legislation sufficiently often', and 'over-reliance on detailed guidance and regulatory positions to establish legal requirements'¹⁵⁹ all of which are extensively described in chapters 4 and 5.

¹⁵⁸ United Kingdom Environmental Law Association (UKELA), King's College London and Cardiff University's ESRC Centre for Business Relationships, Accountability, Sustainability and Society, 'The State of UK Environmental Law in 2011-2012: Is There a Case for Legislative Reform?' (2012) ('the UKELA report'). See also UKELA and King's College London, 'The State of UK Environmental Legislation in 2011: Is There a Case for Reform?' (Interim Report 2011) ('the Interim Report').

¹⁵⁹ Executive Summary, Interim Report 8.

The UKELA report is narrower in scope than the conceptual framework that I have developed in this thesis, since it restricts its focus to environmental legislation, and does not directly deal with institutional questions.¹⁶⁰ Nevertheless, the recommendations in the report are of relevance to the Indian context, especially since some of the problems identified are inevitable consequences of the inherently polycentric and interdisciplinary nature of environmental law across all jurisdictions. The report offers solutions to particular problem areas that are partially based on interviews with environmental law practitioners, judges, academics and industry representatives. Some of the recommendations that are of specific relevance to the problem of fragmentation in Indian environmental law include more routine consolidation of legislation, identifying matters that are more suitable for inclusion in legislative rather than guidance documents, ensuring clarity regarding the legal status of guidance documents, incorporating best practices in legislative scrutiny, and communicating and explaining the basis for decisions to stakeholders.¹⁶¹

The report also recommends that further work be undertaken to identify whether the problems identified are representative of more systemic problems with UK environmental law, and that the potential of environmental principles and objects clauses in ensuring greater coherence be explored.¹⁶² In another account¹⁶³ of the fragmentation of environmental legislation in the UK, the authors, Scotford and Robinson warn that the statutory incorporation of environmental principles might be ‘a simplistic hope as a discrete reform, considering the inherent fragmentation of

¹⁶⁰ *ibid* 18-19.

¹⁶¹ *ibid* 13-16.

¹⁶² *ibid* 17.

¹⁶³ Eloise Scotford and Jonathan Robinson, ‘UK Environmental Legislation and Its Administration in 2013—Achievements, Challenges and Prospects’ (2013) 25 *Journal of Environmental Law* 383.

environmental law.’¹⁶⁴ Even the UKELA report suggests that the inclusion of principles without more ‘legislative detail’ is unlikely to have the intended effect on fragmentation.¹⁶⁵

The other recommendations made by Scotford and Robinson fall under the heads of ‘legislative integration’ and ‘rationalising environmental policy and guidance.’¹⁶⁶ Under the first head, they suggest specific changes to the regime on environmental permitting in order to reduce administrative duplication. They also suggest the creation of a single set of regulations to administer environmental sanctions in light of the divergence in powers of the authorities across different regimes.¹⁶⁷ Under the second head, they point out that guidance documents in the UK are in the process of being re-organised according to their level of specificity in order to make them more accessible to stakeholders.¹⁶⁸ They also suggest that ‘a wider reform exercise might reassess when guidance is required by legislation, including on what conditions and to what end, and how it is scrutinised and developed.’¹⁶⁹

Naturally, the specific *content* of the recommendations described in the previous paragraphs is not as relevant as the *nature* of the changes that they embody. The changes described above aim to simplify, coordinate, guide and promote transparency and scrutiny. These recommendations for reform throw light on the manner in which fragmentation is understood—as a complex, disjointed body of laws

¹⁶⁴ *ibid* 408. However, the authors also state such incorporation could ‘inform and regularise processes of decision-making, by indicating where the overall balance of priorities lies in relation to polycentric environmental problems.’ As I have reiterated through this thesis, Indian environmental statutes fail to express precisely this kind of balance.

¹⁶⁵ UKELA report 17.

¹⁶⁶ Scotford and Robinson (n 163) 404.

¹⁶⁷ *ibid* 406.

¹⁶⁸ *ibid* 408-9.

¹⁶⁹ *ibid*

and rules lacking coherence that go against rule of law values like clarity and certainty.

Similar recommendations to tackle legislative complexity have been made by the Good Law Initiative launched by the Office of the Parliamentary Counsel in the UK.¹⁷⁰ The four main aspects of a ‘good law’ that the Initiative is concerned with are Content (necessity, conflict with other laws, level of detail), the Architecture of the Statute Book (determining the hierarchy and structure of statute law, distinguishing between Acts and Regulations), Language and Style (taking into account the readership) and Publication (navigating access in a digital age).¹⁷¹

In Part II, I will argue that the description of Indian environmental law in this thesis demonstrates that it meets at least four out of the five markers of excessively complex legislation set out by the OPC. It is ‘unclear’ (contradictory provisions, layered and heavily amended), ‘disjointed’ (overlapping regulations), ‘inaccessible’ (difficult to identify up-to-date versions of legislation) and ‘ineffective’ (fragmented implementation).¹⁷²

The New Zealand Legislative Design and Advisory Committee is another example of an institutional response to concerns about legislative quality. It was established in June 2015 (remodeled on the earlier Legislative Advisory Committee) to provide advice to government departments and agencies about the design and content of bills early on in their development.¹⁷³ It administers the Legislative

¹⁷⁰ See <<https://www.gov.uk/guidance/good-law>> accessed 17 April 2016.

¹⁷¹ For more information about what the Initiative is doing to address each of these components, see <<https://www.gov.uk/guidance/good-law#content-language-architecture-and-publication>> accessed 17 April 2016.

¹⁷² For a fuller explanation of all five criteria, see Office of the Parliamentary Counsel, ‘When Laws Become Too Complex’ <<https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex#features-of-complex-legislation>> accessed 17 April 2016.

¹⁷³ See <<http://www.ldac.org.nz/>> accessed 17 April 2016.

Advisory Committee Guidelines (‘LAC Guidelines’) that contain a checklist with principles to guide officials in the drafting of legislation.¹⁷⁴ Some of the principles on this checklist require officials to have regard to the manner in which the policy objective is defined, the manner in which new legislation relates to existing legislation, treaties and international obligations, and the delegation of law-making powers to the executive.¹⁷⁵

Under each of these heads, the checklist requires officials to ensure the following: that the policy objective is clearly discernible and consistent with the provisions of the proposed legislation; that the new legislation explicitly addresses conflicts and interactions with existing legislation; that the new legislation does not re-state matters that are already addressed in existing legislation; that legislation implementing a treaty provide easy access to the treaty that it implements; and where legislation is delegated, that it is subject to appropriate levels of scrutiny, publication and review.¹⁷⁶ The Committee is also in the process of drawing up a more detailed Manual to flesh out the LAC Guidelines.

This overview of legislative reform measures in this section have helped distil some of the key principles that make up fragmentation, and more crucially, linked them to rule of law values regarding clarity and certainty. They have also thrown light on the loss of coherence as a corollary of the fragmented nature of the law. This is now used as a descriptive device in Part II of the thesis. The next chapter provides practical context to the theoretical discussion in this chapter by describing law-

¹⁷⁴ The checklist is available at <<http://www.ldac.org.nz/assets/documents/Principles-checklist.pdf>> accessed 17 April 2016.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

making, law-implementing and law-interpreting processes in India, and also by establishing indicators for the environmental rule of law.

CHAPTER THREE: ESTABLISHING INDICATORS

A. Introduction

Chapter 2 laid the foundation for answering the central question of the thesis: how can we think about the rule of law in the context of Indian environmental law? The answer lay in focusing on the appropriate role of the different institutions of government. This chapter attempts to flesh out the conceptual framework developed in part 2 by situating it in the context of Indian law-making, law-implementing and law-interpreting processes.

Section B provides an overview of the distinctive features that characterise the process by which the law, in general, is made in India. I begin by describing legislative drafting processes and also provide a short overview of the form and structure of Indian regulatory legislation. This feeds into an overview of administrative law processes, with a focus on the delegated legislative powers of executive authorities.

The third component in this law development process is the judiciary, and I provide a brief sketch of judicial activism and public interest litigation in India. Each of the aspects of the law development process that I focus on in section B is worthy of a thesis in its own right. I touch upon them only with the limited aim of providing context to the conceptual framework developed in chapter 2.

In section C, I flesh out this conceptual framework by developing three indicators to assess the legal quality of instruments produced by each institution of government. The question that I ask is what are the features of these instruments that determine whether the three institutions are playing their role in maintaining and strengthening the rule of law? I suggest the following three indicators for legislation, executive orders and judgments respectively: a) the capacity of statutes to clearly

guide executive and judicial action by goal-setting and balancing competing interests; b) the ability of the executive to make flexible yet reasoned decisions grounded in primary legislation; and c) the application of statutory interpretation and consistent standards of judicial review as courts give effect to environmental rights and legal principles.

This lays the ground for Part II of this thesis, where I provide examples of the manner in which these indicators are manifested.

B. Background to Law Development in India

1. Legislative Processes

In this section, I describe some of the key features of law-making, law-implementing and law-interpreting processes in India that contribute to the weakening of the rule of law and a breach of the principle of separation of powers in addition to exacerbating fragmentary tendencies. The first bit focuses on legislative drafting processes, in particular the closed-off nature of law-making and the lack of adequate consultative mechanisms.

Chapter 9 of the Manual on Parliamentary Procedures of the Government of India sets out the process for the drafting of bills and piloting them through Parliament. Proposals for bills are to be initiated in the department to which the subject-matter of the legislation relates,¹⁷⁷ following which the relevant department is to draw up legislative proposals in consultation with all interests and authorities concerned, ‘essentially from administrative and financial points of view.’¹⁷⁸ The limitation of this consultation with other departments to ancillary questions of

¹⁷⁷ Manual on Parliamentary Procedures, [9.1].

¹⁷⁸ *ibid* [9.2] (a).

administration and finance is revealing of the narrow, subject-specific way in which the initial stages of legislative drafting are conceived.

However, once the Ministry of Law and Justice has vetted a legislative proposal, the Manual states that a note for Cabinet ought to be prepared in consultation with other concerned departments,¹⁷⁹ although it remains unclear whether such departments are once again to be consulted only for the limited purpose of administrative and financial feasibility. Academic literature on the Indian legislative drafting process is limited,¹⁸⁰ and there is no comprehensive source of research on the extent of compliance with legislative drafting procedures set out in the Manual. In fact, one of the ways in which the research agenda of this thesis may be carried forward is through an exhaustive empirical account of which departments and ministries are consulted in the drafting of which kinds of legislation.

This would be a useful way of gaining insight into the manner in which different issues are viewed as separate regimes by different authorities within government, as well as into the general culture of consultation in the legislative process. In Part III, where I critically analyse environmental institutional reform proposals, I also comment on the consultative processes through which such proposals were drawn up,¹⁸¹ and note that the *manner* in which reforms are crafted can be as crucial to fragmentation as the *substance* of the reforms themselves. This suggests that it is not just the *content* of statutory regimes that is indicative of fragmentation,

¹⁷⁹ *ibid* [9.2] (c).

¹⁸⁰ TK Viswanathan, *Legislative Drafting-Shaping the Law for the New Millennium* (Indian Law Institute 2007); SK Hiranandani, 'Legislative Drafting: An Indian View' (1964) 27 *Modern Law Review* 1.

¹⁸¹ Chapter 8(D)(1).

but also the *process* by which they were created, hence the emphasis on legislative drafting processes in this section.

Although quantitative information on intra-governmental consultative processes during legislative drafting is not available, in-depth accounts of the framing of specific laws provide a helpful window into the manner in which government frames issues during the legislative process. This is relevant to an understanding of fragmentation in the municipal context.

An example of this is a legislative history of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 by the then Minister of Rural Development, who drove the framing of the law, and by his aide.¹⁸² In their account of the process of drafting the law, the authors explicitly state that the Ministry of Rural Development (responsible for piloting the land acquisition legislation) worked extensively with the MoEFCC to ensure that the shortcomings of the environmental impact assessment process under the Environment Impact Assessment Notification 2006 ('the EIA Notification') were not replicated in the social impact assessment process crafted under the land acquisition law.¹⁸³

The minister's account suggests that a more organic consultative process was adopted in the framing of the land acquisition law than the formal inter-ministerial task forces that are regularly constituted as a prelude to legal and policy reform. These task forces do not necessarily provide equal representation to all the ministries that might be concerned with a particular issue. The terms of reference of these taskforces also inevitably dictate the weight that is given to different viewpoints.

¹⁸² Jairam Ramesh and Muhammad Ali Khan, *Legislating for Justice: The Making of the 2013 Land Acquisition Law* (OUP 2015).

¹⁸³ *ibid* 21.

A good example of this is the report submitted by a working group appointed by the Ministry of Steel in 2011. It was set up to examine specific issues relating to the steel sector like demand and supply, raw material and infrastructure, and research and development. One of the recommendations in its report¹⁸⁴ was to undertake underground mining in the Western Ghats, an ecologically sensitive area, the regulation of which was itself the subject of a separate task force—the Western Ghats Ecology Expert Panel—set up by another ministry, the MoEFCC. The recommendation was strongly criticised by environmentalists, as well as the State Government of Karnataka, where the mining was proposed.¹⁸⁵

The composition of the working group that made the recommendation to undertake underground mining reveals an overwhelming preponderance of representatives of infrastructure ministries and steel manufacturers. In contrast, the MoEFCC had a sole representative.¹⁸⁶ There is no evidence of the working group having consulted the Western Ghats Ecology Expert Panel, despite the fact that one of the recommendations of the working group had a direct bearing on an issue within the remit of the Expert Panel.

The terms of reference of the working group were not motivated by a genuine desire for consultation either. The only mention that was made of the environment was to consider the manner in which environment and forest clearances might have an impact on ‘raw material availability and infrastructure linkages for the steel sector.’¹⁸⁷

¹⁸⁴ Ministry of Steel, ‘Report of the Working Group on Steel Industry for the Twelfth Five Year Plan (2012-2017)’ (2011).

¹⁸⁵ Meera Mohanty, ‘Task Force Suggests Underground Mining in Western Ghats’ *The Economic Times* (12 March 2012)
<http://articles.economictimes.indiatimes.com/2012-03-12/news/31153035_1_mining-in-western-ghats-underground-mining-steel-ministry> accessed 13 March 2016.

¹⁸⁶ Report of the Working Group on Steel Industry (n 139) Annexure-II, 189.

¹⁸⁷ *ibid* 190.

The constitution of inter-ministerial committees or inter-departmental task forces suggests that there is some official degree of consultation in the policy-making and legislative drafting processes in India. However, in practice, these processes still remain largely self-contained, driven by the interests of the ministry piloting them. For instance, when State Governments were asked to draw up State Action Plans on Climate Change in 2009, an analysis of the Plans revealed that there were fundamental shortcomings with the manner in which the mainstreaming of climate change was understood and implemented.¹⁸⁸ Similarly, under the EIA Notification, the requirement of environmental impact assessment is restricted only to individual projects; environmental considerations are not required to be taken into account while framing policy or legislation.

The closed-off nature of this process is also extended to public participation. The Manual does not make any mention of consulting non-government stakeholders or members of the public while framing legislation, and successive Governments have displayed an erratic record in facilitating such public participation.

For the most part, the contents of draft Bills are not made available to the public until they are introduced in Parliament.¹⁸⁹ On the occasions on which comments are invited from the public, the time provided is not sufficient. (The Government allowed 15 days to submit comments on the draft Environment Laws (Amendment) Bill described in the previous chapter.) In the even more rare instances when non-official participation in legislative drafting is invited, it is only when a particular issue has evoked such public emotion and protest as to compel Government

¹⁸⁸ Anu Jogesh and Navroz Dubash, 'From Margins to Mainstream? State Climate Change Planning in India' (2014) 49 *Economic and Political Weekly*.

¹⁸⁹ Tarunabh Khaitan, 'Reforming the Pre-Legislative Process' (2011) 46 *Economic and Political Weekly* 27.

to cooperate with civil society. For instance, the mass outpouring of grief and anger in the aftermath of the gang rape of a medical student in Delhi in December 2012 prompted the Government at the time to constitute a committee that considered thousands of comments and representations from the public and produced a report¹⁹⁰ recommending amendments to the criminal law for the protection of women. However, the Government ultimately diluted these recommendations¹⁹¹ and rushed through an ordinance instead of a Bill, thereby bypassing debate on the changes that it had made.¹⁹²

Similarly, in 2011, confronted by a groundswell of public support for an anti-corruption crusader who undertook a fast to death, the Government was forced to discard its draft of a Bill creating an ombudsman to investigate corruption among public authorities. Instead, it was compelled to hand over the task of drafting to a committee that was formally constituted to include a civil society representative.¹⁹³ While this was a positive step towards creating a more consultative process, it also raised concerns about the legitimacy of the civil society members on the committee and their claims to represent public opinion.¹⁹⁴ The incident also brought home the point that there existed no permanent, institutionalised mechanisms to facilitate pre-

¹⁹⁰ Report of the Committee on Amendments to Criminal Law (23 January 2013).

¹⁹¹ Chintan Chandrachud, 'Disappointing Departures from the Verma Committee Report' *Oxford Human Rights Hub* (3 February 2013) <<http://ohrh.law.ox.ac.uk/disappointing-departures-from-the-verma-committee-report/>> accessed 17 April 2016.

¹⁹² 'Wanted: A Verma Ordinance' *The Hindu* (4 February 2013) <<http://www.thehindu.com/opinion/editorial/wanted-a-verma-ordinance/article4375579.ece>> accessed 17 April 2016.

¹⁹³ 'Government issues notification on committee to draft Lokpal Bill' *The Hindu* (9 April 2011) <<http://www.thehindu.com/news/national/article1637935.ece>> accessed 17 April 2016.

¹⁹⁴ Tarunabh Khaitan, 'How Should We Make Laws' *The New Indian Express* (7 July 2011) <<http://www.newindianexpress.com/columns/article416157.ece>> accessed 17 April 2016.

legislative public participation, and that the Government's response would remain *ad hoc*, influenced by popular feeling about a particular issue.

In January 2014, at a meeting of the Committee of Secretaries, a decision was taken to introduce a pre-legislative consultation policy and to modify the Manual on Parliamentary Procedures accordingly.¹⁹⁵ This policy requires departments and ministries to be proactive about publishing draft legislation or at least statements about the key features of the legislation, accompanied by explanatory notes and an estimate of the impact of the legislation on fundamental rights and the environment. The draft legislation or these other details are to be kept in the public domain for at least 30 days, following which summaries of comments received from the public ought to be published on website of the relevant department or ministry. The Ministry of Law and Justice ought to verify compliance with such pre-legislative consultative procedures. Finally, the Cabinet must also be presented with a summary of such comments, including those from stakeholders like other affected departments or ministries.

This is obviously an important legislative reform measure, but it falls short of being truly consultative on several counts. For one, it still contemplates the participation of the public at a stage only after legislation has already been drafted, unlike the practice in other jurisdictions of circulating Green Papers or White Papers on the basis of which bills are drafted. Second, although public comments are invited, the policy leaves it to the discretion of the relevant ministry or department in question to hold simultaneous consultations with stakeholders. Third, if the department or ministry believes that it is not 'feasible or desirable' to follow this pre-legislative

¹⁹⁵ Decisions taken in the meeting of the Committee of Secretaries held on 10th January, 2014 under the Chairmanship of Cabinet Secretary on the Pre-Legislative Consultation Policy (PLCP) (including principal and subordinate legislation).

consultation policy, it only needs to record the reasons for this in a note to Cabinet.¹⁹⁶ Fourth, the policy applies only to legislative measures of the Central Government and not to State Legislatures. There is no mention of consulting State Governments while drafting laws on the Concurrent List. Finally, given that it is only a policy direction rather than a binding legal obligation, the impact that it is likely to have on changing legislative drafting practices might be limited, with the apprehension that the Government might choose to bypass the policy to serve its interests.

The ineffectiveness of the policy was made evident with the recent passage of the Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill on 11 March 2016. This Bill links biometric information to the delivery of financial subsidies by the Government and had raised serious concerns about the right to privacy when an earlier version was introduced in Parliament by the previous Government.¹⁹⁷ Despite these concerns, the current Government not only introduced in Parliament, but also passed a new version of the Bill without first circulating a draft for public comments, a move that has attracted sharp criticism from civil society.¹⁹⁸ There is no consistency about the publication of draft bills for comments by other ministries and departments either, despite the pre-legislative consultation policy being in force for over two years now. Neither is there any evidence of the Government publishing explanatory notes or estimates of the impact of proposed legislation as recommended in the policy.

¹⁹⁶ It is important to note that clause (i) of section 8 of the Right to Information Act 2005 exempts cabinet papers from disclosure under the Act.

¹⁹⁷ Amba Uttara Kak and Swati Malik, 'Privacy and the National Identification Authority of India Bill: Leaving Much to Imagination' (2010) 3 National University of Juridical Sciences Law Review 485.

¹⁹⁸ Chinmayi Arun, 'Privacy is a Fundamental Right' *The Hindu* (18 March 2016) <<http://www.thehindu.com/opinion/lead/lead-article-on-aadhaar-bill-by-chinmayi-arun-privacy-is-a-fundamental-right/article8366413.ece>> accessed 17 April 2016.

The difficulty of fostering a culture of participation and transparency in India through policy instruments has prompted recommendations to introduce binding legal obligations to ensure pre-legislative public participation. For instance, a report by Oxford Pro Bono Publico for the National Campaign for the People's Right to Information ('OPBP report')¹⁹⁹ suggests amending the Directive Principles of State Policy in Part IV of the Indian Constitution to include the following provision:

Provision for Public Participation in Lawmaking

'The State shall take steps to ensure full, meaningful and effective public participation in the framing of laws, rules, regulations, schemes, policies, plans and programmes through publication of drafts, public consultations and due consideration of all submissions.'²⁰⁰

This provision is intended to allow courts to review legislation for compatibility with the principles of public participation, along the lines of the South African Constitution, which imposes duties on the two houses of Parliament as well as the provincial legislatures to facilitate public participation in legislative processes.²⁰¹ Alternatively, given the difficulty of Constitutional amendments, the OPBP report also recommends the imposition of a statutory duty to facilitate public participation on State authorities.²⁰²

The National Advisory Council ('NAC')²⁰³ considered a similar statutory route to pre-legislative consultation when it drew up a working paper²⁰⁴ exploring the

¹⁹⁹ Oxford Pro Bono Publico, 'A Comparative Survey of Procedures for Public Participation in the Lawmaking Process-Report for the National Campaign for People's Right to Information' (2011) ('OPBP report').

²⁰⁰ *ibid* 68.

²⁰¹ Sections 56, 59 and 115, Constitution of South Africa. See also OPBP report (n 695) 8-12.

²⁰² OPBP report (n 199) 68.

²⁰³ The National Advisory Council ('NAC') was a body set up under the previous Government to advise the Government in framing law and policy. It comprised a mix of bureaucrats and civil society members, and played a prominent role in the drafting of legislation to guarantee socio-economic rights like food and education. The NAC has since been dissolved.

potential of section 4 of the Right to Information Act 2005 ('Right to Information Act'). Clause (b) of sub-section (1) of Section 4 of the Right to Information Act requires all public authorities²⁰⁵ to publish the procedure followed in their decision-making process, including the particulars of any arrangement that exists for consultation of members of the public. Clause (c) requires all public authorities to publish 'relevant facts' while formulating policies or implementing decisions that affect the public, while sub-section (2) of section 4 imposes a *suo motu* duty of disclosure of as much information as possible to the public at regular intervals. In *Venkatesh Nayak v Chief Secretary, Government of Delhi*,²⁰⁶ the Central Information Commissioner held that a draft Bill would fall within the meaning of 'relevant facts'. On this basis, the NAC working paper stated that section 4 was probably the most effective provision within which to house a legal duty of pre-legislative consultation. However, it also recognised the inherent weaknesses of this provision, which included the absence of a penalty for failure to disclose information and the vagueness of the phrase 'relevant facts'.

In any case, section 4, in the form in which it currently exists can only be interpreted to impose a pro-active duty of *disclosure*, not *consultation*.²⁰⁷ However, imposing a statutory duty of consultation requires careful construction. On the one hand, there must be mechanisms that require the Government to respond to the

²⁰⁴ Note on Meeting of NAC Working Group on Transparency and Accountability in Pre-Legislative Process (10 February 2012) ('NAC working paper').

²⁰⁵ Clause (h) of section 2 of the Right to Information Act defines a public authority as an authority/body/institution of self-government established under the Constitution or under any other law or notification issued by Government. Parliament and State Legislatures would fall within the ambit of the Act.

²⁰⁶ Decision No. CIC/SG/C/2010/000345+000400/8440, order dated 7 July 2010 <<http://indiankanoon.org/doc/622425/>> accessed 18 April 2016.

²⁰⁷ Vidhi Centre for Legal Policy, 'Note on Pre-legislative Consultation and Representation' (Submitted to the National Advisory Council's Working Group on Transparency, Accountability and Governance, 9 September 2012).

feedback it receives, including providing reasons for accepting or rejecting comments; on the other hand, there is the danger that a binding duty to this effect might cause ‘excessive and unhelpful litigation.’²⁰⁸ This emphasises the inherent limitations of statutory solutions and the need to strengthen existing Parliamentary processes to facilitate public participation and improve legislative quality.

In this context, the National Commission for the Review of the Working of the Constitution makes some important recommendations. In a background paper on the Working of Parliament and the Need for Reforms,²⁰⁹ it recommends the following measures: streamlining the functions of the Parliamentary and Legal Affairs Committee, greater use of the Law Commission of India,²¹⁰ creating a new Legislation Committee to oversee the design of laws, and referring all draft Bills to Department-related Parliamentary Standing Committees.²¹¹ (Currently, there is no established practice of referral and Governments bypass such Committees especially when they command strong majorities in Parliament and wish to pass a Bill expeditiously).²¹² These measures are all designed to strengthen communication and coordination between the legislature and the executive, in an attempt to ensure normative consistency across the branches of government.

²⁰⁸ NAC working paper (n 204) 3.

²⁰⁹ National Commission for the Review of the Working of the Constitution, Volume II, Book 3 (2002).

²¹⁰ In 2015, the 20th Law Commission undertook a project to identify and recommend the repeal of obsolete laws, an important exercise in consolidating laws and improving legislative quality. See Bibek Debroy, ‘Old but Not Gold’ *The Indian Express* (23 July 2015) <<http://indianexpress.com/article/opinion/columns/old-but-not-gold/>> accessed 18 April 2016.

²¹¹ For an argument in favour of making the proceedings of Parliamentary Standing Committees public, see Prashant Reddy Thikkavarapu, ‘Under Cover: The Unreasonable Secrecy of Parliamentary Committees’ *The Caravan* (1 October 2015) <<http://www.caravanmagazine.in/perspectives/under-cover-parliamentary-committees-secrecy/2>> accessed 18 April 2016. See also OPBP report (n 695) 70, arguing for greater access of the public to Standing Committee meetings.

²¹² ‘Government making standing committees irrelevant, says opposition’ *The Economic Times* (29 April 2015).

The objective of this detailed discussion was to demonstrate that although mechanisms for consultation exist in the Indian context, in practice, the policy-framing and legislative processes resemble the closed-off treaty-making processes on the international plane that contribute to fragmentation. The perfunctory nature of this consultation is also an indication that law-making is viewed more as a technical task and less as an exercise in deliberative democracy.²¹³ This is partially reflected in the lack of articulation of legislative intent in regulatory statutes, some of the key characteristics of which are described below.

Most regulatory statutes, especially in areas like telecommunications, competition, and infrastructure²¹⁴ are enabling laws.²¹⁵ These statutes set up authorities (usually comprising a mix of government and expert members), empower them to investigate offences, delegate extensive powers to them to frame regulations, and may also constitute tribunals to hear appeals against their decisions. Legislative objectives are at best expressed indirectly by prescribing a broad set of functions for the authorities set up under them. Secondary rules and regulations work out the bulk of the details regarding the operation of such statutes.

This snapshot of regulatory statutes²¹⁶ is relevant because it provides an indication of the kind of function that legislation is seen as serving. This is important

²¹³ For an account of the manner in which environmental law-making processes in the US have transformed from ambitious laws that made ‘hard threshold societal choices’ to narrow exercises in appropriations legislation, see Richard Lazarus, ‘Congressional Descent: The Demise of Deliberative Democracy in Environmental Law’ (2005) 94 *Georgetown Law Journal* 619.

²¹⁴ Examples of such statutes include the National Highways Authority of India Act 1988, the Telecom Regulatory Authority of India Act, 1997, the Competition Act, 2002 and the Land Ports Authority of India Act 2010.

²¹⁵ For a fuller account of the ‘facilitative’ and ‘expressive’ roles of the law in regulation, see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007).

²¹⁶ It is not intended to be representative of all regulatory legislation in the country. The Electricity Act, 2003, for example, is more than a bare-bones statute setting up the Central and State Electricity Regulatory Commissions. It also provides detailed directions regarding the generation and transmission of electricity, the duties of electricity generating companies and transmission facilities as well as

for the development of an indicator to evaluate the legal quality of legislation and its contribution to maintaining the environmental rule of law. Indian environmental *statutes* bear the closest resemblance to the regulatory legislation described above. (Environmental *law*, of course, spans a much broader range of legal fields that include tort law, contract law, administrative law and human rights).²¹⁷

This description of regulatory legislation also provides a useful backdrop for a discussion of the main features of law-implementing processes in India and the key issues at the core of Indian administrative law in the next section.

2. Executive Processes

Administrative law scholarship in India does not reflect the central and pervasive role that it occupies in the operation of the executive arm of government. There are only a handful of comprehensive treatises on the subject,²¹⁸ and among individual scholars, there is an overwhelming emphasis on judicial review, and the application of *Wednesbury* unreasonableness and the doctrine of proportionality in the Indian context.²¹⁹

specific procedures for the grant of licences. However, statutes like this in the regulatory arena in India remain the exception.

²¹⁷ See generally Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) 5-20.

²¹⁸ SP Sathe, *Administrative Law* (7th edn LexisNexis Butterworths Wadhwa); MP Jain and SN Jain, *Principles of Administrative Law* (LexisNexis Butterworths Wadhwa 2011); C K Thakker, *Administrative Law* (2nd edn, Eastern Book Company, 2012).

²¹⁹ See generally Shivaji Felix, 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' (2006) *Acta Juridica* 95; Abhinav Chandrachud, 'Wednesbury Reformulated: Proportionality and the Supreme Court of India' (2013) 13 *Oxford University Commonwealth Law Journal* 191; Chintan Chandrachud, 'Proportionality, Judicial Reasoning and the Indian Supreme Court' (2016) *University of Cambridge Faculty of Law Legal Studies Research Paper Series*, Paper No. 12.

Some recent scholarship also focuses on administrative tribunals,²²⁰ including empirical work on their impact and effectiveness.²²¹ These are all valid subjects of academic interest, but like the description of Indian environmental legal scholarship in the Introduction demonstrated, the focus of this administrative legal scholarship is court, or tribunal-centric. A crucial issue that is sidelined is the manner in which the extensive rule-making powers that are delegated under hundreds of statutes are exercised by executive authorities.

An evaluation of this process of delegated law-making is crucial in the context of the environmental rule of law because it is an expression of the manner in which the executive interprets the directions contained in primary legislation. Inconsistency between primary laws and secondary rules is indicative of the law's incoherent development. In India, each House of Parliament has a Committee on Subordinate Legislation whose function it is to

scrutinise whether powers to make rules, regulations, bye-laws, schemes or other statutory instruments...have been properly exercised within such conferment or delegation.²²²

Most statutes contain a provision requiring delegated legislation to be laid before Parliament or a State Legislature (in case of a law enacted by the State Government) within a specified time period. It is then the function of the Committee on Subordinate Legislation to examine whether the instrument in question is within the scope of its parent statute, or whether it should more properly be dealt with through primary

²²⁰ Arvind Datar, 'The Tribunalisation of Justice in India' (2006) *Acta Juridica* 288.

²²¹ Vidhi Centre for Legal Policy, 'State of the Nation's Tribunals Parts I and II' (2014) <<http://vidhilegalpolicy.in/reports-1/2015/4/15/the-state-of-the-nations-tribunals-i>> and <<http://vidhilegalpolicy.in/reports-1/2015/4/15/state-of-the-nations-tribunals-ii>> accessed 27 March 2016.

²²² Rajya Sabha Secretariat, 'Committee on Subordinate Legislation' (Practice and Procedure Series 2005).

legislation. The power of this Committee to scrutinise subordinate legislation has since been extended not only to instruments that are *required* to be laid before Parliament or State Legislatures under a statute, but also to any other exercise of executive power.²²³

Delegated legislation across different areas has frequently been challenged in court for exceeding the scope of the primary legislation under which it was framed.²²⁴ In addition to this, the Parliamentary Committees on Subordinate Legislation have repeatedly documented illegalities by various departments and ministries regarding the manner in which officials exercise their powers of delegated legislation. In its 21st report, the Lok Sabha Committee on Subordinate Legislation lists the following major problems with the framing of delegated legislation—inordinate delay in publishing rules and regulations, the use of ‘vague expressions’, and the absence of clear guidelines for the exercise of discretionary power.²²⁵

Rule 320 of the Lok Sabha Rules of Procedure states that the power of the Committee to scrutinise delegated legislation extends, among other things, to determining whether such legislation contains matter that is more properly dealt with in an Act of Parliament. If the Committee is of the opinion that the exercise of delegated legislation is not in accordance with the grounds under which the Committee is empowered to scrutinise it, it may bring this matter to the attention of the Lok Sabha, along with its recommendations. The recommendations of the Committee are expected to carry weight with Government ministries, who are also

²²³ *ibid* 6-7.

²²⁴ A keyword search of Supreme Court and High Court judgments on the legal database, Manupatra threw up 1067 judgments in which the legality of delegated legislation was examined. The keywords used were “delegated legislation” and “*ultra vires*”.

²²⁵ Committee on Subordinate Legislation, ‘Non-Implementation of Oft-Repeated Recommendations of Committee on Subordinate Legislation, Lok Sabha, by Various Ministries’ (Lok Sabha Secretariat 2011).

required to furnish to the Committee statements of action proposed to be taken based on the Committee's recommendations.²²⁶

The vigorous exercise by the Committee of this particular function is vital in preventing the undisciplined use of delegated legislation that is a contributor to fragmentation. Although the Committee has been reasonably active since it was established in 1953, its recommendations do not appear to have had the intended effect on the exercise of delegated legislation. The administrative law scholar, Sathe, summarises some of the important principles that may be gleaned from the specific recommendations made by the Committee from time to time.²²⁷ One of these is that guidelines or criteria to be observed by the authority vested with discretionary powers ought to be laid down in the rules. However, as the description in Part II will demonstrate, guidelines for the exercise of executive discretion remain largely absent, while authorities continue to use executive instruments in the form of circulars and office memoranda to embody rules of a legislative character.²²⁸ This is despite the fact that the Supreme Court has also laid down that 'a statutory rule cannot be modified or amended by executive instructions.'²²⁹

Evidently, both Parliamentary mechanisms and judicial directions have not been very successful in fostering a culture of administrative discipline. Administrative law scholarship in India on the distinctions between different kinds of legislative and executive instruments is also limited. There has been little interest in this particular aspect of administrative law reform. The Government constituted two Administrative

²²⁶ Sathe (n 218) 82.

²²⁷ *ibid* 85.

²²⁸ See Pratik Datta, 'Amendments by Stealth: MCA Resurrects Henry VIII's Legacy' (2014) 19, for a description of the manner in which the Ministry of Corporate Affairs is making substantive amendments to the Companies Act 2013 through 'General Circulars.'

²²⁹ *Senior Superintendent of Post Offices v Izhar Hussain* (1989) 4 SCC 318, 320.

Reforms Commissions, first in 1966 and then in 2005. These bodies submitted reports on a range of issues relevant to public administration, such as personnel administration, the right to information and the ethics of good governance, but did not deal with methods of rule-making. The reports of these Commissions also discussed Centre-State relations, but did not consider in any detail differences in administrative practices across State authorities and the challenges that this presented for the implementation of the law.

The breadth of the administrative State in India²³⁰ makes the scrutiny of the manner in which executive authorities perform their functions very important. The framework on the environmental rule of law that I develop in this thesis requires the scrutiny of the legal instruments of each institution of government. As far as the executive is concerned, I scrutinise in particular the manner in which executive authorities advance the law through delegated legislation and executive orders, and examine whether this executive advancement of the law is inconsistent with primary legislation. The discussion above sets out the framework for the operation of rule-making authorities, thereby providing the context for the development of this indicator.

3. Judicial Processes

An overview of the legal development process in India would not be complete without an account of the role of the courts. I restrict myself, in this discussion, to the Supreme Court and its history of judicial activism. This is particularly important in the context of the environmental rule of law and the separation of powers because it is in this role that the Court has performed more of a law-making function than a law-

²³⁰ OP Dwivedi and RB Jain, 'India's Administrative State' (Gitanjali Publishing House 1985).

interpreting one.²³¹ Gaps in the manner in which the legislature and the courts develop the law are crucial manifestations of fragmentation, and the Supreme Court's unique law-making role, particularly in the advancement of socio-economic rights and environmental jurisprudence,²³² necessarily forms the backdrop to the development of a conceptual framework of fragmentation in the Indian context.

Apart from this exercise by the Court of law-making functions, its judicial activism is also relevant to fragmentation because it radically altered the manner in which institutions of government interacted with each other. The procedural innovations adopted by the Court in public interest litigation, such as the continuing mandamus and the appointment of expert fact-finding committees have been praised for facilitating a 'judicial conversation' with government actors.²³³ This role of the Court in initiating dialogue must also be taken into account while conceptualising a framework related to the rule of law and the separation of powers.

In the Introduction, I referred to a recent work by Anuj Bhunia that makes a sharp break from the overwhelmingly flattering narrative that the role of the courts in public interest litigation has received over the years. An academic debate on the principal arguments of the book on a prominent Indian constitutional law blog²³⁴ throws up the following main themes in Bhunia's work—the marginalisation by the court of the public interest petitioner, the privileging of the amicus curiae by the court, the disregard of standard rules of evidence, and the failure of the Supreme

²³¹ Dam (n 22). Over the years, the Supreme Court has laid down guidelines for the prevention of sexual harassment at the workplace (*Vishaka v State of Rajasthan* AIR 1997 SC 3011), for the appointment of judges to the higher judiciary (*Supreme Court Advocates on Record Association v Union of India* (1993) 4 SCC 441), and more recently, for the conduct of clinical trials (*Swasthya Adhikar Manch v Union of India* (Writ Petition No. 33/2012)).

²³² See generally n 18 and 19.

²³³ Fredman (n 9) 133.

²³⁴ See <<https://indconlawphil.wordpress.com/2017/02/01/iclp-book-discussion-anuj-bhuanias-courting-the-people-roundup/>> accessed 6 February 2017.

Court to recognise the polycentric nature of the problem with disastrous results. These themes suggest that the Court, in its zeal to ensure good outcomes and open up standing for a wide class of people has lost touch with the very basics of judicial process and reasoning, with adverse impacts for the rule of law. As the author remarks while responding to critiques of his work, ‘the rise of PIL and its attack on every other aspect of judicial procedure has also meant that minimal hermeneutic labour in the form of judicial justification is no longer at a premium.’ The bleeding of PIL jurisprudence into other cases has meant that substantive judicial reasoning has been sacrificed at the altars of a more convenient judicial process.²³⁵ This impact of judicial activism on the content of legal reasoning is an important background feature to take into account while establishing indicators for legal quality.

In this section, my aim was to provide an overview of key features of the process of law development in each of the three institutions of government—the legislature, the executive and the judiciary—with the objective of highlighting those features that were closely linked to the rule of law, separation of powers as well as the separateness and uncertain hierarchy that mark fragmentation. In the case of the legislature, these features were the lack of genuinely consultative processes and sparsely constructed regulatory legislation. For the executive, the extensive delegation of powers and irregularities in the exercise of subordinate legislation are relevant features in the context of the rule of law. Finally, as far as the judiciary is concerned, the law-making and dialogue-facilitating role of the Supreme Court, as well as its disregard for procedural formality and its penchant for micromanagement and governance are the most distinctive characteristics. The next section uses these

²³⁵ Aparna Chandra, ‘ICLP Book Discussion: Anuj Bhuwania’s ‘Courting the People’-III: Aparna Chandra on Substance and Process < <https://indconlawphil.wordpress.com/2017/01/26/iclp-book-discussion-anuj-bhuanias-courting-the-people-iii-aparna-chandra-on-substance-and-process/>> accessed 6 February 2017.

background features to develop indicators that are able to assess the legal quality of the instruments issued by each of these institutions of government.

C. Indicators for Legal Quality

In this section, I suggest indicators that are able to assess the legal quality of the instruments of each of the institutions of government and help determine the extent to which they strengthen or weaken the environmental rule of law as conceptualised in chapter 2. These may be capable of application to other areas of the law (as I suggest in the Conclusion), but have particular resonance for Indian environmental law in light of the discussion on its distinctive features in the previous chapter. However, before I explain indicators, it is important to think of indicators for the secondary framework of fragmentation as well. In the next paragraphs, I point out those features of fragmentation on the international plane that are also capable of transposition to the domestic Indian context without significant modification.

In international law, fragmentation is characterised by separate regimes and uncertain hierarchy. The evidence of this is in the multiple self-contained yet overlapping treaties, courts and tribunals on the international plane. As I demonstrated in chapter 2, such overlap may take the form of direct contradiction, milder incompatibility or even harmony. Municipal law is similarly marked by such multiplicity, and in Part II, it is the first indicator that I use to demonstrate fragmentation.

I highlight the multiple regimes that govern issues related to the environment, with statutory regimes, including the rules and executive orders passed under them forming the starting point of the description in chapters 4 and 5. Judicial decisions are discussed separately in chapter 6. I evaluate the degree of overlap among the regimes

by focusing on the legislative text, in the case of statutes and rules, and on the content of executive orders. Some of the indicators that are used to assess the degree of overlap are—the use of *non obstante* clauses that indicate the relationship of the statute with other laws; the consistency with which similar terms and processes are defined across different statutory provisions, rules and orders; and explicit references made in the text of the statute, rule or order to related provisions under other regimes.

The degree of normative inconsistency or incompatibility across different regimes cannot be assessed solely from legislative text. Legal culture, especially the practice and attitude of administrative authorities, also has a significant impact on the manner in which provisions across regimes are interpreted and implemented.²³⁶ I highlight this attitude to the extent that it finds expression in the executive orders issued by these authorities.

Another feature of fragmentation is the lack of coordination across authorities, although there may be instances where such channels of communication exist. In such cases, I examine the legal hierarchy of the instrument that creates them. The higher the authority of the instrument, the lower is its fragmentary tendency. Consultation among authorities might well have evolved as part of administrative practice expressed in the form of informal guidelines or internal operating procedures. However, if these are not formally backed by statutory authority, they lack stability and certainty, and do not strengthen the rule of law.

The reason for fragmentation (expressed through the indicators derived above) is the inability of legal instruments issued by the three institutions of government to maintain the rule of law. The instruments are : a) primary statutes and secondary rules

²³⁶ Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007); Nicolas de Sadeleer, *Implementing the Precautionary Principle: Approaches from the Nordic Countries, EU and USA* (Earthscan 2007).

and regulations; b) executive orders, that are variously issued in the Indian context in the form of notifications, circulars, notices, clarifications, office memoranda and even guidelines; and c) judicial decisions.²³⁷ The quality of each legislative instrument is evaluated through an indicator established for the purpose.

Chapter 2 has already established normative benchmarks for the functioning of each of the institutions of government. Using these, I propose the following broad indicators for each of the instruments: a) the capacity of statutes to guide judicial or executive behaviour by goal-setting or balancing competing interests; b) the ability of the executive to take flexible yet reasoned decisions grounded in primary legislation; and c) the use of statutory interpretation and consistent standards of judicial review by the courts as they give effect to environmental rights and principles. These indicators are fleshed out below.

Statutes are the primary vehicles of legislative intent.²³⁸ They express the balance struck by the legislature between competing interests²³⁹ and lay down guiding principles for implementation.²⁴⁰ This directing function²⁴¹ is especially relevant in the context of complex, polycentric issues like the environment. In theory, the clearer

²³⁷ Although the term ‘instrument’ usually refers only to laws, rules or orders that are framed by the legislature and the executive respectively, I have extended it to encompass judicial decisions purely for the sake of convenience and consistency.

²³⁸ GP Singh, *Principles of Statutory Interpretation* (13th edn LexisNexis Butterworths Wadhwa 2012).

²³⁹ For an overview of theories of the legislative process and the functions performed by statutes, see William Eskridge, Philip Frickey and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (3rd edn West Group 2001).

²⁴⁰ See Fisher, Lange and Scotford (n 72 258, who argue that public administration is limited not only by ‘defining the powers of administrative decision-makers in legislation and accompanying policy instruments. It also occurs through legal provisions and principles that dictate *how* such powers should be exercised.’

²⁴¹ For a discussion of the manner in which directing principles like the polluter pays, prevention and precautionary principles can ‘propel codification by providing a system to underpin any new code’, see Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 268. The author also discusses how environmental principles can ‘guarantee the coherence’ of modern law by ‘removing contradictions, eliminating redundancy, and completing unfinished portions of the subject.’

the expression of legislative intent, the less the likelihood of inconsistent interpretation by the executive or the courts,²⁴² and consequently, the less the likelihood of incoherence.

In light of this, the principal indicator that I employ to evaluate the legal quality of primary or secondary legislation is the manner in which such legislation lays down its principles, makes its objectives clear or sets its priorities. Apart from the preamble, such principles or objectives may be expressed explicitly or implicitly in the legislative text in the following ways. The statute may set out the different factors that executive authorities ought to have regard to while exercising the discretion vested in them, thereby providing guiding principles for implementation. Additionally, the objectives of the statute might be expressed indirectly by prescribing the functions of authorities that are empowered to exercise power under it. In Part II, I evaluate the clarity and certainty with which such principles and objectives are communicated, if at all, through the legislative text.

Once again, the hierarchy of the instrument through which they are communicated is likely to have an impact on stability and therefore of the rule of law. Embedding principles and objectives in primary statutory text has a stronger and more lasting effect on the coherence of the law than expressing them through secondary rules and regulations.²⁴³ The clear expression of legislative policy and goals through a

²⁴² For suggestions regarding the manner in which court-legislature dialogue ought to take place in light of the public choice theory of legislation, see William Eskridge, 'Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation' (1988) 74 *Virginia Law Review* 279. Public choice theory suggests that legislation serves private ends rather than the public good, and that legislative intent cannot necessarily be equated with good policy. This theory therefore has implications for a method of statutory interpretation that relies on legislative intent. See also Cass Sunstein, 'Law and Administration after "Chevron"' (1990) 90 *Columbia Law Review* 2071, for a discussion of the division of the interpretive function between executive agencies and the courts in the United States.

²⁴³ Rules and regulations are easier to enact and amend than primary legislation. Statutes must go through a lengthy process of introduction and deliberation in Parliament or a State Legislature. Rules and regulations must only be laid before the Central or State legislative bodies for a prescribed time

primary statute is also critical in holding the executive to account and guiding its behaviour, a critical organising principle of the rule of law. The body on which power is conferred by a statute must act within the limits of the authority set by such statute.²⁴⁴ If the statute itself does not clearly articulate its objectives, it leaves room for the executive to develop independent interpretations of the law inconsistent with legislative intent, thereby contributing to fragmentation. The capacity of statutes to articulate such intent becomes especially important in light of the closed-off legislative processes described earlier in this chapter.

This brings me to the second indicator—the ability of the executive to make flexible yet reasoned decisions grounded in primary legislation. Unlike the legislature and the courts, executive authorities are most closely involved in the day-to-day operation of the law. Their orders provide the best evidence of the manner in which legislative intent is translated on the ground. Translations that are incompatible with such intent contribute to fragmentation. I attempt to assess this incompatibility in the following ways.

For one, I examine the function that executive authorities are primarily performing through their orders. Are they applying the law to particular facts and exercising discretion in individual cases? (e.g. granting a permit or an environmental clearance). Or are they largely performing policy or law-making functions? (e.g. changing the conditions that are required to be taken into account while granting such permit or clearance). The more that executive authorities play the norm-setting role usually performed by the legislature, thereby breaching the principle of separation of

period. If no modifications are suggested, the rules or regulations come into effect after the expiry of the period.

²⁴⁴ This is a well-established principle in the jurisprudence of the Indian Supreme Court. See *Revula Subba Rao v The Commissioner of Income Tax* AIR 1952 Mad 127; *Additional District Magistrate (Revenue) Delhi Administration v Shri Shri Ram* AIR 2000 SC 2143; *Kunj Behari Butail v State of Himachal Pradesh* (2000) 3 SCC 40; *State of Karnataka v Ganesh Kamath* (1983) 2 SCC 402.

powers, the more hierarchical uncertainty they create,²⁴⁵ and the greater the likelihood of fragmentation and weakening of the rule of law. A fundamental tenet of administrative law is that essential legislative functions cannot be delegated, including functions that have the effect of ‘determining legislative policy and its formulation as a binding rule of conduct.’²⁴⁶ Executive orders that perform such functions are in breach of this tenet and thereby weaken the environmental rule of law. This is especially of concern given the lack of legislative oversight of executive functions in the manner described earlier in this chapter.

Next, I assess incompatibility between legislative intent and executive orders by examining the manner in which such orders are grounded in the primary statutory text from which they derive their authority. The evidence of this lies in the reasons, if any, provided by the executive authorities for their orders, especially in explicit references made to parent statutory provisions. Such reasons, or the lack of them, shed light on the manner in which executive authorities understand the law, and in a way, is also indicative of the clarity with which the legislative intent has been articulated.

Finally, the indiscriminate use of executive orders may also dilute the coherence of the law if they are primarily used to carve out exceptions to primary legislation. The frequency with which executive authorities provide piecemeal exemptions from generally applicable provisions is therefore also a factor that I take into account while evaluating the legal quality of executive orders.

²⁴⁵ For a discussion of the legal confusion created by the expansion of legislative powers in policy and guidance documents in the context of UK environmental law, see Fisher, Lange and Scotford (n 72) 257, 457-59. See also Cynthia R Farina, ‘Statutory Interpretation and the Balance of Power in the Administrative State’ (1989) 89 Columbia Law Review 452 for a discussion of the respective roles of the legislature, executive agencies and the courts in the setting out what the law is in the context of US administrative law.

²⁴⁶ *In Re: The Delhi Laws Act 1912, the Ajmer-Merwara (Extension of Laws Act 1947) and the Part C States (Laws) Act 1950* AIR 1951 SC 332.

The third aspect of the legal process that I evaluate is the jurisprudence of the Indian Supreme Court, which has arguably had a more profound impact on Indian environmental law than the other institutions. It has virtually re-drafted forest conservation legislation²⁴⁷ and laid down important environmental principles.²⁴⁸ Communication between the Court and the other institutions of government is most strongly visible in the manner in which the legislature, and to a greater extent, the executive respond to its decisions.²⁴⁹ The clarity with which the Court communicates with these institutions and the certainty and coherence that it brings to the law is best assessed through the *reasoning* that the Court employs, rather than the focus in existing scholarship on the outcomes of its decisions.

The rigour that the Court brings to its decision-making can play a very important role in tying together the disparate components of a fragmented statutory and regulatory framework.²⁵⁰ I examine four trends in judicial reasoning: a) the extent of reliance by the courts on the statutory framework; b) the consistency in the standards of review applied; c) the appointment of expert committees as part of the decision-making process, and d) the kinds of orders and directions issued. Each of these is related to the rule of law, separation of powers and fragmentation in the following ways.

Interpreting statutes and rules is the Court's primary function. It indicates how the Court interacts with its normative environment. Using such statutes and rules as

²⁴⁷ *Godavarman* (n 106).

²⁴⁸ n 98-n 101.

²⁴⁹ See chapter 7(C), where I refer to piecemeal executive orders issued in response to Supreme Court judgments on compensatory afforestation.

²⁵⁰ For a theoretical discussion of the link between judicial reasoning and coherence, see 'Interpretation and Coherence in Legal Reasoning' *The Stanford Encyclopedia of Philosophy* (first published 29 May 2001, substantially revised 10 February 2010) <<http://plato.stanford.edu/entries/legal-reas-interpret/>> accessed 12 April 2016.

part of its reasoning demonstrates that the Court is aware of, and is taking into account related law-making activity in other institutions.²⁵¹ There is some concern that the Court's enthusiastic advancement of socio-economic rights has strengthened the role of Constitutional rights and principles at the expense of the more mundane, but equally important functions of statutory interpretation and administrative law review.²⁵²

I assess whether this concern ought to apply to Indian environmental law as well, given the central role that Constitutional jurisprudence occupies. The articulation of environmental principles without embedding them in the statutory and regulatory framework contributes to fragmentation by failing to clarify the relationship between norms at different levels of hierarchy, and by failing to read them together as a coherent whole.

Inconsistency in the standards of review applied by the Court also creates uncertainty and fails to provide clear guidance to the executive regarding the exercise of discretion, thereby weakening the rule of law. A similar lack of clarity is created by ambiguity in the Court's language. As I describe in chapter 6 and the Appendix, the Court frames some directions or orders in the manner of suggestions or recommendations to the executive or legislature, while others are clearly mandatory. This creates confusion about the binding nature of the obligations laid down by the Court, thereby contributing to fragmentation. Vague or imprecisely articulated directions cause similar confusion.

²⁵¹ See Roscoe Pound, 'Common Law and Legislation' (1908) 21 Harvard Law Review 383 observing, more than a century ago, that courts 'incline to ignore important legislation...making no mention of the statute'. He also notes that the legislature similarly 'make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial law-making.'

²⁵² Farrah Ahmed and Tarunabh Khaitan, 'Constitutional Avoidance in Social Rights Adjudication' (2015) Oxford Journal of Legal Studies 1. For a discussion of constitutional avoidance in the UK, see Jeff King, *Judging Social Rights* (CUP 2012).

Finally, I also examine the manner in which the Court uses expert opinion to inform its orders and directions. This is relevant because it is revealing of the Court's framing of Indian environmental law, particularly its *separation* of technical expertise from other forms of knowledge. It is also useful to examine whether the Court uses such expert committees to develop piecemeal, individualised solutions to particular problems, thereby performing executive functions and breaching the principle of separation of powers or whether it builds on expert recommendations to lay down norms of more general application.

D. Conclusion

The objective of this chapter was to provide a richer contextual backdrop to developing a conceptual framework of the environmental rule of law and fragmentation in India. I did this by providing a glimpse into key features of legislative, executive and judicial processes in India. In particular, I demonstrated the manner in which these features might contribute to the separateness and uncertain hierarchy, contributing to fragmentation, and which features might weaken the rule of law. For instance, I described closed-off policy-framing and legislative drafting processes that encourage the separate development of the law. I also highlighted irregularities in administrative law and practice to demonstrate that executive authorities might contribute to fragmentation by creating uncertainty in the hierarchy of different legislative and executive instruments.

As far as the judicial development of the law is concerned, I focused on the Indian Supreme Court's history of judicial activism. I suggested that the Court might be weakening the rule of law, particular in the context of public interest litigation, with its disregard for procedure and substantive legal reasoning.

Using this context, I suggested indicators to assess fragmentation in Indian environmental law. These included indicators similar to those characterising fragmentation in international law—multiple laws and authorities, overlapping jurisdiction and conflicting provisions. Additionally, I proposed three more indicators, one each to evaluate the legal quality of statutes, executive orders and judgments in the Indian context, and thereby demonstrate fragmentation. These indicators were developed on the basis of their capacity to strengthen or weaken the environmental rule of law as conceptualised in chapter 2. These indicators are: a) the capacity of statutes to guide judicial or executive behaviour by goal-setting or balancing competing interests; b) the ability of the executive to take flexible yet reasoned decisions grounded in primary legislation; and c) the use of statutory interpretation and consistent standards of judicial review by the courts as they give effect to environmental rights and principles. I explained the connection between these indicators and the rule of law, separation of powers and fragmentation. I also suggested more detailed ways to way identify these indicators in Indian law. These are now applied to the practical working of Indian environmental law in Part II.

PART II: ANALYSING INDIAN ENVIRONMENTAL LAW

CHAPTER FOUR: LEGISLATIVE FRAGMENTATION

A. Introduction

In Part I, I laid the groundwork for this thesis by developing a conceptual framework. In Part II, I apply this framework to demonstrate the fragmentation of Indian environmental law, the underlying reason for which is the failure of the institutions of government to maintain the rule of law.

This chapter focuses on fragmentation in environmental legislation, while chapter 5 focuses on executive decision-making, and chapter 6 describes fragmentation in judicial reasoning. Section B describes the fragmentation of legislation through multiple self-contained yet overlapping regimes that lack unifying norms. I describe the multiple statutes and authorities and identify inconsistencies, conflicts and overlapping jurisdiction. Section C uses the indicator developed in chapter 3 to demonstrate that environmental statutes largely fall short of their expected role in guiding executive and judicial behaviour through goal-setting and balancing competing interests. I also analyse legislative text for the clarity with which it communicates its objectives and the manner in which it takes account of other regimes. Given the close overlap between legislative and executive fragmentation, common case studies on mining and indigenous forest rights are depicted in the next chapter.

Apart from describing legislative fragmentation and demonstrating the weakening of the rule of law, I also portray the poor implementation of Indian environmental law, particularly in the case studies. I rely on an understanding of implementation that is broader than issues of compliance and enforcement that form

the focus of most Indian environmental writing.²⁵³ Compliance and enforcement are restricted concepts that focus on violations and sanctions, while implementation encompasses a wider range of measures across the different institutions of government to strengthen the law and ensure its effectiveness.²⁵⁴ It is in this sense that the functioning of different statutory regimes and executive authorities is discussed in chapters 4 and 5.

B. Legislative Fragmentation

In chapter 2, I demonstrated that fragmentation in international law contemplates fragmentation within regimes (climate change) as well as across regimes (trade and environment). This also applies to national legal systems. In this section, I therefore first demonstrate fragmentation *within* some of the key statutory regimes of Indian environmental law—the Indian Forest Act, the Wildlife (Protection) Act 1972 (‘the Wildlife Protection Act’), the Forest (Conservation) Act 1980 (‘the Forest Conservation Act’) and the Environment (Protection) Act, 1986 (‘the Environment Protection Act’). As far as fragmentation *across* regimes is concerned, I describe it as part of the case studies in chapter 5. The three regimes that I focus on are forest conservation, mining, and indigenous forest rights, all of which regulate the use of, and access to forest land. Of these, only the regime on forest conservation is traditionally ‘environmental’ in so far as it is administered by the MoEFCC. The principal statute on mining—the Mines and Minerals (Regulation and Development)

²⁵³ For an explanation of the differences between implementation, enforcement and compliance in the context of international law, see Ibrahim FI Shihata, ‘Implementation, Enforcement, and Compliance With International Environmental Agreements—Practical Suggestions in Light of the World Bank’s Experience’ (1996-7) 9 *Georgetown International Environmental Law Review* 37.

²⁵⁴ Leroy Paddock, Du Qun, Louis Kotzé, David Markell, Kenneth Markowitz and Durwood Zaelke (eds), *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* (Edward Elgar 2011); Paul Martin and Amanda Kennedy, *Implementing Environmental Law* (Edward Elgar 2015).

Act, 1957 ('the Mines and Minerals Act')—is administered by the Ministry of Mines, while the Ministry of Tribal Affairs is responsible for the implementation of the Forest Rights Act. As the case studies demonstrate, the clash between the competing objectives of these three regimes and the absence of unifying norms influences their implementation.

1. The Interaction of Separate and Overlapping Regimes

The multiple, subject-specific statutory regimes that make up Indian environmental law are a mixed product of colonial legacy and a wave of environmental consciousness in the 1970s and 80s that marked the terms of Prime Minister Indira Gandhi²⁵⁵ and coincided with landmark international environmental legal developments. The Indian Forest Act 1927 was passed under British rule to allow the colonial administration to assume control over the management of forests and forest produce. Until the passage of the Water (Prevention and Control of Pollution) Act 1974 ('the Water Act'), the Indian Forest Act along with the different State forest laws (all of which also vested proprietary rights over forests in the State Governments) was the only statutory regime that represented any comprehensive attempt to deal wholly with some aspect of the natural environment,²⁵⁶ albeit not with the intrinsic objective of environmental protection.

This objective only found expression with the enactment of the Wildlife Protection Act, the Air (Prevention and Control of Pollution) Act 1981 ('the Air Act')

²⁵⁵ Mahesh Rangarajan, 'Striving for a Balance: Nature, Power, Science and India's Indira Gandhi, 1917-1984' (2009) 7 *Conservation and Society* 299.

²⁵⁶ There were some early pollution control laws like the Bengal Smoke Nuisance Act 1905 and the Bombay Smoke Nuisance Act 1912 as well as a euphemistically titled law to regulate hunting called the Wild Birds and Animals Protection Act 1912. For examples of early 'piecemeal and inadequate' attempts at legislation, see Divan and Rosencranz (n 8) 31.

and the Environment Protection Act, which were passed to give effect to the Stockholm Declaration adopted at the United Nations Conference on the Human Environment in 1972. With the passage of the Forest Conservation Act in 1980, Parliament also recognised the need to protect forests for their inherent worth and as part of the larger scheme of ecological preservation.²⁵⁷

Apart from the Indian Forest Act, a command-and-control approach underlies all these statutes. Each of the statutes prohibits certain kinds of activities, usually within certain areas, unless an authority created or designated by the statute grants permission. Violating the provisions of these statutes is a criminal offence and attracts imprisonment and a fine. The Air Act and the Water Act prohibit the discharge of emissions or effluents without obtaining the consent of the State Pollution Control Boards ('PCBs') set up under them.²⁵⁸ S 2 of the Forest Conservation Act prohibits State Governments from diverting forest land for non-forest purposes (including the use of such land by private actors) without obtaining the prior approval of the Central Government. In 1991 and 1994 respectively, the Central Government promulgated the Coastal Regulation Zone Notification ('CRZ Notification') and the Environment Impact Assessment Notification ('EIA Notification')²⁵⁹ under the Environment Protection Act. Separate clearances must now be obtained under each of these Notifications for activities that fall within their purview. Similarly, S 29 of the Wildlife Protection Act prohibits the destruction of wildlife or habitat within a sanctuary without a permit.

²⁵⁷ The Statement of Objects and Reasons of the Act states that Act was intended to curb deforestation, which had been creating an 'ecological imbalance' and leading to 'environmental deterioration.'

²⁵⁸ Air Act, s 21 and Water Act, s 25.

²⁵⁹ A revised EIA Notification was issued in 2006.

The proliferation of statutes and authorities go hand in hand, with each of these statutes and notifications setting up boards or committees usually comprising a mix of government officials and technical experts.²⁶⁰ Apart from the PCBs under the Air and Water Act, the CRZ Notification creates National and State Coastal Zone Management Authorities, while the EIA Notification sets up Central and State Expert Appraisal Committees as well as State Environment Impact Assessment Authorities. The Wildlife Protection Act constitutes the National and State Boards of Wildlife. The forest regime, which is historically distinct from the regime on environmental laws, has fewer expert statutory authorities,²⁶¹ but is administered by an entirely separate branch of the Indian civil administration, the Indian Forest Service. The Forest (Conservation) Rules, 2003 ('the Forest Conservation Rules') list at least 7 different authorities within the forest administration through which an application for forest clearance must pass (This detailed procedure was finally comprehensively codified through amendments to the Rules made only as recently as 2014).

The multiplicity that marks fragmentation on the international plane is therefore very much a feature of Indian environmental law as well. In the next paragraphs, I discuss the manner in which these multiple regimes and authorities take each other into account. The ILC report stated that 'conflict clauses' were one of the standard devices by which the hierarchical relationship between treaty regimes could be clarified. The domestic equivalent of this is the *non obstante* clause that gives precedence to the provisions of the statute in which it is employed over other laws. S 2 of the Forest Conservation Act contains this clause. It reads, 'Notwithstanding

²⁶⁰ Notable exceptions are the Conservation and Community Reserve Management Committees set up under ss 36B and 36 D respectively of the Wildlife Protection Act. These include representatives of non-governmental organisations and members of the local community around sanctuaries and national parks. However, the role of these committees is strictly advisory.

²⁶¹ S 3 of the Forest Conservation Act sets up an Advisory Committee to make recommendations to the Central Government regarding the diversion of forest land.

anything contained in any other law for the time being in force in a State' the State Government shall make an order diverting forest land for non-forest purposes only with the prior approval of the Central Government. As I describe in chapter 6, the Supreme Court has applied this clause several times while dealing with conflicts between State forest laws, mining laws and the Forest Conservation Act.

While this clause may be a useful tool for the Court to apply, the very fact that such cases have periodically been brought before it betrays confusion about the applicability of the various regimes among Government authorities, private actors and non-governmental organisations (these usually file the cases). Moreover, s 24 of the Environment Protection Act contains a similar *non obstante* clause, which provides that the rules and orders made under it are to have effect 'notwithstanding anything inconsistent therewith contained in any enactment other than this Act.' It is unclear how the Court would read both these clauses together, should it be asked to resolve inconsistencies between the Environment Protection Act and the Forest Conservation Act (The provisions of these statutes do not, of themselves, demonstrate a direct conflict, but given the prolific promulgation of rules and orders under both these regimes, there is scope for inconsistency, which the *non obstante* clauses in both the parent statutes would not be able to resolve).

The Wildlife Protection Act adopts a different method to establish hierarchy between laws through a repeal and savings provision in section 66. This section states that provisions in other laws relating to any matter covered under the Wildlife Protection Act stand repealed to the extent that they correspond with or are repugnant to any provision in the Wildlife Protection Act. However, this provision has clearly not had the effect that it was intended to. Two other statutes—the Elephants' Preservation Act 1879 and the Wild Birds and Animals Protection Act 1912—

continue to remain on the statute books. Since they prescribe less stringent penalties than the Wildlife Protection Act for similar offences, they leave open the possibility of misuse, so much so that the Law Commission of India felt it necessary to recommend their repeal.²⁶²

It follows that statutory devices such as the ones just described are of limited use in clarifying legal relationships between regimes, at least outside of court. It is therefore useful to examine whether these regimes have developed more substantive connections. The Indian Forest Act and the Wildlife Protection Act regulate the same physical space. The Indian Forest Act empowers State Governments to demarcate three kinds of forests—reserved forests,²⁶³ protected forests²⁶⁴ and village forests.²⁶⁵ The Wildlife Protection Act similarly empowers State Governments to create sanctuaries²⁶⁶ and national parks,²⁶⁷ which often overlap with reserved forests and protected forests. Given that the boundaries of these different areas overlap significantly, there ought to be clarity regarding the manner in which these categories are defined and consistency in the manner in which activities within such areas are regulated. However, the provisions across the two statutory regimes are not sufficiently harmonised.

²⁶² Law Commission of India, Report No. 248, ‘Obsolete Laws: Warranting Immediate Repeal’ (Interim Report 2014) 25, 32.

²⁶³ Indian Forests Act, s 3.

²⁶⁴ Indian Forests Act, s 29.

²⁶⁵ Indian Forests Act, s 28.

²⁶⁶ Wildlife Protection Act, s 18.

²⁶⁷ Wildlife Protection Act, s 35.

The Wildlife Protection Act defines a ‘protected area’²⁶⁸ without any reference to protected forests under the Indian Forest Act.²⁶⁹ Similarly, the definition of community reserves under the Wildlife Protection Act²⁷⁰ makes no reference to village forests under the Indian Forests Act, although the principle underlying the two categories is the same i.e. vesting rights and duties for the protection of forests and wildlife in villages and local communities in and around the areas in question.²⁷¹ S 26(d) of the Indian Forests Act prohibits the pasturing of cattle within reserved forests, while s 29 of the Wildlife Protection Act specifically states that the grazing or movement of livestock is not prohibited within a sanctuary. Inconsistencies like this between the two statutes have caused conflicts between forest authorities, indigenous tribes and conservationists.²⁷² Some of these cases have made their way to the Supreme Court, and I discuss the manner in which the Court has dealt with these in chapter 6 and the Appendix.

The Wildlife Protection Act, being the later statute, missed the opportunity to establish clearer linkages with the Indian Forest Act, although both statutes govern the same land by employing broadly similar mechanisms. The result is confusion and

²⁶⁸ Wildlife Protection Act, s 2(24A).

²⁶⁹ For a recent discussion of vague demarcations of forest areas and protected areas within a sanctuary, see AK Ghosh, ‘Wildlife Conservation in India: Are We Really Serious?’ *Down to Earth* (16 October 2015) <<http://www.downtoearth.org.in/blog/wildlife-conservation-in-india-are-we-really-serious--51505>> accessed 9 April 2016.

²⁷⁰ Wildlife Protection Act, s 36C.

²⁷¹ For more details about the manner in which provisions on village forests under the Indian Forest Act and community reserves under the Wildlife Protection Act could be coordinated, see Prashant Mohanty, ‘Conservation Reserve and Community Reserve in Odisha: A Study on the Potentials and Initiatives Taken So Far’ (Regional Centre for Development Cooperation) <<http://www.rcdindia.org/PbDocument/8a2da4ad94c8452-e70b-4285-92e1-b54ab77681c9Community%20Reserves%20&%20Conservation%20Reserves%20in%20Odisha.pdf>> accessed 9 April 2016.

²⁷² For an account of these conflicts from the anthropological perspective of legal pluralism, see Maarten Bavinck and Amalendu Jyotishi, *Conflict, Negotiations and Natural Resource Management: A Legal Pluralism Perspective from India* (Routledge 2014).

uncertainty, and an approach to conservation that is ineffective because of the lack of integration.²⁷³ A similar lack of linkages characterises the regimes on environmental and forest clearance as well. As mentioned earlier, environmental clearance for certain categories of projects must be obtained under the EIA Notification. If such project also proposes to use forest land, clearance must be obtained under the Forest Conservation Act. As the next paragraphs demonstrate, these clearances are granted by separate authorities that operate entirely independently of each other.

Under the EIA Notification, projects are divided into two categories on the basis of their spatial impact as well as potential impacts on the environment and human health. Larger projects are assessed by the Expert Appraisal Committee at the national level, while the MoEFCC makes the final decisions regarding clearance. Projects that are considered suitable for clearance at the State level are assessed by State Expert Appraisal Committees, while the final power to grant clearance vests in State Environment Impact Assessment Authorities. As already mentioned earlier, the authorities that grant clearance under the Forest Conservation Act are a chain of officials (Divisional Forest Officer, Conservator of Forests, Principal Chief Conservator of Forests) in the Indian Forest Service, assisted by the statutory Forest Advisory Committee.

Neither the EIA Notification, nor the Forest Conservation Act and rules issued under it require the authorities under these regimes to take each other's recommendations into consideration, or even to formally consult with each other. Under the EIA Notification, the form that must be submitted in order to apply for environmental clearance requires the project proponent to include details of the impact of the proposed project on forests in addition to other aspects of the

²⁷³ Both the National Wildlife Action Plan (2012-2016) and the draft National Wildlife Action Plan (2017-2031) recognise the need to bring reserved and protected forests under the Indian Forest Act within the scheme of the protected areas network under the Wildlife Protection Act.

environment. Nevertheless, there is no provision in the EIA Notification that states that the Expert Appraisal Committees ought to take into account the assessment of this impact on forests by the Forest Advisory Committee or other official under the Forest Conservation Act. Instead, Appendix VI of the EIA Notification recommends that the Expert Appraisal Committees constituted under it comprise forestry experts as well.

At best, this is a duplication of expertise, since experts under both regimes will now conduct an assessment of the impact of the project on forests. On the whole, however, it represents a failure to integrate processes that otherwise ought to be integrally connected to each other. In fact, paragraph 8(v) of the EIA Notification explicitly states that regulatory clearances from other authorities are not required unless the environmental clearance under the EIA Notification is sequentially dependent on such other clearances, either for technical reasons or as a requirement of the law. However, from a reading of the Forest Conservation Rules below, it is not clear whether the law requires obtaining forest clearances before environmental clearances or vice versa.

The Forest Conservation Rules, unlike the EIA Notification exhibit a greater attempt at creating linkages with the EIA process, but even they have not been drafted with sufficient clarity to require officials, while making their determination under the Forest Conservation Act, to take into account the recommendations of the Expert Appraisal Committees under the EIA Notification. For instance, Rule 7(4)(e)(vi) of the Forest Conservation Rules states that one of the factors that the Forest Advisory Committee ought to have due regard to before making a recommendation on the diversion of forest land is whether the State Government has 'considered all issues having direct or indirect impact of the diversion of forest land on forest, wildlife and

environment.’(sic) On the face of it, this appears to encourage communication between the EIA and the forest regimes. However, the connection could have been made more explicit by requiring the Forest Advisory Committee to have due regard to the recommendations of the Expert Appraisal Committees or State Environment Impact Assessment Authorities under the EIA Notification.

In fact, the provision seems to suggest that environmental and forest clearance ought to proceed sequentially. If the Forest Advisory Committee is to have due regard to whether the State Government has considered the impact of the diversion on the environment, it would appear to follow that the EIA process ought to be completed before an application for forest clearance is considered. However, this is not made adequately clear in the Forest Conservation Rules. Forest clearance is granted in two stages. In the first stage, the Central Government grants in-principle approval subject to compliance with certain conditions. The Rules fail to stipulate that one of these conditions includes obtaining environmental clearance under the EIA Notification; instead, this condition only finds mention in the approval letters granted to individual applicants.

This critique of the Notification and the Rules might appear hyper-technical, but this lack of clarity has contributed to the lax enforcement of these provisions by the MoEFCC, with scores of projects, usually mining activities, reported to be operating without at least one of the two clearances required under these regimes.²⁷⁴ Recognising that this lack of communication between the authorities under the two regimes had permitted project proponents to escape greater scrutiny, the MoEFCC

²⁷⁴ See VK Rai, Dr NS Raman, Dr SK Choudhary, Srijana Rai, ‘Forest Clearance for Mining Projects and the Need to Conduct Rigorous Audit of Stage I Forest Clearance’ (2015) 2 International Journal of Innovative Research in Advanced Engineering 196. See also below section E(2).

even issued an office memorandum in 2011 to state that formal environmental clearance would be issued only after Stage-I forestry clearance had been obtained.²⁷⁵

Although this requirement was confirmed by the Supreme Court in *Lafarge Umiam Mining Pvt. Ltd. v Union of India*²⁷⁶ (*'Lafarge'*), another office memorandum has now expressly delinked environmental and forest clearances for linear projects like roads, railways and power transmission lines.²⁷⁷ These frequent changes to the procedure through the use of office memoranda also highlights the need to ground mechanisms like this in instruments of a higher legal hierarchy. I expand on this in section D, where I describe the substantive advancement of the law by the executive.

The description of Indian environmental statutes in this section so far has demonstrated that they fit the traditional indicators of fragmentation—multiple laws, multiple authorities, inconsistent yet overlapping provisions, and self-contained modes of operation. In the next paragraphs, I describe how these statutes also weaken the environmental rule of law as determined by the indicator established in chapter 3—the capacity of statutes to guide executive or judicial behaviour by goal-setting or balancing competing interests.

2. Articulation of Legislative Intent

The only explicit reference to environmental principles in any Indian statute is the National Green Tribunal Act 2010 (*'the National Green Tribunal Act'*). S 20 of the Act states that the NGT must apply the principles of sustainable development, the

²⁷⁵ Office Memorandum, 'Consideration of Projects for Grant of Environmental Clearance under EIA Notification, 2006, which involve Forestland—Procedure to be followed—Regarding' (31 March 2011).

²⁷⁶ (2011) 7 SCC 388.

²⁷⁷ Office Memorandum, 'Consideration of projects for grant of environment clearance under EIA Notification, 2006, which involve forest land - Procedure to be followed - further clarifications' (19 March 2013).

polluter pays principle and the precautionary principle while passing its orders. The Act does not define these principles. Other statutes incorporate these principles indirectly at best. For example, pollution control statutes like the Environment Protection Act, the Air Act and the Water Act incorporate the polluter pays principle in some sense because they are command-and-control laws that impose criminal penalties for emitting or discharging pollutants in excess of the prescribed standards. However, specific questions regarding the operationalisation of this principle such as the definition of a polluter, the degree of liability, and how payment is calculated have been left to the determination of courts and now the NGT.²⁷⁸ Although the absence of a statutory articulation of the content and scope of this principle has paved the way for some ‘creative decision-making’ in some instances, it has also diluted the impact of the principle in others.²⁷⁹

A similar lack of specificity characterises the articulation of legislative objectives. The preambles to the environmental statutes described in this section contain only vague, aspirational assertions about the prevention and control of pollution, the protection and improvement of the environment and the ‘ecological and environmental security of the country.’²⁸⁰ There are no statutorily prescribed target-based objectives either.²⁸¹ The strongest expression of legislative intent in these statutes is through the prescribed powers and functions of the statutory authorities. S

²⁷⁸ Lovleen Bhullar, ‘Making the Polluter Pay in India: Scope and Limitations of Environmental Law’ in Ghosh (n 17).

²⁷⁹ *ibid.*

²⁸⁰ Wildlife Protection Act, Preamble.

²⁸¹ See Manju Menon, Shibani Ghosh, Navroz Dubash, Kanchi Kohli in consultation with Pratap Bhanu Mehta and Kanchi Kohli, ‘A Framework of Principles for Environmental Regulatory Reform: Submission to the High Level Committee’s Review of Environmental Law’ (2014), criticising the abstract objectives in Indian environmental laws and recommending the inclusion of ‘clear, positive statements regarding the ‘tangible, measurable benefits’ of environmental regulation (‘Principles for Environmental Regulatory Reform’).

16 and 17 of both the Air Act and the Water Act enumerate the powers and functions of the Central and State PCBs. S 3 of the Environment Protection Act does the same for the Central Government, although the Act does not designate a specific authority for the performance of these functions. Together, these provisions empower the relevant authorities to draw up comprehensive programmes to control pollution, to lay down environmental quality standards, to disseminate information, and in the case of State PCBs, to inspect industrial plants and manufacturing processes.

Even when enumerating powers and functions, the capacity of Indian environmental statutes to guide executive or judicial behaviour falls short. Currently, environmental statutes only empower PCBs to initiate criminal prosecution against violators. If an individual or a firm violates any provision of an environmental statute, he will be tried before a criminal court and subject to a fine or imprisonment. There is no statutory power vested in the PCBs to impose civil penalties. However, in the wake of the recent Delhi air pollution crisis, the Central Pollution Control Board has issued directions²⁸² under s 5 of the Environment Protection Act²⁸³ directing Municipal Commissioners to penalise the burning of agricultural waste/crop residue. Thus, one statutory authority, the Central Pollution Control Board appears to be delegating a power which it itself does not have to an executive authority, completely contrary to the scheme of the existing environment statutes.

The statutory language used to confer these powers on the authorities is enabling.²⁸⁴ Section 3 of the Environment Protection Act states that the Central

²⁸² F.No.A-19014/44/06-MON

²⁸³ S 5 of the Environment Protection Act allows the Central Government to issue directions to any person, officer or authority in exercise of its powers and functions under the Act. However, if the Central Government itself has not been vested with the power to impose civil penalties, it is difficult to see how a delegation of this power to another authority would be lawful.

²⁸⁴ Cf ss 5C and 8 of the Wildlife Protection Act, which impose duties on the National and State Boards of Wildlife respectively.

Government *may* take any of the measures that it prescribes for the purpose of protecting and improving the quality of the environment. However, the Supreme Court has held that when the exercise of power conferred on a public authority is linked to the enforcement of a public or private right of a citizen, the word ‘may’ ought to be read as ‘shall’ and the enabling *power* ought to be interpreted as a *duty* to further the object and purpose of a statute.²⁸⁵ In the absence of clearly articulated legislative objectives and in the face of executive apathy, the Court has exercised its interpretive powers in order to compel authorities to implement the law. The most recent example of such interpretation by the Court is in *Lafarge*, where it held that s 3 of the Environment Protection Act imposed a power coupled with a duty on the Central Government to ‘appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy 1988.’²⁸⁶

The weak statutory articulation of legislative intent is reflected in the case law of the Court analysed in chapter 6 and the Appendix. There are few instances in which the Court relies on the object and purpose of legislation to resolve inconsistencies or conflicts between statutory regimes. Similarly, the Court rarely assesses the exercise of discretionary power by authorities against the limits set by the relevant statutes. Again, this is at least partially a reflection of the fact that environmental statutes provide limited to no direction to authorities regarding the exercise of discretionary power. For example, both the Air Act and the Water Act empower State PCBs to

²⁸⁵ *Madanlal Fakrichand Dudhediya v S. Changdeo Sugar Mills* AIR 1962 SC 1543, 1557; *Chinnamar Kathiam v Ayyavoo* AIR 1982 SC 137, 140; *L.Hriday Narain v I.T.O., Bareilly*, AIR 1971 SC 33, 36.

²⁸⁶ *Lafarge* [122], discussed in chapter 6(C)(1). See also *ND Jayal v Union of India* (2004) 9 SCC 362, where the Court stated that the power to grant environmental clearances under the EIA Notification was coupled with the duty to monitor compliance with the conditions under which the clearance was granted.

grant industrial plants the consent to operate, but neither of the Acts, nor the rules framed under them specify the factors that the PCBs ought to have regard to while making their decisions.

The Environment Protection Act and the Forest Conservation Act provide limited guidance through the rules framed under them. Rule 5 of the Environment (Protection) Rules 1986 ('the Environment Protection Rules') lists the factors that the Central Government may take into consideration while prohibiting or restricting the location of industries in different areas. These include the environmental quality standards laid down for an area, its biological diversity, or the net adverse environmental impact that is likely to be caused by the industry proposed to be prohibited. However, the courts have engaged with this provision infrequently, especially after the EIA Notification was first issued in 1994.²⁸⁷ While the provisions of Rule 5 and the EIA Notification overlap, they have not been harmonised sufficiently. For example, clause (viii) of Rule 5 states that the Central Government, while prohibiting or restricting the location of industries, may have regard to their proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act 1958. This factor does not find mention in the EIA Notification. There are similar discrepancies regarding the proximity of industries to national parks and sanctuaries. The Environment Protection Rules state that the Central Government may take into consideration the proximity of industries to 'closed areas' notified under the Wildlife Protection Act (a term that is not defined anywhere in the Act or Rules), while the EIA Notification refers to 'protected areas' instead.

²⁸⁷ A search of the online legal database, Manupatra reveals that there have been only 11 cases at both the Supreme Court and the High Courts that have explicitly referred to Rule 5 of the Environment Protection Rules. Even then, in most cases, the court cites it as part of the general scheme of the Environment Protection Act, rather than as a standard against which the Government's decisions regarding the location of industries may be reviewed. In other cases, the courts engage only with the procedural, not substantive aspects of Rule 5 (The provision requires the Government to invite objections from the public regarding the location of industries).

This inconsistency is compounded by Rule 7(4)(e) of the Forest Conservation Rules, which sets out the factors that the Forest Advisory Committee ‘shall have due regard to’ while rendering advice on the diversion of forest land for non-forest purposes. Clause (i) of this provision states that the Committee shall consider whether the forest land proposed to be diverted forms part of a nature reserve or biosphere reserve, terms that are not defined under any statute, and which therefore lack legal status. In each of the three instruments described above, authorities must have regard to essentially the same factor while making a determination about the location of an industry i.e. proximity to flora and fauna. Yet, this same factor is defined inconsistently across all three instruments, creating confusion and thereby contributing to fragmentation.

As mentioned above, Indian environmental statutes and rules provide evidence of the implicit incorporation of environmental legal principles into Indian environmental law. Penalties under the pollution control statutes as well as the award of compensation for environmental damage under the National Green Tribunal Act²⁸⁸ are expressions of the polluter pays principle. Similarly, the EIA Notification and the regulation of hazardous wastes under the Environment Protection Act²⁸⁹ embody some versions of the principle of sustainable development and the precautionary principle respectively. However, the statutes and rules themselves do no work in defining the contours of these principles or in articulating their content and scope, and therefore, their capacity to guide executive or judicial behaviour is low, an example of which can be seen in the illegality of the notification vesting powers in Municipal Commissioners to award civil penalties mentioned earlier.

²⁸⁸ National Green Tribunal Act, s 15.

²⁸⁹ Hazardous and Other Wastes (Management and Transboundary) Rules 2016.

A similar lack of detail characterises the expression of legislative objectives. Factors to guide the implementation of the law by authorities are rarely set out. When they are, they are expressed in rules or notifications, at a lower rung in the legal hierarchy. Moreover, they are inconsistently defined across regimes, adding to the uncertainty of an already fragmented framework. This is likely to have had some impact on the manner in which courts review the exercise of power by authorities under environmental statutes, as I discuss in chapter 6 and the Appendix. According to the indicator established in chapter 3 i.e. the capacity to guide behaviour through the legislative articulation of goals or the balancing of competing interests, the current body of statutes weakens the rule of law. The impact of this fragmented legislative and regulatory framework on the exercise of executive power is discussed in the next chapter.

CHAPTER FIVE: EXECUTIVE FRAGMENTATION

A. Introduction

In this chapter, I explain the link between fragmentation, the executive advancement of the law, and the rule of law. I provide examples from the field of forest conservation and environmental impact assessment that demonstrate the following: a) crucial decisions that fundamentally alter the interpretation and operation of statutes are often taken through executive instruments, creating uncertainty in the legal hierarchy; b) such decisions do not tend to be well-reasoned and lack sufficient grounding in primary or secondary legislative text; and c) piecemeal alterations and exemptions weaken the unity of the law. The first and third are characteristics of fragmentation, while the second is the indicator established in chapter 3 to determine the weakening of the environmental rule of law.

In the second half of the chapter, I provide snapshots of fragmentation by describing challenges to the implementation of the Forest Rights Act as well as illegalities in mining activities. These display the features of fragmentation described in chapter 4 as well.

B. Executive Advancement of the Law

After the current Government assumed power in 2014, one of the first ‘achievements’ that its MoEFCC claimed for itself was the publication of a compendium of notifications and office memoranda issued under the EIA Notification 2006.²⁹⁰ In order to appreciate the significance of this compendium, it is useful to briefly describe

²⁹⁰ Compendium of Gazette Notifications, Office Memoranda Under Environment Impact Assessment Notification 2006 (Ministry of Environment, Forests and Climate Change, 2014).

and explain the distinctions between the different kinds of executive instruments used by the MoEFCC and other authorities. The EIA Notification was issued by the Central Government in the exercise of its powers under s 3 of the Environment Protection Act and Rule 5 of the Environment Protection Rules, both of which empower the Central Government to impose prohibitions or restrictions on the location of industries, operations or processes in any area. Rule 5 also prescribes the procedure that the Central Government must follow in order to impose a prohibition or restriction.

First, it must give notice of its intention to impose such prohibition or restriction by notification in the Official Gazette. The notification must provide a brief description of the area and the industries proposed to be prohibited or restricted as well as the reasons for the imposition. Objections are invited in writing from the public within sixty days of the date of publication of the notification in the Official Gazette. After considering these objections, the Government may impose prohibitions or restrictions within a year of the date of the initial publication in the Official Gazette. In 1994, the Rules were amended to allow the Central Government to dispense with the requirement of giving notice to the public if it considered that it was in the public interest to do so. The Wildlife Protection Act prescribes similar procedures for notifying areas as national parks or sanctuaries.²⁹¹

The use of notifications as tools for the exercise of executive power brings a certain degree of transparency and accountability to the process, since it invites representations from the public. The Government has, however, frequently exercised its power to dispense with the public notice required by Rule 5.²⁹² Nevertheless, even

²⁹¹ Ss 18 to 26A and ss 35 to 36D of the Wildlife Protection Act.

²⁹² All amendments to the EIA Notification in 2013 and 2014 dispensed with the public notice requirement. However, the trend appears to have changed in 2015. A complete list of the circulars issued by the MoEFCC under the EIA Notification is available here: <<http://www.moef.nic.in/circulars>> accessed 13 April 2016.

when public participation is waived, notifications are at the very least published in the Official Gazette, unlike the circulars, office memoranda, guidelines and instructions that the MoEFCC frequently uses to ‘clarify’ the law. These other executive instruments are issued without public consultation, and unlike notifications, are usually not traceable to the exercise of a specific statutory power. Since they are not published in a legal document like the Official Gazette, they can be hard to access and create uncertainty about the law.

In light of this, the compendium of notifications and office memoranda published by the MoEFCC is an important step towards certainty because it brings together in one document, all the changes and clarifications made to the EIA Notification since it was first issued in 2006. The compendium also classifies these executive instruments into categories, depending upon the kind of function they perform. The MoEFCC intends the compendium to be an easy source of reference for project proponents and regulatory authorities, who must stay updated about recent legal developments. As important as it is for the law to be accessible and clear to its users, the compendium is still only a superficial solution to the fragmentation of the law caused by the overuse of executive instruments. The compendium is unable to clarify the difference in legal effect between notifications and office memoranda or circulars and does not provide any indication of when the MoEFCC uses one over the other. Crucially, the compendium does nothing to address the deeper problem of the frequent amendment of the law through executive instruments.

More than 20 amendments each have been made to the CRZ and EIA Notifications since they were issued in 1991 and 2006 respectively. Researchers who have tracked these amendments over the years claim that most of them favoured project proponents, and were in fact used to legalise illegalities committed under

previous versions of the law.²⁹³ The very fact that the EIA Notification is itself an executive order that was passed without any Parliamentary involvement has been highlighted as one of the reasons for the periodic amendments that have diluted its effectiveness.²⁹⁴ In the next paragraphs, I provide an overview of the executive instruments issued over the years by the MoEFCC in the context of environmental and forest clearances, focusing in particular on the extent to which such instruments make substantive changes to the law. In effect, the executive performed law-making functions, violating the principle of separation of powers.

Several instruments make significant changes to the manner in which the EIA process is conducted, but are not explicitly incorporated as amendments to the EIA Notification. Most of these changes are designed to speed up the assessment process and are often explicitly made on the representation of project proponents. For instance, the MoEFCC issued a circular²⁹⁵ restricting the powers of the Expert Appraisal Committees to demand additional studies from project proponents on issues that did not form the original terms of reference,²⁹⁶ but were revisited later by the Committees. The MoEFCC stated that demanding such additional information delayed the EIA process and was also ‘against the spirit of the EIA Notification.’ It had therefore been ‘*requested* to issue instructions’ (emphasis supplied) to the Committees.

²⁹³ Manju Menon and Kanchi Kohli, ‘Environmental Confessions’ *LiveMint* (16 November 2009) <<http://www.livemint.com/Opinion/DEisJdU0admFOR18Sae2HO/Environmental-confessions.html>> accessed 13 April 2016.

²⁹⁴ Sunita Dubey, ‘EIA: The Foundations of Failure’ *IndiaTogether* (10 March 2006) <<http://indiatgether.org/eiafail-environment>> accessed 13 April 2016.

²⁹⁵ Circular, ‘Seeking Additional Studies by EACs/SEACs during appraisal of project beyond the Terms of Reference (ToRs) prescribed under EIA Notification 2006, as amended-regarding.’ (7 October 2014).

²⁹⁶ Under the EIA Notification, during Stage-II (Scoping) of the EIA process, the Expert Appraisal Committees issues ‘detailed and comprehensive Terms of Reference (ToR)’ to project proponents for the preparation of an EIA report on the basis of which the Committee conducts its appraisal.

The MoEFCC did not refer to any specific provision of the EIA Notification in support of its claim that demanding additional studies from project proponents would violate the spirit of the EIA Notification. If anything, the instructions of the MoEFCC in this circular are *contrary* to the spirit of any EIA process, the ultimate objective of which is to ensure that environmental and developmental concerns are appropriately balanced and that such decisions are taken on the basis of the most comprehensive information available. Although this is a universally accepted objective of the EIA process,²⁹⁷ it does not find explicit mention in the text of the EIA Notification. This reaffirms the argument that I made in the previous section about the link between fragmentation and the failure to legislatively set goals. The failure to firmly articulate the objectives of the EIA process in the EIA Notification²⁹⁸ or in the parent Environment Protection Act allowed the MoEFCC to protect private interests under the garb of giving effect to the spirit of the EIA Notification.

Another way in which executive orders have made changes to the EIA process is by weakening public hearing requirements for different categories of projects. Under the EIA Notification, all projects must be submitted to a public consultation process that allows the concerns of local communities and other affected persons to be taken into account. The Notification exempts certain enumerated projects from this requirement.²⁹⁹ Apart from these, the MoEFCC has regularly passed executive orders

²⁹⁷ See generally Stephen Tromans and Karl Fuller, *Environmental Impact Assessment: Law and Practice* (LexisNexis UK 2003).

²⁹⁸ The draft version of the 1994 EIA Notification contained a strong rationale for the need for an EIA process, but this was omitted from the final version of the Notification. The 2006 EIA Notification does not contain any rationale either. See Kanchi Kohli and Manju Menon, *Eleven Years of the Impact Assessment Notification, 1994: How Effective Has it Been?* (Kalpavriksh Environmental Action Group 2005).

²⁹⁹ Some of the projects that are exempted are building and construction projects, projects involving national defence, security and other strategic considerations. See Paragraph 6 (III), EIA Notification.

exempting additional categories of projects.³⁰⁰ Some of the most recent categories exempted include the one-time capacity expansion of coal mining projects,³⁰¹ irrigation projects of a certain capacity,³⁰² and projects located within industrial estates or parks.³⁰³

In the last two cases, the MoEFCC did not offer detailed reasons for exemption, although the trigger for the exemption of projects located within industrial estates appeared to be representations from project proponents themselves. As far as the exemption for the one-time capacity expansion of coal mining projects is concerned, the MoEFCC responded to a request for exemption from the Ministry of Coal, which cited the need to ‘ramp-up coal production for enhancing power production in public interest.’ Implicit in this request was the contention that public hearings impeded coal production. While granting the exemption, the MoEFCC made no attempt to empirically determine the delay caused by such hearings. Neither did it consider the feasibility of alternatives like expedited public hearings.

Most importantly, the MoEFCC did not apply the criteria that the EIA Notification itself sets out for the waiver of public hearings. The only condition for such waiver set out in the EIA Notification is the inability of the relevant authority to conduct public hearings in a manner that allows local persons to express their views freely because of a *local situation* (emphasis supplied).³⁰⁴ This suggests that the

³⁰⁰ Kanchi Kohli, ‘When People are Merely Roadblocks’ *IndiaTogether* (6 February 2015) <<http://indiatogether.org/people-participation-and-public-hearing-in-eia-considered-roadblock-government>> accessed 14 April 2016.

³⁰¹ Office Memorandum, ‘Guidelines for granting Environment Clearance of Coal Mining Projects involving One Time Production Capacity Expansion in the Existing Operation-reg’ (28 July 2014).

³⁰² S.O. 1599(E), Notification dated 25 June 2014.

³⁰³ Office Memorandum, ‘Exemption from Public Consultation for the projects/activities located within the Industrial Estates/Parks’ (10 December 2014).

³⁰⁴ Paragraph 6(III)(v), EIA Notification.

MoEFCC may properly exercise its power of waiver only in individual projects prompted by the particular circumstances of the case rather than extend the exemption to an entire category of projects. However, the MoEFCC has displayed a tendency to convert its authority to exercise individualised discretion into a broader power to lay down standards of more general application, in violation of the principle of separation of powers. This is particularly true of the guidelines issued by it in the context of forest conservation, discussed below.

The manner in which the Forest Conservation Act and Rules are structured requires the MoEFCC to apply its mind to each *individual* application for the diversion of forest land, and grant approval for its use for non-forest purposes on a case-by-case basis. However, the MoEFCC, on several occasions has issued guidelines that grant ‘general approval’ to entire *categories* of projects, irrespective of the individual differences among forest land within such categories. The categories for which such general approval is granted are defined on the basis of the type of non-forest purpose for which an application is made for diversion, rather than on the basis of the nature of the forest land in question. In some cases, this non-forest purpose is the creation of public utility works in times of natural disasters³⁰⁵ or in order to meet internal security needs.³⁰⁶ The necessity of a blanket approval might be justified in

³⁰⁵ ‘Guidelines for diversion of forest land for non-forest purposes under Forest (Conservation) Act, 1980-General approval under Section 2 of the Forest (Conservation) Act, 1980- *reg* (18 December 2015). In this case, the MoEFCC granted general approval for the creation of development infrastructures in flood-affected districts.

³⁰⁶ ‘General approval under section 2 of the Forest (Conservation) Act, 1980 for diversion of forest land for creation of critical public utility infrastructure by Government Departments involving not more than 5.00 hectares of forest land in each case in Left Wing Extremism affected districts-*reg* (25 February 2016).

such cases given the urgency of the situation, but it is not similarly apparent in cases involving the diversion of forest land for infrastructure projects.³⁰⁷

In fact, in some cases, the exercise of this general power actually goes against the object and purpose of the Forest Conservation Act and the orders of the Supreme Court discussed in chapter 6 and the Appendix. A good example of this are guidelines granting an extension of time to mining leaseholders who might not have obtained prior approval from the Central Government for the diversion of forest land.³⁰⁸ Detailed reasons for the grant of general approvals, other than representations from interested stakeholders, are rarely set out in the guidelines. In no instance do the guidelines refer to Rule 7(4)(e) of the Forest Conservation Rules, which, as mentioned earlier, set out the factors that the Forest Advisory Committee ought to have due regard to while granting approval for the diversion of forest land. In fact, the guidelines show no evidence of the Forest Advisory Committee having been consulted at all.

In any case, there is no provision under the Forest Conservation Act that allows the Central Government to exercise this power of *general* approval. If at all, conditions governing the grant of such general approval could have been laid down in rules framed under the Act.³⁰⁹ Instead, the MoEFCC grants this general approval

³⁰⁷ ‘Guidelines for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980-General approval for underground laying of optical fibre cables, drinking water supply pipelines, CNG/PNG pipelines within existing right of way of roads and petroleum pipelines’ (7 September 2015).

³⁰⁸ ‘Guidelines for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980-Submission of proposals to obtain approval for diversion of entire forest land located within a mining lease’ (31 March 2016). These guidelines extended the earlier deadline for obtaining the approval of the Central Government by 6 months.

³⁰⁹ S 4 of the Forest Conservation Act confers a very broad rule-making power on the Central Government to carry out the provisions of the Act.

through guidelines that are confusingly passed in the form of office memoranda and are therefore of uncertain legal effect.

The discussion in this section demonstrates that the exercise of executive discretion by authorities under Indian environmental law is messy.³¹⁰ The legal status of the different executive instruments used is uncertain and the frequent changes wrought through them make the law unclear and confusing. The MoEFCC does not draw appropriate distinctions between matters that ought to be covered by primary or secondary legislation and those that are better regulated by executive orders. Rules of general application that ideally ought to have been submitted to appropriate Parliamentary scrutiny are instead often passed through executive instruments.

In most cases, the MoEFCC does not provide detailed reasons to support the decisions that it takes through executive orders. Where reasons are provided, they do not contain sufficient linkages to the parent statute, and are instead often made on the representation of private industry representatives who seek a dilution. In the next section, I discuss how some of these features as well as the features of legislative fragmentation described in the earlier chapter have affected the implementation of the Forest Rights Act.

C. Implementation in Practice

1. The Forest Rights Act

The Forest Rights Act was passed in order to reverse the exclusion of indigenous tribes and other traditional forest dwellers from forest land under colonial policies and legislation, including the Indian Forest Act. The Act also recognised that forests ‘have

³¹⁰ For a historical and State-wise account of the effect on forest conservation of the frequent use of executive orders, see ‘Forest conservation is too complex an issue to be resolved by executive fiat’ *Down To Earth* <<http://www.downtoearth.org.in/indepth/forest-conservation-is-too-complex-an-issue-to-be-resolved-by-executive-fiat-13145>> accessed 17 April 2016.

the best chance to survive if communities participate in the conservation and regeneration measures.³¹¹ The Act therefore created a legislative framework within which individual and community forest rights that indigenous tribes had traditionally exercised could be formally recognised and vested in them.³¹² The Act was passed by the Central Government, but State Governments were responsible for the implementation of its provisions.

In December 2010, a joint Committee of the Ministry of Tribal Affairs ('MoTA') and the MoEFCC released a report on the implementation of the Act, ('the Implementation report')³¹³ which revealed several problems.³¹⁴ Eleven State Governments had not even begun the process of implementation, while the implementation process in other States demonstrated clear violations. In several cases, forest-dwelling tribes had been evicted from forest land before the process of settling their rights had been completed.³¹⁵ The Committee also found that claims to forest rights were falsely rejected by forest authorities³¹⁶ in a significant number of cases, and often without assigning any reasons.³¹⁷ Although some progress had been made

³¹¹ Forest Rights Act, Statement of Objects and Reasons.

³¹² Forest Rights Act, s 4.

³¹³ Report, National Committee on Forest Rights Act (A Joint Committee of Ministry of Environment and Forests and Ministry of Tribal Affairs, Government of India 2010) ('the Implementation report').

³¹⁴ For an overview of the problems with the Act's implementation, see the Executive Summary, Implementation Report 10-24.

³¹⁵ Clause (2) of s 4 of the Forest Rights Act states that forest rights holders within the critical wildlife habitats of national parks and sanctuaries are not to be resettled unless the process of recognition and vesting of rights has been completed. Before resettlement, the State Government should also be satisfied that the presence of the rights holders is 'sufficient to cause irreversible damage' and that 'other reasonable options, such as, co-existence are not available.'

³¹⁶ Chapter IV of the Forest Rights Act sets out the procedure for making claims and for the vesting of forest rights. Initially, the claim is to be determined by the Gram Sabha, which is the village assembly of the adult members of the village. This claim must then pass through a chain of committees within the forest administration in order to be confirmed.

³¹⁷ Executive Summary, Implementation report, 14.

regarding the vesting of individual rights, most State Governments betrayed a poor record as far as the vesting of community forest rights was concerned. In particular, the Committee found that forest officials erroneously rejected community forest rights claims under the Act by citing existing schemes and arrangements, such as the Joint Forest Management Scheme ('JFM'), which also permitted community participation in forest conservation.³¹⁸ Finally, the Committee also found that forest authorities were erroneously rejecting the claims of rights holders within protected areas under the Wildlife Protection Act.³¹⁹

The problems that the Implementation report highlights with the implementation of the Forest Rights Act are typical of the features of fragmentation described so far, and ultimately attributable to an environmental rule of law indicator, the lack of capacity of statutes to clearly balance competing interests. The Forest Rights Act was passed amid much opposition from conservationists and forest authorities,³²⁰ so much so that retired forest officials and wildlife conservation organisations filed several petitions in State High Courts and the Supreme Court against the implementation of the Act.³²¹ Although these petitions have been dismissed, civil society organisations continue to document the manner in which

³¹⁸ The JFM Scheme was set up in response to directions in the National Forest Policy, 1988 to involve village communities in the protection and regeneration of forests. The JFM Scheme formed an integral part of forest governance, but never received legal backing, except in a few States.

³¹⁹ Executive Summary, Implementation report, 19-20.

³²⁰ Lovleen Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4 Law Environment and Development Journal 20, 23.

³²¹ Padmaparna Ghosh, 'Forest Dwellers Act Faces Yet More Legal Opposition' *LiveMint* (21 March 2008) <<http://www.livemint.com/Politics/jYCx68IBVxaDdUbjY1RhYM/Forest-dwellers-Act-faces-yet-more-legal-opposition.html>> accessed 17 April 2016; Kumar Sambhav Shrivastava, 'Wildlife NGO group gets flak for seeking curbs on forest rights of indigenous people' *Down to Earth* (11 April 2014) <<http://www.downtoearth.org.in/news/wildlife-ngo-group-gets-flak-for-seeking-curbs-on-forest-rights-of-indigenous-people---43993>> accessed 17 April 2016.

forest officials subvert the spirit of the Act.³²² Forest officials impede the implementation of the Act because their idea of forest governance is shaped by the Indian Forest Act and by the Forest Conservation Act. These laws express a fundamentally different approach from the Forest Rights Act to community participation in forest management. The poor implementation of the Forest Rights Act is therefore at least partially a product of the fragmentation created by the clash of separate yet overlapping regimes exhibiting normative inconsistency about the role and purpose of the law.

The other problems with the implementation of the Forest Rights Act described are also examples of some of the key features of fragmentation. For instance, confusion about the interaction of the Forest Rights Act with the pre-existing, but non-statutory JFM scheme demonstrates the uncertain hierarchy that is created by relying on executive orders rather than primary or secondary legislation to advance the law. Similarly, the lack of clarity regarding the relationship between the Forest Rights Act and the Wildlife Protection Act highlights the need to harmonise key terms and processes across statutes that deal with the same subject-matter.

Although the Committee does not explicitly frame the problem with the poor implementation of the Forest Rights Act as one of fragmentation or the rule of law, many of the recommendations that it makes to strengthen implementation are integrally linked to this phenomenon. For instance, it recommends closer consultation between the MoEFCC and MoTA to develop a coordinated set of instructions for

³²² Mahim Pratap Singh, 'Forest Rights Act losing steam as officials play with rules' *The Hindu* (7 August 2010) <<http://www.thehindu.com/news/national/forest-rights-act-losing-steam-as-officials-play-with-rules/article555755.ece>> accessed 17 April 2016; Sourish Jha, 'Process Betrays the Spirit: Forest Rights Act in Bengal' (2010) 45 *Economic and Political Weekly* 24; Madhusudan Bandhi, 'Implementation of the Forest Rights Act' (2013) 48 *Economic and Political Weekly* 21.

officials responsible for implementing the Act.³²³ It also recommends that the MoEFCC provide legal backing to circulars that express the balance of priorities struck by it among environmental, developmental and indigenous interests to promote stability and certainty, essential rule of law components. In fact, this failure to embody substantive provisions in instruments of a higher legal hierarchy might now allow the Government to dilute tribal rights relating to the diversion of forest land for industrial projects. In 2009, the MoEFCC under the previous Government issued a circular³²⁴ that stated that the diversion of forest lands in areas to which the Forest Rights Act applied would not take place without the consent of the local community. This was a very powerful right and effectively gave indigenous tribes a veto to development projects, which they exercised successfully against a large mining company in a landmark referendum.³²⁵ However, the failure to provide this right with a stronger legal backing than a circular to this right is allowing the current MoEFCC to chip away at it and weaken the requirement to obtain the consent of indigenous tribes.³²⁶

The Implementation report also points out specific provisions in related statutes like the Wildlife Protection Act that require amendment in order to remove inconsistencies with the Forest Rights Act, as well as provisions in the Forest Rights Act itself that require more legislative detail in order to provide more guidance to

³²³ Executive Summary, Implementation Report 14.

³²⁴ Ministry of Environment and Forests, Circular dated 30 July 2009.

³²⁵ Arunima Mishra, 'Rule of Thumb: Tribals in Orissa's Niyamgiri hills reject Vedanta's bauxite mining project in a landmark referendum' *Business Today* (15 September 2013) <<http://businesstoday.intoday.in/story/orissa-niyamgiri-rejects-vedanta-entry-impact-reasons/1/197972.html>> accessed 21 April 2016.

³²⁶ Kumar Sambhav Shrivastava, 'Don't take away Gram Sabha's powers under FRA: activists petition Modi' *Down to Earth* (12 September 2014) <<http://www.downtoearth.org.in/news/dont-take-away-gram-sabhas-powers-under-fra-activists-petition-modi-46326>> accessed 21 April 2016.

implementing authorities. Finally, the Committee also indirectly suggests that an overhaul of the existing scheme of forest laws in the country might be necessary for the effective implementation of the Forest Rights Act.³²⁷ All these recommendations are aimed at improving legislative quality and are therefore of relevance to the reform measures discussed in chapter 8.

2. Mining Illegalities

Mining activities constitute one of the most prominent sources of environmental law violations in India. As I demonstrate in chapter 6, they are also one of the most frequently challenged activities in court. These illegalities have been documented in various reports that I discuss briefly in this section in order to provide an overview of problems with the implementation of the law governing these activities. In 2013, the Comptroller and Auditor General of India published a report auditing the process of forest diversion in India ('CAG report').³²⁸ One section of the report highlighted irregularities in this process with specific reference to mining leases.³²⁹

The CAG report provided details of several instances in which State Governments had granted renewals to mining leases without obtaining the prior approval of the Central Government in contravention of s 2 of the Forest Conservation Act. Even more relevant for the purposes of this thesis, the CAG report stated that the MoEFCC did not take up the issue of unauthorised renewal with the relevant State authorities.³³⁰ The report also cited the 'abysmal failure of the Ministry'

³²⁷ Implementation report 135.

³²⁸ Report No. 21 of 2013, 'Compliance Audit on Compensatory Afforestation in India' (Union Government, Ministry of Environment and Forests 2013) ('CAG report').

³²⁹ CAG report 46-52.

³³⁰ *ibid* 47.

to ensure that final clearances were granted only after verifying compliance with in-principle approvals.³³¹ The report similarly criticised the MoEFCC for failing to verify that environmental clearances had been obtained before granting final approval for the diversion of forest land³³² as well as for failing to take into account monitoring reports that had documented the adverse impact of mining activities on the flora and fauna in a particular region.³³³ The evidence of these violations confirms the lack of integration across different statutory regimes that I highlighted in chapter 4.

The CAG report represents only a small proportion of illegalities. The Shah Commission reports on illegal mining in the States of Goa³³⁴ and Odisha³³⁵ reveal a systemic breakdown in the implementation of environmental laws. These reports also document the failure of relevant authorities to obtain different kinds of clearances and approvals under various statutory regimes. Examples of such lapses highlighted in the Goa report include the failure to obtain clearance from the Standing Committee of the National Board of Wildlife for mining within eco-sensitive zones, the illegal delegation of powers to the Chief Wildlife Warden under the Wildlife Protection Act to grant approvals for mining, and the inconsistent imposition of conditions attached to environmental clearances under the EIA Notification.³³⁶ The conclusion drawn at the end of the report is that there is ‘total lack of coordination’ among the environment, forest and wildlife sections of the MoEFCC, as well as between the

³³¹ *ibid* 49.

³³² *ibid* 53.

³³³ *ibid* 53-54.

³³⁴ Shah Commission Report, ‘Illegal Mining in the State of Goa’ (Commission of Enquiry for Illegal Mining of Iron Ore and Manganese 2012) (‘Goa report’).

³³⁵ First Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha, Volume I (Shah Commission of Enquiry for Illegal Mining of Iron Ore and Manganese 2013) (‘Odisha report’).

³³⁶ Goa report 189-200.

State Forest Department, the State PCB and the Director of Mines.³³⁷ To remedy this, the report recommends the appointment of a Committee comprising all relevant departmental heads so that collective decisions about the various regulatory mechanisms may be taken.³³⁸

The Odisha report records similar violations, with the biggest transgression once again being the failure to obtain environmental and forest clearances before commencing mining operations. The concluding observations in both reports criticise the flagrant nature of the violations and call for stricter enforcement. The Commission states that the provisions of the law are clear and therefore does not make any recommendations for amendment. The Commission also suggests that corruption, rather than a misinterpretation of confusing legal provisions is at the root of these violations. While corruption may undoubtedly be a factor, I nevertheless argue that legislative integration across the different statutory regimes that govern mining activities also deserves attention. Such integration can provide a more certain legal status to the coordination and consultation mechanisms recommended by the Commission, enhance the capacity to guide behaviour, and thereby reduce the likelihood of violations.

A bare reading of the Mines and Minerals Act and the Rules framed under it throws up some suggestions for creating linkages with environmental statutes. For instance, sub-section (2) of section 4 of the Act states that no mining lease is to be granted otherwise than in accordance with the Act and the rules framed under it. This could be amended to prohibit the grant of such leases unless compliance with the provision of relevant environmental laws and rules is also demonstrated. A reference to environmental laws and rules could similarly be incorporated under section 11.

³³⁷ *ibid* 195-196.

³³⁸ *ibid*

This section grants a preferential right to the holder of a reconnaissance permit or a prospecting licence, providing that no breach of such permit or licence has been committed. Preferential rights could also be withheld from permit holders or licencees who were found to have violated environmental laws.

Similar opportunities also exist for the harmonisation of the Mineral Conservation and Development Rules 1988 with environmental laws and rules. Rules 37 and 38, in particular, offer good examples. Rule 37 makes a specific reference to environmental laws by requiring mining leaseholders to ensure that their emissions do not exceed the limits prescribed under the Air Act and the Environment Protection Act. However, no such reference is made to the Water Act in Rule 38 while regulating the discharge of 'toxic liquids' as a part of mining activities.

These specific examples are only intended to demonstrate the scope that exists for greater integration between environmental and mining regimes, rather than provide an exhaustive account of their inconsistency and lack of coordination. While the documentation of violations and illegalities by the Comptroller and Auditor General and bodies like the Shah Commission serves a useful purpose, legislators must make use of such evidence to construct laws that are better integrated and are able to prevent such violations.

D. Conclusion

In this chapter, I described the use of executive instruments to make substantive changes to rights and obligations and the legal uncertainty that this created. The lack of guidance in primary environmental legislation, the absence of formal coordination mechanisms across regimes, and frequent amendments through the exercise of executive power combine to create a confusing, incoherent and fragmented body of

law. Rather than make individual decision guided by legislative norms as suggested by the indicator established in chapter 3, the environmental executive in India violates the principle of separation of powers and frames rules of general application instead, that are not rooted in primary legislation. The poor implementation of the Forest Rights Act and the rampant illegalities in mining activities are linked to this weakening of the environmental rule of law. Chapter 7 demonstrates how the fault lines described in this chapter are deepened by the multiple legal regimes created by India's federal system of government. The next chapter considers how some of the uncertainties created by the legislative an executive fragmentation described in chapters 4 and 5 plays out in the courts.

CHAPTER SIX: FRAGMENTATION AND THE COURTS

A. Introduction

In chapters 4 and 5, I demonstrated the manifestation of fragmentation across the many statutory and executive instruments that make up Indian environmental law. In this chapter, I turn my attention to the judiciary and demonstrate the fragmented nature of judicial reasoning and its contribution to the weakening of the environmental rule of law. In section B, I describe key trends in judicial reasoning through an overview of select judgments of the Supreme Court that deal with a cross-section of issues like forest conservation, EIA, wildlife preservation, mining, and indigenous rights to natural resources.

In chapter 3, I stated that I would examine four trends in the Court's reasoning as evidence of its ability to strengthen or weaken the rule of law and adhere to the principle of separation of powers. These are: a) the Court's treatment of, and reliance on the statutory and regulatory framework in addition to its use of Constitutional provisions and environmental principles; b) the consistency in the standards of review applied by the Court or the manner in which it balances competing interests; c) the Court's engagement with technical expertise; and d) the nature of its orders and directions. In the Appendix at the end of this thesis, I provide a tabular presentation of the Court's judgments along these four trends. .

In section B, I dissect the inferences from this presentation of information in greater detail. An analysis of these judgments serves two purposes. First, it provides an insight into the manner in which the Court weakens the environmental rule of law in light of the broad indicator established in chapter 3 i.e its ability to use statutory

interpretation and consistent standards of judicial review as it gives effect to environmental rights and principles. Additionally, it also provides a window into the already fragmented nature of the legislative and executive elements of Indian environmental law. The nature of the issues that the Court is called upon to deal with reveals the extent of fragmentation across laws, rules and executive orders, and I highlight these wherever relevant since they point to the underlying weakening of the rule of law and the failure of institutions of government to play their role in developing environmental law.

In section C, I present a more detailed account of two cases that provide additional perspectives on the relationship of the judiciary with fragmentation. The first of these is *Lafarge*, which is unique for its application of the doctrine of proportionality, unlike the other cases in the Appendix, as well as for its directions to the Government on environmental institutional reform. The second case study demonstrates another facet of fragmentation i.e. conflicting orders across different fora. I present a recent case that was litigated before both the Bombay High Court and the NGT, with directly conflicting results. This provides a useful insight into the manner in which competing jurisdictions are negotiated and offers potential for future research.

B. Trends in Judicial Reasoning

This section primarily analyses the judgments and orders of the Indian Supreme Court tabulated in the Appendix. I have already partially explained the rationale for my methodology in choosing these judgments in chapter 1. Before I begin a substantive discussion of the trends in the Court's reasoning, I provide a fuller explanation of this rationale below.

I draw on a pre-existing data set of judgments from a recent socio-legal analysis of the Supreme Court by Geetanjoy Sahu.³³⁹ In his analysis, Sahu focuses on the impact that the political economy and the ideological preferences of judges have had on the ‘greenness’ of the Supreme Court’s judgments, although he also includes a very brief section on ‘The Importance of the Legal Framework in Judicial Decision Making.’³⁴⁰ It is this legal framework that I am primarily concerned with in this thesis. Although I use the same material as Sahu, the focus of my analysis is entirely different.

Sahu analyses judgments of the Supreme Court between 1980 and 2010. The rationale that he offers for this is that it is the higher judiciary that predominantly deals with environmental litigation i.e. the High Courts at the State level and the Supreme Court at the apex, with most High Court cases eventually reaching the Supreme Court through appeals.³⁴¹ He restricts the time period to the thirty years between 1980 and 2010, because before 1980, the Supreme Court did not consider any environmental issues, and after 2010, most environmental cases were transferred to the NGT.³⁴² Applying these parameters, Sahu arrives at 191 environmental judgments,³⁴³ that range from issues like the illegal transit of forest produce³⁴⁴ to

³³⁹ Sahu (n 53).

³⁴⁰ *ibid* 80-83.

³⁴¹ *ibid* 16.

³⁴² *ibid*.

³⁴³ This excludes the landmark *Godavarman* case in which the Court has passed over a hundred orders and which has already received intensive scholarly treatment. See Dutta and Yadav (n 107).

³⁴⁴ *State of Madhya Pradesh v Swaroopchandra* AIR 1997 SC 301.

health risks posed by insecticides and food additives,³⁴⁵ from the violation of noise pollution control rules³⁴⁶ to unauthorised construction.³⁴⁷

It is beyond the scope of this thesis to exhaustively analyse all 191 judgments using the criteria that I developed in chapter 3, although this would undoubtedly add depth to its principal argument. I narrowed the pool of cases for analysis to complement the case studies discussed in chapters 4 and 5, and therefore first identified all cases that had any connection with forests and mining. As demonstrated earlier, these subjects offer greater scope for analysis because they are governed by their own individual statutory regimes in addition to the generally applicable environmental statutes like the Environment Protection Act, the Air Act and the Water Act.

Applying this criterion, I arrived at 85 cases. However, more than half these cases deal with one of the following issues: a) the illegal transit of forest produce, especially the confiscation of equipment used to transport such produce; b) the trade in wild animals and birds under the Wildlife Protection Act; and c) the transfer of proprietary rights in private forests from private individuals to the State Government. Such cases are not inherently polycentric and do not therefore offer the same scope for the application of the criteria that I developed in chapter 3. They usually do not involve more than one statutory regime, the application of which by the Court is fairly straightforward and does not involve the use of environmental principles. Excluding these cases brought the pool down to about 40 cases. Of these, I picked the 29 most illustrative cases, excluding only those cases where the Court's orders were either too

³⁴⁵ *Ashok v Union of India* AIR 1997 SC 2298.

³⁴⁶ *Forum for Prevention of Environment and Sound Pollution v Union of India* AIR 2005 SC 3118.

³⁴⁷ *Goan Real Estate and Construction Ltd. v Union of India* 2010 (3) SCALE 512.

brief for analysis or where the facts were almost identical to another case already analysed.

Of these 29 cases, as many as 22 are writ petitions filed in the public interest either by individuals or social organisations. As the analysis in section B demonstrates, the nature of these petitions has an important influence on the Court's reasoning and suggests that the manner in which litigation is structured is revealing of the extent of adherence to the rule of law. At least a third of the cases are concerned with environmental damage caused by private activities (mining, quarrying, stone crushing), but the Government has also been impleaded because of its failure to regulate these activities effectively. The Government's actions have usually been directly challenged in cases concerning protected forests, national parks or sanctuaries, where the Government has either regularised encroachments, granted access to indigenous tribes or proposed development projects in such areas. These cases implicate a complex network of competing interests, thereby highlighting the interdisciplinary and polycentric nature of environmental law and offering useful material for the analysis below.

1. Engagement with the Statutory and Regulatory Framework

The first criterion that I apply while analysing the Court's reasoning (in Column 3 of the Appendix) is its engagement with the statutory and regulatory framework applicable to the case. This includes all primary statutes that have a bearing on the issue at hand, any secondary rules, as well as the range of applicable executive instruments in the form of notifications, circulars, orders and guidelines. There are three different aspects to the Court's engagement with this framework, and in the Appendix, I document which of these aspects the Court observes.

First, I consider whether the Court undertakes a basic mapping of the statutory and regulatory framework i.e. whether it identifies the legal provisions that are applicable to the case at hand. Next, I assess whether the Court recognises a conflict between two or more regimes. If that is not relevant in a particular case, I consider whether the Court identifies ambiguity in the meaning or applicability of a legal provision. Finally, I evaluate the manner in which the Court resolves this conflict or ambiguity and the ultimate role that the statutory or regulatory framework plays in influencing the Court's orders and directions. Usually, if the Court follows the first step, but not the next two, I classify its engagement with the statutory and regulatory framework as 'minimal' in Column 3 of the table in the Appendix.

In just under a third of the cases analysed, the Court does not list a single applicable statutory or regulatory provision, despite the fact that these cases very clearly require the application and interpretation of environmental laws and rules. For instance, while hearing a writ petition seeking the closure of stone-crushing and quarrying operations³⁴⁸ because of their proximity to residential homes, the Court did not refer to any provisions in the Environment Protection Act or rules, although both these instruments offer guidance on restricting the location of industrial activities.³⁴⁹ This is repeated in other public interest litigation seeking a ban on mining and quarrying activities.³⁵⁰

³⁴⁸ *Kennedy Valley Welfare Association v Ceylon Repatriates Labourers Welfare and Service Society* 2000 (2) SCALE 143 [S. No. 10, Appendix] ('*Kennedy Valley*').

³⁴⁹ Section 3(2) (v) of the Environment Protection Act empowers the Central Government to take measures for the 'restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.' Rule 5 (ix) of the Environment Protection Rules, 1986 specifically states that the Central Government may take into consideration 'proximity to human settlements' while restricting the location of industries.

³⁵⁰ *MC Mehta v Union of India* 1991 SCC (2) 353 [S. No. 12, Appendix]; *Mohammad Haroon Ansari v District Collector* AIR 2004 SC 823 [S. No. 19, Appendix] ('*Mohammad Haroon Ansari*').

Failure to engage with applicable statutory or regulatory provisions is particularly noteworthy in *Kamal Nath*.³⁵¹ This is the first case in which the Court incorporated the doctrine of public trust into Indian environmental law. The Court relied primarily on the articulation of the doctrine by US courts. In the US cases³⁵² cited by the Court, the doctrine had usually been applied to demonstrate that the State had misconstrued its powers and limits under a *statute*. The facts of *Kamal Nath* before the Indian Supreme Court clearly demonstrated the applicability of the Forest Conservation Act. In particular, the question that ought to have exercised the Court was whether the power of the Government under section 2 of the Act to give prior approval for the diversion of forest land for a non-forest purpose could be exercised to regularise encroachment on forest land. The Court could then have applied the newly borrowed doctrine of public trust to inform its interpretation of this provision.

In fact, the Court even noted that it was usually the function of the legislature or the executive to strike a balance between the preservation of natural resources and commercial use and that the judicial role ought to be restricted to reviewing this balancing exercise through the application of Constitutional provisions.³⁵³ However, the Court did not attempt to enquire whether such a balance had indeed been struck by the legislature through the Forest Conservation Act or other environmental legislation. Instead, it directly applied the doctrine of public trust without establishing any connection with the Forest Conservation Act. Although this case displays the propensity of the Court to rely on higher order environmental legal principles, it also

³⁵¹ (n 98).

³⁵² *Gould v Greylock Reservation Commission* 350 Mass 410 (1966) (Supreme Judicial Court of Massachusetts); *Sacco v Development of Public Works* 352 Mass 670 (Supreme Judicial Court of Massachusetts).

³⁵³ *Kamal Nath* (n 98) [28].

betrays the weakness of the Forest Conservation Act in failing to articulate its objectives.

One of the factors that might have prevented the Court from drawing a connection between the object and purpose of the Forest Conservation Act and the public trust doctrine is the absence of guidance in the Act regarding the manner in which the balance between forest and non-forest purposes ought to be struck. As described in chapter 4, the Act gives no indication of the principles that ought to guide the Central Government in the exercise of its power to divert forest land. These find limited expression only in Rule 7(4)(e) of the Forest Conservation Rules, 2003, which sets out a list of factors that the Forest Advisory Committee ought to have regard to while determining whether or not to divert forest land.

Almost an equal number of cases display minimal engagement with the statutory or regulatory framework. The Court's engagement or lack thereof is not necessarily a function of the manner in which the litigant frames the issue. For instance, in *Animal Environmental and Legal Defence Fund v Union of India*,³⁵⁴ the petitioner, while challenging the grant of fishing permits in a tiger reserve to indigenous tribes, specifically asked the Court to reconcile inconsistent provisions under the Indian Forest Act and the Wildlife Protection Act. Although the Court reproduced these provisions in its judgment, it did not make an attempt to articulate the precise scope of the inconsistency. Instead, it sidestepped the question and upheld the grant of permits by balancing environmental interests against the needs of the tribes, without any reference to the manner in which the statutory provisions in question had already struck a balance. While the Court might ultimately have reached an equitable result in this case, its superficial engagement with the two statutory

³⁵⁴ AIR 1997 SC 1071 [S.No. 3, Appendix] (*Animal and Environmental Legal Defence Fund*).

regimes was a missed opportunity to clarify the hierarchical relationship between them and to create certainty for all the stakeholders involved.

Cases where the Court has displayed greater engagement with the statutory and regulatory framework usually involve conflicts between State-specific regimes on forests that date from the late 19th century to the 1950s and 60s and the Central Forest Conservation Act which entered into force in 1980.³⁵⁵ In such cases, activities that had been authorised under the previous State regimes have been challenged under the later Forest Conservation Act. The Court has resolved such conflicts through a straightforward application of the *non obstante* clause in the Forest Conservation Act.³⁵⁶ In a couple of cases, the Court has applied richer interpretive techniques than this clause, and has relied on the National Forest Policy, the object and purpose of the regimes in question, Constitutional provisions on environmental rights and duties, and India's international environmental legal obligations to resolve inconsistencies between such regimes.³⁵⁷

On the whole, however, the Court's engagement with the statutory and regulatory framework is not sufficiently rigorous and causes fragmentation in the following ways. The nature of the disputes before the Court reveals confusion and uncertainty among State authorities, private actors and local communities about the scope and applicability of different statutory regimes. These cases offer the Court the

³⁵⁵ *KM Chinnappa, Applicant in TN Godavarman v Union of India* AIR 2003 SC 724 [S.No. 11, Appendix]; *Nature Lovers Movement v State of Kerala* 2009 (5) SCC 373 [S. No. 22, Appendix].

³⁵⁶ *Ambica Quarry Works v State of Gujarat* AIR 1987 SC 1037 [S.No. 2, Appendix] ('*Ambica Quarry Works*'). Cf *Karnataka Industrial Areas Development Board v C Kenchappa* AIR 2006 SC 2038 [S.No.9, Appendix] ('*Karnataka Industrial Areas Development Board*'), where the Court did not engage with the *non obstante* clause in the Karnataka Industrial Areas Development Board Act by considering the effect that it would have on environmental laws.

³⁵⁷ *Essar Oil Limited v Halar Utakarsh Samiti* AIR 2005 SC 1834 [S.No. 8, Appendix] ('*Essar Oil*'); *Pradeep Krishna v Union of India* AIR 1996 SC 2040 [S. No. 23, Appendix] ('*Pradeep Krishna*').

opportunity for clarification. However, its failure to even map out applicable laws and rules in a significant number of cases only perpetuates this uncertainty.

In several cases, the Court also passes up the opportunity to settle uncertain hierarchical relationships between regimes, and within regimes, between different kinds of legislative and executive instruments. One of the solutions that the ILC report suggests for fragmentation is the application of interpretive techniques in such a way that provisions across different regimes are read together so as to avoid a conflict. As demonstrated above,³⁵⁸ the Court has avoided such conflicts, but only by entirely bypassing engagement with the varying provisions, rather than by attempting to read them harmoniously.³⁵⁹

In other cases, although the Court has engaged with the statutory framework, its interpretation has had the effect of compounding uncertainty. For instance, in *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh*,³⁶⁰ the Court, while hearing a challenge against limestone mining in an ecologically fragile area initially reaffirmed the position that it had held in previous cases i.e. that the renewal of mining leases required the prior approval of the Central Government under s 2 of the Forest Conservation Act, even though the lease might have been granted before the Act came into force. This interpretation was consistent with the text and the object and purpose of the Act.

The Court, however, went a step further to hold that the provisions of the Act would be violated even if mining activities were permitted under the strictest conditions. The Court relied on the National Forest Policy and cited community

³⁵⁸ *Animal Environmental and Legal Defence Fund*

³⁵⁹ See also *Banwasi Sewa Ashram v State of Uttar Pradesh* AIR 1987 SC 374 [S.No. 5, Appendix 10] (*'Banwasi Sewa Ashram'*).

³⁶⁰ AIR 1988 SC 2187 [S.No. 24, Appendix] (*'Rural Litigation and Entitlement Kendra'*).

interests in preserving forest wealth to arrive at the conclusion that the Act imposed a *complete prohibition* on mining in forest areas. Although this reasoning has obvious positive implications for the environment, there is nothing either in the text of the Act or the rules to justify such an interpretation. In fact, the scheme of the Act expressly *permits* forest land to be diverted for non-forest purposes. The only caveat that it imposes is that the prior approval of the Central Government be obtained. The Government would certainly be within the limits of its statutory power to refuse such approval in individual cases or even to issue an order imposing a blanket ban on mining in forest areas in the exercise of its executive power under the Act.

However, there is a significant difference between the Government making this determination and the Court holding that the provisions of the Forest Conservation Act *require* the Government to prohibit such activities. The Court ought to have restricted itself to assessing whether the Central Government had validly exercised its statutory powers and whether it had taken into account relevant considerations in the particular circumstances of this case. Instead, the Court appeared to suggest that mining in forest areas is inherently prohibited under the provisions of the Forest Conservation Act.³⁶¹ This is evidently not the case. In the years since the Court made this pronouncement, it has dealt with other cases involving mining on forest land, where it once again confined itself to stating that prior Central Government approval was required for the diversion of such land,³⁶² rather than imposing a complete ban. To date, the MoEFCC continues to grant approval for the

³⁶¹ *Rural Litigation and Entitlement Kendra* case [47]. The Court states that mining in ‘these areas’ would violate the provisions of the Forest Conservation Act, but it remains unclear whether the ‘these areas’ refers to the case at hand or any areas to which the Forest Conservation Act applies.

³⁶² *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297 [S.No. 27, Appendix] (‘*Samatha*’); *MC Mehta v Union of India* (2009) (6) SCC 142 [S.No. 18, Appendix]. Cf *State of Andhra Pradesh v M/s Anupama Minerals* 1995 (81) SCC 117 [S.No. 27, Appendix], where the Court held that not only was the State Government entitled to refuse to grant the renewal of a mining lease in a forest area, but that the provisions of the Forest Conservation Act actually imposed a *duty* on it to refuse such approval.

diversion of forest land for mining purposes, although it has imposed some restrictions on mining in forest areas within and around national parks and sanctuaries.

If the Court intended to confine its prohibition on mining to the forest areas in this particular case, the language that it employed was ambiguous and did not convey this position with sufficient certainty. If it did indeed intend to extend the ban to all forest areas in general, it is evident that this position stands sharply at odds with the legislative scheme and existing executive practice. Either way, the Court failed to clarify the legal status on mining in forest areas satisfactorily, thereby contributing to weakening the rule of law.

The Court has a mixed record on clarifying the relationship between legislative and executive instruments at different hierarchies. In some cases, it appears to rely on guidelines and policy statements rather than statutory provisions,³⁶³ in others, it explicitly states that policy statements do not detract from established statutory provisions.³⁶⁴ The nature of public interest litigation also means that the Court often passes a series of ongoing interim orders that do not allow it to engage more rigorously with the statutory and regulatory framework.³⁶⁵

Writ petitions in the public interest are filed under Articles 32 or 226 of the Indian Constitution, which empower the Supreme Court and the High Courts respectively to issue writs for the enforcement of the fundamental rights in Part III of the Constitution. The Supreme Court has consistently held that the right to a clean and healthy environment is an integral component of the fundamental right to life under

³⁶³ *Dahanu Taluka Environment Protection Group v Bombay Suburban Electricity Supply Co. Ltd.* (1991) 2 SCC 539 [S.No. 7, Appendix] ('*Dahanu Taluka*').

³⁶⁴ *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149 [S.No. 28, Appendix].

³⁶⁵ *MC Mehta v Union of India* 1991 SCC (2) 353 [S.No. 12, Appendix].

Article 21.³⁶⁶ The basis of all public interest writ petitions on environmental matters is therefore a violation of Article 21. The other relevant Constitutional provisions are Articles 48A and 51A(g) of the Constitution. Article 48A is a Directive Principle of State Policy³⁶⁷ which requires the State to ‘endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.’ Article 51A(g) imposes a corresponding duty to protect and improve the environment on every Indian citizen. The Court has extensively applied both these provisions while deciding environmental matters.³⁶⁸

Since Constitutional rights, principles and duties are implicit in the subject-matter of public interest litigation, it might be expected that the Court engages with these more rigorously than it does with the statutory and regulatory framework. The manner in which these provisions are applied to review Government decisions, balance competing interests and incorporate international environmental legal principles is discussed below.

2. Judicial Review

Under Column 5 of the Appendix, I evaluate the Court’s reasoning on two counts. Since most of the cases that I discuss challenge the illegality of mining activities, the validity of permits and leases granted to the operators comes into question. I examine whether the Court frames the issue in such terms and whether it reviews the exercise of executive discretion within the limits set by the statutes under which such permits

³⁶⁶ *Subhash Kumar v State of Bihar* AIR 1991 SC 420, 424; *Virender Gaur v State of Haryana* 1995 (2) SCC 571.

³⁶⁷ The Directive Principles of State Policy are set out in Part IV of the Indian Constitution. Article 37 states that these principles ‘shall not be enforceable by any court, but...are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.’

³⁶⁸ *Sachidanand Pandey v State of West Bengal* AIR 1987 SC 1109; *Kinkeri Devi v State of Himachal Pradesh* AIR 1988 HP 4, 8.

and leases were granted. I also examine the deference demonstrated by the Court to decisions of the executive permitting or prohibiting the activity in question, whether the Court applies a clearly articulated standard of review, and the consistency of this standard across the different cases analysed. Where the Court engages with the substantive merits of decisions taken by the executive, I analyse the manner in which the Court balances environmental and developmental interests against each other, and its use of Constitutional provisions and environmental legal principles.

Given that the Court's engagement with the statutory and regulatory framework is minimal (as described in the previous paragraphs), it follows that in most cases, it does not concern itself with either the procedural or substantive legality of decisions taken by the executive. It largely fails to examine whether authorities have observed the statutory procedure prescribed, whether this relates to the grant of environmental clearance³⁶⁹ or a mining lease³⁷⁰ or permits to indigenous tribes within sanctuaries or national parks.³⁷¹ This omission has significant implications for the clarity-related component of the rule of law. In chapter 4, I demonstrated the confusion and uncertainty created by frequent amendments to the procedure for obtaining environmental and forest clearances. When the legality of such clearances is challenged before the Court, it is presented with the opportunity to clarify this procedure, resolve inconsistencies and establish linkages between regimes. For most of the cases set out in the Appendix, the Court fails to definitively document irregularities in statutory procedure.

³⁶⁹ *Dahanu Taluka*.

³⁷⁰ *Karnataka Industrial Areas Development Board*.

³⁷¹ *Animal and Environmental Legal Defence Fund*. Cf *Essar Oil* (n 431) and *Pradeep Krishna*.

The Court demonstrates considerable inconsistency in its review of the substantive exercise of executive discretion. It is important to note that none of the cases analysed in the Appendix involve challenges to delegated *legislation*, to which a different standard of review would be applied³⁷² in contrast to the review of *administrative* action that makes up the bulk of the cases that I discuss in this thesis.³⁷³ Executive discretion in India is subject to judicial review under three broad heads—illegality, irrationality and procedural impropriety.³⁷⁴ In the previous paragraph, I stated that the Court, for the most part, does not engage with this last head of review. Similarly, as the discussion on the Court’s engagement with the statutory and regulatory framework earlier in this section demonstrated, it does not have a very strong record of reviewing the exercise of discretion against the limits set by the parent statute. This leaves the standard of irrationality, where the Court questions whether discretion has been exercised unreasonably or arbitrarily, without taking into account relevant considerations or applying irrelevant ones.³⁷⁵

In India, judicial review on the grounds of rationality has effectively meant that Courts have applied the standard of *Wednesbury* unreasonableness to judge

³⁷² While reviewing delegated legislation, the Court has said it will examine whether it is in excess of the power conferred on the delegate only with reference to specific statutory provisions and the object and purpose of the Act. See *Maharashtra State Board of Secondary and Higher Secondary Education v Paritosh* AIR 1984 SC 1543, in *SP Sathe* (n 218) 107. The Court will not review the substantive merits of policy as might be set out through delegated legislation, the only exception being where the rule in question is unreasonable. (*Sathe* 107). The presumption of validity is stronger in the case of delegated legislation in comparison to executive action. See *Khoday Distilleries Ltd. v Karnataka* (1996) 10 SCC 30 in *Sathe* 108.

³⁷³ In fact, of all the 191 environmental judgments reviewed by Geetanjoy Sahu, there is no case in which the validity of delegated legislation has been challenged, either on the grounds that it exceeds the scope of its parent statute or on the grounds of its Constitutional invalidity.

³⁷⁴ *Sathe* (n 218) 388.

³⁷⁵ *ibid* 406.

executive discretion.³⁷⁶ Although proportionality review is increasingly being employed in place of *Wednesbury* unreasonableness, its articulation by the court remains weak, and it has been argued that in effect, the doctrine of *Wednesbury* unreasonableness is perpetuated.³⁷⁷ It is in light of this backdrop that the Court's reasoning in the environmental cases in the Appendix is discussed below.

There is no case in which the Court explicitly articulates and applies any one of the different standards of review discussed in the previous paragraphs. The closest that it gets to articulating its review of Government decisions in traditional administrative law terms is in two cases. In *Dahanu Taluka*, while hearing a challenge against the construction of a thermal power plant, the Court restricted itself to determining whether the Government had taken into account relevant and material considerations, while ignoring immaterial and extraneous influences. Some version of the standard of reasonableness is applied in *MC Mehta v Union of India*³⁷⁸ where the Court replicates a test applied by it in a previous pollution control case, *Andhra Pradesh Pollution Control Board v Professor MV Nayudu (Retired)*.³⁷⁹ In this case, the Court stated that 'the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's" test'³⁸⁰ (emphasis supplied).

In the other cases, it is this question about the acceptable level of harm to human health and the environment that the Court attempts to answer with varying

³⁷⁶ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (CA), where Lord Greene MR held that the Court of Appeal could interfere with a decision 'that was so unreasonable that no reasonable authority could ever have come to it.'

³⁷⁷ Chandrachud (n 219).

³⁷⁸ AIR 2004 SC 4016 ('*Aravalli Mining*') [S.No.17, Appendix].

³⁷⁹ AIR 1999 SC 812 ('*Nayudu*').

³⁸⁰ *Nayudu* [38].

degrees of consistency. The level of harm is usually measured against public interest in development, and in some cases, the right to livelihood of indigenous tribes. In *Consumer Education and Research Society v Union of India*,³⁸¹ the Court held that the even if there was proof that a decision (in this case, the reduction in the areas of a sanctuary) had been taken hastily, it would be reversed only if it could be demonstrated that this would have ‘an irreversible adverse effect on the environment.’³⁸² In this case, the Court clearly turned the precautionary principle on its head, despite the fact that this principle, along with the polluter pays principle, the sustainable development principle and the principle of inter-generational equity were all cited in the Court’s judgment. This represents a common feature of the Court’s reasoning, where it cites Constitutional provisions and environmental principles to reach its desired result,³⁸³ without properly articulating their scope and content or explaining the manner in which they apply to the facts of a particular case.

In fact, in nearly half the cases analysed in the Appendix, the Court bypasses even this token mention of Constitutional provisions or environmental principles in its judgments. Instead, it arrives at varying balances between environmental and developmental interests that are partially influenced by the deference that it accords to the decisions of the Government. In *Banwasi Sewa Ashram* and in *Dahanu Taluka*, which pitted thermal power plants against indigenous rights and environmental interests respectively, the Court deferred to the power of the Government to strike a balance between competing objectives, and dismissed the challenge against the power

³⁸¹ AIR 2000 SC 975 [S.No. 6, Appendix] (*Consumer Education and Research Society*’).

³⁸² *Consumer Education and Research Society* [6].

³⁸³ See Saptarishi Bandopadhyay, ‘Sustainable Development and Indian Environmental Jurisprudence’ in Ghosh (n 17), who observes that ‘that while judicial orders may instrumentally alter the balance of interests in a given dispute, the Court’s interpretations do little more to develop or clarify the underlying premise.’

plants.³⁸⁴ In other cases, while emphasising the need to defer to Government and expert opinion, the Court nevertheless imposes its own limits, which vary from case to case. For instance, in *Essar Oil*, the Court, while stating that it would not substitute its opinion for that of the experts, simultaneously confirmed that activities that caused ‘irreversible damage’ could not be permitted within sanctuaries. In *Kennedy Valley*, this limit was placed at the endangerment of human life and the likelihood of danger to grass or plants.

In yet another case,³⁸⁵ the limit was framed more vaguely by the Court. The Government was ordered to be guided by international environmental legal obligation unless ‘there were compelling reasons to depart therefrom.’ The Court attempted to flesh out these compelling reasons by stating that natural resources could only be exploited privately and commercially if the Court, not the Government, considered this necessary in the public interest. Ultimately, however, the Court left this to be determined by two statutory committees. The use of, and deference to technical expertise by the Court is discussed in the next paragraphs.

Given the inherently interdisciplinary and polycentric nature of environmental issues, the executive must necessarily be granted a certain degree of flexibility in exercising its discretion. There is no ‘one-size-fits-all’ approach to the judicial review of such discretion.³⁸⁶ Nevertheless, the need for this flexibility is not enough to explain the inconsistent standards demonstrated by the Court in the cases analysed in this thesis. The Court falls short on each of the three traditional grounds of judicial review in Indian administrative law. There is insufficient engagement with the

³⁸⁴ This tendency of the Court to defer to the Government in the case of large infrastructure projects is also confirmed in Sahu’s socio-legal analysis of the Court’s judgments. See Sahu (n 53) 12.

³⁸⁵ *KM Chinnapa, Applicant in TN Godavarman v Union of India* AIR 2003 SC 724 [S.No.11, Appendix] (‘Chinnapa’)

³⁸⁶ See Fisher, Lange and Scotford (n 72) 283-296.

procedural and substantive limits set by the statutory framework and varying degrees of deference to the executive while reviewing the rationality of its discretion. (The Court has not engaged with proportionality review in environmental cases, except in *Lafarge*, discussed in the next section). Although the application of Constitutional provisions and environmental principles has the potential to impart coherence, the Court's treatment of them remains too superficial to be able to tie together the fragmented statutory and regulatory framework.

3. Engagement with Technical Expertise

In the previous section, I demonstrated that the balance struck by the Court between environmental and developmental interests varied with the degree of deference that the Court accorded to the executive. In this section, I demonstrate that the Court is also strongly influenced by expert opinion, and that its engagement with specialist reports has an impact on its reasoning and the framing of its orders and directions. Technical expertise plays an important role in most of the cases analysed in the Appendix, and in most public interest environmental litigation in general. Either the Court or the Government appoints expert committees to conduct fact-finding exercises and to make recommendations regarding the impact of mining or quarrying activities (for the cases analysed in this thesis) on the environment.

The committees appointed are overwhelmingly technocratic, comprising either existing members of State PCBs or officials from other departments or agencies. The Court appointed non-official members to committees only in two of the cases in the Appendix.³⁸⁷ Even then, the members were appointed to monitoring committees to oversee the implementation of the directions of the Court rather than to inform the

³⁸⁷ *Aravalli Mining and Rural Litigation and Rural Litigation and Entitlement Kendra*.

Court's decision-making process. In *Aravalli Mining*, even these non-official members who were intended to represent the public were technical experts, rather than local residents affected by the mining activities in question. Only in *Rural Litigation and Entitlement Kendra* did the Court appoint 'public-spirited citizens' as members of a monitoring committee.

In several cases, the Court's engagement with technical expertise merely meant that it directed existing authorities to conduct inspections and report on the environmental damage being caused by the activities challenged. For example, in *MC Mehta v Union of India*,³⁸⁸ as well as in *Kamal Nath*, the Court directed the Central PCB to submit reports based on inspections of the sites in question. The Court, therefore, used its need for technical information to direct authorities to carry out their statutory functions. In another case,³⁸⁹ the Court used one statutory authority (the Environment Pollution Control Authority) to document the manner in which another statutory authority (the Haryana PCB) had failed to carry out its duties. This use by the Court of expert committees or bodies to record violations of environmental laws is a function of the manner in which environmental writ petitions in the public interest are framed. In most instances, petitioners point to the failure of existing authorities to prevent environmental damage, with the Court stepping in to direct them to perform their functions.

In other cases, the Court uses external expert committees to assist it in determining whether to ban or suspend environmentally damaging activities, and if not, the conditions under which they ought to be permitted. The recommendations of such committees form an integral component of the Court's final directions, with the

³⁸⁸ AIR 1996 SC 1977 [S.No. 13, Appendix] ('*Badkal and Surajkund Mining*').

³⁸⁹ *Aravalli Mining*.

Court often reproducing such recommendations verbatim. In fact, in some cases, the Court's discussion of expert opinion is the sole element of its judgment, acting as a substitute for the Court's engagement with the statutory or regulatory framework or with environmental principles.³⁹⁰ In other cases, although the Court undertakes a balancing exercise, it leaves it to the expert committees to make the final determination i.e. whether or not a particular activity may be permitted in a particular area.³⁹¹

In most cases, the Court's decisions are consistent with the recommendations of expert committees,³⁹² although there are also instances in which the Court refers only perfunctorily to expert reports without dealing with their recommendations in detail.³⁹³ In both the cases in the Appendix in which the Court displayed this latter treatment of technical expertise, its final decision upheld the actions of the Government in reducing the boundaries of a sanctuary and constructing a thermal power plant. The Court did not explicitly offer any justification for its departure from the expert recommendations, although in *Dahanu Taluka*, this departure is explained by the deference that the Court accorded to the executive. In most of the other cases analysed in the Appendix, especially those that deal with the illegality of mining activities, the Court was not called upon to decide between conflicting expert recommendations and Government positions. The Government largely cooperated with the Court, even appointing expert committees of its own accord in some cases.³⁹⁴

³⁹⁰ *Mohammad Haroon Ansari*

³⁹¹ *Tarun Bharat Sangh, Alwar v Union of India* AIR 1992 SC 514 [S.No. 30, Appendix].

³⁹² *Badkal and Surajkund Mining; MC Mehta v Union of India* 1991 SCC (2) 353 [S.No. 12, Appendix] ('*Delhi Stone Crushing*').

³⁹³ *Dahanu Taluka; Consumer Education and Research Society*

³⁹⁴ *Rural Litigation and Entitlement Kendra; Aravalli Mining*.

The frequent use of expert committees by the Court is partially explained by the fact that the cases analysed in the Appendix were heard before the NGT had been constituted. While this serves to preserve the legitimacy of the Court, it also has the effect of producing a fragmented body of case law that is not much more than an assortment of technocratic, particularised solutions to problems from which it is difficult to glean principles of general application in environmental law. In fashioning solutions like this, the Court is also more often than not breaching the principle of separation of powers and exercising executive functions. The nature of the Court's orders and directions, discussed in the next section also bear this out.

4. Nature of Orders and Directions

The Court's orders and directions are inevitably shaped by the manner in which writ petitions are framed and the kind of relief that is demanded of the Court. The cases analysed in this Appendix may be divided into broadly two types. In the first type of case, the Court deals with individual instances of illegality, such as the carrying on of an environmentally damaging activity without the appropriate permit or approval. Such cases are fairly straightforward and the Court issues clear, unambiguous directions either ordering such activity to stop³⁹⁵ or upholding the decision of the Government to cancel a permit or lease,³⁹⁶ as the case may be. These cases are not relevant in the context of fragmentation, in as much as they do not facilitate dialogue between the Court and other institutions of government. The only communicative function that they perform is clearly spelling out legal provisions and the consequences of their breach.

³⁹⁵ *Delhi Stone Crushing*.

³⁹⁶ *Ambica Quarry Works; A Chowgule and Co. Ltd v Goa Foundation and Others* (2008) 12 SCC 646. [S.No. 4, Appendix].

In the second type of cases, the Court is usually called on to decide more polycentric questions. The *Rural Litigation and Entitlement Kendra* case is a good example. In this case, the Court had to weigh the environmental harm from mining activities against the economic interests of mining operators as well as the impact that this would have on the livelihood of workmen in these mines. In such cases, the Court issues directions to relevant authorities to implement the recommendations contained in expert committee reports. Such orders do not necessarily facilitate deliberative dialogue either. Instead of the Court issuing top-down directions like the first set of cases described above, the Government is required to obey technical experts, without necessarily being able to participate in drawing up the solution.

In some cases, the Court's orders contribute to uncertainty when they fail to clearly specify the authorities to which they are directed. For example, in *Badkal and Surajkund Mining*, the Court stated that detailed mining plans as well as environment management plans were to be approved by 'a designated authority with specialisation in environment.' It was unclear from the Court's directions whether this designated authority referred to an already existing authority or whether the Government had to create a special authority for the purpose. If the Court intended the latter, it is another example of the Court excluding the Government from dialogue rather than facilitating it. In any case, the creation of yet another authority could only have an adverse impact on fragmentation by increasing multiplicity.

There are other cases in which the Court's orders are inherently vague. For instance, in *MC Mehta v Union of India*,³⁹⁷ the Court issued a general direction to protect the ecology of the area to 'all concerned' without specifying the authority to which it applied, and thereby diluting the effectiveness of its order. In some cases, the

³⁹⁷ 1997 (3) SCC 715 [S.No. 14, Appendix].

Court's orders are entirely in the nature of exhortations,³⁹⁸ in yet other cases, a specific consequence is attached to the fulfillment of a condition that is imprecisely articulated. For instance, in the *Badkal and Surajkund case*, the Court stated that mining activities would be ordered to be closed if environmental degradation reached 'a point of no return' without offering any indication of how such an end-point was to be determined. Similarly, in *Mukthi Sangarsh Movement v State of Maharashtra*,³⁹⁹ the Court directed authorities supervising the commercial quarrying of a river bed to introduce checks necessary to 'balance the preservation of the natural gift and the social consumption.' Apart from expressing the balance struck by the Court between competing interests, such standards serve no purpose in the form of a binding direction because they are unable to provide any guidance to the authority in question about implementation.⁴⁰⁰

Finally, there are cases in which the Court has initiated dialogue by directing the Government to frame policies on issues of environmental importance. In a writ petition requesting the Court to direct the Government to strengthen the enforcement and implementation of environmental laws in India,⁴⁰¹ rather than direct the Government to set up authorities under sub-section 3 of s 3 of the Environment Protection Act, the Court directed it to frame a national policy and time-bound implementation programme to protect the environment. The ineffectiveness of such directions is, however, evident in *Lafarge* discussed in the next section, where the Court finally issued binding directions to the Government to appoint a regulator.

³⁹⁸ *Ajay Singh Rawat v Union of India and Others* 1995 (3) SCC 266 [S.No.1, Appendix].

³⁹⁹ 1990 Supp SCC 37 [S.No.20, Appendix]

⁴⁰⁰ See also *Karnataka Industrial Areas Development Board*

⁴⁰¹ *MC Mehta v Union of India* 1998 (9) SCC 589 [S.No. 16, Appendix]

C. Case Studies

1. Lafarge, Proportionality and a National Regulator

Lafarge is a classic example of the mining illegalities described in chapter 5. Limestone mining operations were commenced by the French cement manufacturer, Lafarge in the State of Meghalaya in North-East India after obtaining environmental clearance from the MoEFCC. Lafarge did not apply for forest clearance after having obtained a certificate from a Divisional Forest Officer that stated that the project site did not contain any forest land. No-objection certificates to the mining operations were also obtained from the local institution of self-government in the area, the Khasi Autonomous District Council, which did not make any observation regarding the status of the land as forest land. Before granting environmental clearance, the MoEFCC also asked Lafarge to submit information from zoological and biological surveys of the project site. Admittedly, it did not ask Lafarge to obtain forest clearance.

It was only several years after environmental clearance had been granted and work on the project had commenced that the Chief Conservator of Forests visited the site and determined that the felling of trees would require clearance under the Forest Conservation Act. He notified the MoEFCC, which in turn directed Lafarge to apply for forest clearance. Lafarge applied for and obtained clearance to remove limestone from that portion of the project site that had already been broken up. However, when it was asked to separately obtain forest clearance for the non-broken up area of the site, it moved the Supreme Court requesting the Court to direct the MoEFCC to grant Lafarge an expeditious and time-bound clearance.

The facts of the case themselves reveal the fragmented nature of the law on clearances, and the lack of coordination among the multiple authorities involved. This

was made more confusing by the fact that the law had been amended several times since Lafarge first applied for environmental clearance and until it brought its case before the Court. The Court engaged competently with the statutory and regulatory framework by comprehensively setting out the different provisions that were applicable to the case. However, the issue before the Court had less to do with interpreting legal provisions (which had clearly been violated), than with determining the degree of discretion that the Court could allow the MoEFCC in validating *ex post facto* clearance. (After the MoEFCC directed Lafarge to apply for forest clearance, Lafarge had also applied for a revised environmental clearance). The issue was also compounded by the fact that a non-governmental organisation that was an intervenor in the case before the Court alleged that Lafarge had deliberately misrepresented the status of the land.

The MoEFCC, which supported the resumption of mining operations by Lafarge argued that it had taken all relevant considerations into account while granting the revised clearance and ‘could not be said to have acted arbitrarily, capriciously or whimsically.’ In response to this argument, the Court stated that a ‘margin of appreciation’ would apply. The application of this doctrine was prompted by the Court’s interpretation of the principle of sustainable development, which it said ruled out ‘across-the-board principles’, and instead required a case-by-case determination based on due diligence.⁴⁰²

The Court’s application of the margin of appreciation was also influenced by its recognition of the issue before it as a polycentric one. For instance, the Court specifically stated that ‘setting environmental standards involves mediating

⁴⁰² *Lafarge* [19].

conflicting visions about the value of human life.⁴⁰³ Ultimately, however, the Court's use of the margin of appreciation was not very different from its application of the traditional standard of judicial review. In fact, the Court went on to say that the 'constitutional doctrine of proportionality' required it to conduct a 'process of judicial review in contradistinction to merit review.'⁴⁰⁴ There was no discussion of the context in which the doctrine is understood and applied in other jurisdictions or any mention of the three-part analysis that the doctrine usually involves. Instead, the Court asked all the standard questions—whether relevant factors had been taken into account, whether extraneous factors had played a role, whether the decision of the MoEFCC was free of bias.

The Court clearly went to great lengths to justify its deference to the executive. For instance, it was also influenced by the fact that the local indigenous communities had consented to the project and expressed its deference to local knowledge and took into account the definition of 'forest' under the local law.⁴⁰⁵ The Court's understanding of the doctrine of proportionality and the margin of appreciation even meant that it stayed away from applying the principles of sustainable development and intergenerational equity.

It stated that the application of such principles might entail policy choices, and that 'barring exceptions, decisions relating to utilisation of natural resources have to be tested on the anvil of the well-recognised principles of judicial review.'⁴⁰⁶ The Court did not define what such exceptions would be. The only engagement with such principles that it allowed itself was to determine whether the MoEFCC had taken

⁴⁰³ *Lafarge* [20].

⁴⁰⁴ *Lafarge* [30].

⁴⁰⁵ *Lafarge* [25].

⁴⁰⁶ *Lafarge* [31].

these principles into account while arriving at a ‘balanced decision.’ The use of the phrase ‘balanced decision’ once again muddies the waters because it suggests that the Court *will* after all engage in some degree of merits review. However, after a lengthy exposition of the facts of the case, the Court decided to uphold the *ex post facto* clearance granted by the MoEFCC.

However, this margin of appreciation appeared to play no role in the second part of the case, where the Court issued detailed guidelines to the Government regarding the appointment of a National Regulator. The Court stated that the power conferred on the Central Government under sub-section 3 of s 3 of the Environment Protection Act to constitute an authority to take measures relating to environmental protection was to be interpreted as a duty to appoint such authority. Accordingly, the Court held that the Government should appoint a National Regulator to appraise projects, enforce conditions and impose penalties for offences.⁴⁰⁷

The Court went so far as to direct the MoEFCC to expand the number of its regional offices, a direction that would appear to be in clear violation of the principle of separation of powers. The Court also clarified that forest clearances would not be granted unless environmental clearances had been obtained, ordered the Forest Advisory Committee to upload the minutes of its meetings on its website, reiterated that public hearings were a mandatory part of the environmental clearance process and also asked the MoEFCC to draw up a comprehensive policy for the inspection, verification and monitoring of the grant of forest clearances in consultation with the States.

It is difficult to reconcile the reluctance of the Court to intervene in the first half of its order with the detailed directions that it issued to the Court in the second.

⁴⁰⁷ *Lafarge* Part II.

The Court's articulation of proportionality and the margin of appreciation did nothing to clarify the inconsistency in the standards of review described in section B and therefore did not go any way towards strengthening the environmental rule of law in accordance with the indicator established in chapter 3. Its directions regarding the appointment of a National Regulator, although admittedly in breach of the principle of separation of powers, had the effect of initiating a debate and encouraging the Government to think pro-actively about institutional reform proposals. The Court's emphasis on public access to environmental information and the importance of public consultations was also encouraging. The Government commissioned studies regarding the creation of a regulatory authority on the basis of the Court's directions, and some of its key features are discussed in chapter 8.

2. Competing Jurisdictions

As mentioned in the Introduction, the lack of legitimacy and competence of the courts is one of the most frequently cited concerns about judicial activism. It was partially in response to this lack of specialised environmental expertise within the higher judiciary that the National Green Tribunal Act was passed setting up the NGT.⁴⁰⁸ Ironically, even this required impetus from the courts as the executive dragged its feet over finding premises for, and appointing members to the NGT.⁴⁰⁹ Since its constitution, the NGT has acquired as fierce a reputation as protector of the environment as the SC. However, this zealous safeguarding of the environment has

⁴⁰⁸ Paragraph 6 of the Statement of Objects and Reasons of the National Green Tribunal Bill 2009 acknowledges the need to 'establish a specialised tribunal to handle the multidisciplinary issues involved in environmental cases.'

⁴⁰⁹ *Union of India v Vimal Bhai and Others* Petition for Special Leave to Appeal (Civil) No. 12065/2009, Order dated 3 May 2012.

attracted some of the same criticism that was leveled at the SC about exceeding its jurisdiction.⁴¹⁰

Although environmental lawyers and civil society activists continue to value the critical role that the NGT has played in bringing the executive to account,⁴¹¹ some of its recent orders such as ordering a levy on trucks passing through Delhi⁴¹² or banning diesel vehicles more than ten years old from entering Delhi⁴¹³ have clearly strayed into the realm of legislative and executive functions. In light of this background, any attempted reform of environmental judicial institutions therefore ought to carefully consider the manner in which appropriate roles for the executive and the judiciary in the development of environmental law may be defined.

However, more relevant in the context of fragmentation, institutional reforms also ought to take into account the jurisdictional tussles that the NGT has been having with the High Courts ('HCs'). The NGT is effectively intended to replace the HCs in a widely defined set of environmental matters,⁴¹⁴ and appeals from orders of the NGT

⁴¹⁰ Yukti Choudhary, 'Tribunal on Trial' *Down to Earth* (30 November 2014) <<http://www.downtoearth.org.in/coverage/tribunal-on-trial-47400>> accessed 8 February 2016; Arghya Sengupta, 'Captain Planet Gone Wild: Sweeping Diktats of Green Tribunal Show Good Intentions But Bad Grasp of Governance and Law' *The Times of India* (11 April 2015) <<http://blogs.timesofindia.indiatimes.com/toi-edit-page/captain-planet-gone-wild-sweeping-diktats-of-green-tribunal-show-good-intentions-but-bad-grasp-of-governance-and-law/>> accessed 8 February 2016; Nihar Gokhale, 'Blanket Bans and Hefty Fines: Has NGT's Zeal Put its Future in Jeopardy?' *CatchNews* (15 September 2015) <<http://www.catchnews.com/environment-news/blanket-banks-hefty-fines-has-ngt-s-zeal-put-its-future-in-jeopardy-1442249453.html>> accessed 8 February 2016.

⁴¹¹ Armin Rosencranz and Geetanjoy Sahu, 'Assessing the National Green Tribunal After Four Years' (2014) 5 *Journal of Indian Law and Society* 191; Swapan Kumar Patra and VV Krishna, 'National Green Tribunal and Environmental Justice in India' (2014) 44 *Indian Journal of Geo-Marine Science* 1; Centre for Environmental Law, 'National Green Tribunal: Three Years of Revolutionary Jurisprudence' <www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/article_by_cel/> accessed 10 February 2016.

⁴¹² *Vardhaman Kaushik v Union of India*, Original Application No. 21/2014, Order dated 7 October 2015.

⁴¹³ *Vardhaman Kaushik v Union of India*, Original Application No. 21/2014, Order dated 11 December 2015.

⁴¹⁴ S 14 of the NGT Act confers jurisdiction on the NGT 'over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is

lie directly to the SC.⁴¹⁵ With the coming into force of the NGT Act, the SC directed the transfer of all relevant environmental cases pending before courts across the country to the NGT,⁴¹⁶ but the transition has not been smooth. In 2014, the Madras HC ruled that the Southern Zone of the NGT had no jurisdiction to take up matters *suo motu*,⁴¹⁷ while most recently, the Nagpur Bench of the Bombay HC and the NGT issued directly conflicting orders in the same matter.⁴¹⁸ This latter clash is a particularly good example of the fragmentation of the law across separate, but overlapping authorities, ultimately caused by a failure of the relevant institutions to play their appropriate roles, and is described below in detail.

Although the jurisdiction of the NGT and the HCs is intended to be distinct, the line between courts and tribunals in general has increasingly been blurred, especially after the judgment of the SC in the case of *Madras Bar Association v Union of India*.⁴¹⁹ In the case⁴²⁰ described in this section, the Nagpur Bench of the Bombay HC smudged these already blurry distinctions when it ordered the National Highway Authority of India ('NHAI') to undertake road repairs after taking *suo motu*

involved and such question arises out of the implementation of the enactments specified in Schedule I.' These enactments include every major piece of legislation relating to the environment except the Indian Forest Act, the Wildlife Protection Act and the Forest Rights Act.

⁴¹⁵ NGT Act, s 22.

⁴¹⁶ *Bhopal Gas Peedith Mahila Udyog Sangathan and Others v Union of India and Others* (2012) 8 SCC 326.

⁴¹⁷ *P Sundararajan and Others v The Deputy Registrar, National Green Tribunal and Others* 2015 (4) CTC 353.

⁴¹⁸ Rajeswari Ganesan, 'NGT and Bombay High Court clash over National Highway 7 widening' *Down to Earth* (31 July 2015) <www.downtoearth.org.in/news/ngt-and-bombay-high-court-clash-over-national-highway-7-widening-50643> accessed 10 February 2016.

⁴¹⁹ (2014) 10 SCC 1. The broad principle laid down by the SC was that tribunals that had been vested with the subject-matter jurisdiction of HCs ought also to enjoy the same protection as courts. See also Prashant Reddy, 'The Trouble with Tribunals' *Open* (18 May 2013) <www.openthemagazine.com/article/nation/the-trouble-with-tribunals> accessed 10 February 2016.

⁴²⁰ *The Court on its Own Motion v National Highway Authority of India* Civil Application (Original) Nos. 1671/15, 1683/15 and 1684/15 in Public Interest Litigation No. 88 of 2013 ('NHAI').

cognizance of a newspaper article describing the state of a section of the highway between the States of Maharashtra and Madhya Pradesh. The road repairs required the felling of trees, which in turn required forest clearance, thereby bringing environmental questions and the NGT into the picture.

However, the HC refused to engage with this environmental aspect of the matter. Instead, it ruled that the tree felling, for which the MoEFCC had already granted in-principle permission, could not be appealed before the HC or the NGT. The rationale offered by it was that the Court was not empowered to sit in appeal over decisions made by the MoEFCC, which consisted of ‘persons possessing the requisite expertise in the matter.’⁴²¹ This ruling ignored the fact that although the Court itself might not possess the relevant expertise, the NGT had been created precisely with this kind of expertise and was intended to exercise precisely this kind of merits review.

In fact, the HC, while purportedly refraining from conducting a merits review regarding the tree felling nevertheless went on to balance ecological and developmental interests against each other while dealing with another technical aspect of the matter. This concerned the adequacy of the mitigation measures proposed by the NHAI in order to protect a wildlife corridor that would be affected by the widening of the highway. The balancing exercise undertaken by the HC was hastily summed up in the following lines:

Time and again we have insisted that the danger to the environment and ecology has to be minimized. However, at the same time the development work cannot be hampered with. For economic development of the country, the National Highways’ work as important lifelines.

However, insofar as the mitigation measures are concerned, *though we are aware about our limitations and also aware of the fact that we do not possess expertise in the matter; even as a laymen (sic)*, we find that the measures as

⁴²¹ NHAI, Order dated 14 November 2014.

suggested by the Forests Department and Wildlife Institute of India, at least, prima facie, do not appear to be practical.⁴²² (emphasis supplied).

Although the HC acknowledged that it was not inherently competent to decide the admittedly technical questions before it, it nevertheless weighed the merits of the different mitigation proposals for wildlife placed before it. After conducting this balancing exercise, it ordered the relevant authorities to commence work on the road widening by felling trees. In the meantime, an environmental organisation, the *Srushti Paryavaran Mandal* had filed a petition⁴²³ against the road widening before the NGT. In contrast to the HC, the NGT ordered an interim stay on tree felling until the authorities were able to demonstrate the authority in law to undertake this felling.⁴²⁴

Thus, directly contradictory orders were issued by two judicial authorities, so much so that obeying the orders of one would have put the concerned authorities in contempt of the other.⁴²⁵ The conflicting orders in this case are a classic example of fragmentation in the judicial context, in as much as they are product of authorities with competing ideas about the object and purpose of the law exercising their competence over the same subject-matter. The Nagpur Bench ultimately stayed all proceedings on the road widening question that were pending before the NGT, but not before both these bodies had revealed strikingly different approaches to the balancing of environmental and developmental issues.

⁴²² *NHAI*, Order dated 11 September 2015, [13]-[14].

⁴²³ *Srushti Paryavaran Mandal v Union of India and Others*, Appeal No. 25 of 2015 (NGT, Principal Bench, New Delhi) (*'Srushti'*).

⁴²⁴ *Srushti* Order dated 3 July 2015.

⁴²⁵ Vivek Deshpande, 'Tree Felling for Road Project: NGT Issues Contempt Notice to NHAI, Forest Dept' *The Indian Express* (8 September 2015) < <http://indianexpress.com/article/cities/mumbai/tree-felling-for-road-project-ngt-issues-contempt-notice-to-nhai-forest-dept/>> accessed 6 April 2016.

The manner in which this contrasting balancing of interests took place was directly linked to the characterisation of the issue by the two bodies. In chapter 2, I described how competing characterisations of the same issue were central to the concept of fragmentation. In the case at hand, the HC, in order to assert the superiority of its jurisdictional claim over the NGT stated that the felling of trees was only incidental to the larger question of fundamental rights. It held that the right to roads in a good condition was an integral part of the right to life under Article 21 of the Indian Constitution. Article 226 of the Constitution empowers HCs to issue writs for the enforcement of fundamental rights. The reliance by the HC on a Constitutional right meant that it did not consider it necessary to examine a less lofty, but equally crucial matter of administrative law that the NGT was concerned with.

In its order,⁴²⁶ the NGT insisted that the MoEFCC state the authority of law under which it had issued a notification waiving the requirement of clearance from other authorities and thereby granting permission for the tree felling. This question was, however, brushed aside by the HC, which cited the higher claim of the right to life that was threatened by the failure to undertake road repairs. Constitutional rights trump conflicting provisions of legal instruments lower down in the hierarchy.⁴²⁷ However, in doing so, the HC bypassed the exercise of demonstrating the manner in which the detailed and established statutory and regulatory framework on forest and environmental clearances clashed with the court's own arguably overbroad interpretation of the right to life.

This failure of the HC to carefully consider whether the existing statutory and regulatory framework fitted into the Constitutional scheme demonstrates its inability

⁴²⁶ *Srushti* Order dated 3 July 2015.

⁴²⁷ Article 13 of the Indian Constitution states that laws inconsistent with or in derogation of fundamental rights are void.

to meet the third indicator of the environmental rule of law established in chapter 3 to assess the legal quality of judicial decisions. First, the HC missed the opportunity to clearly set out the laws, rules and notifications governing the issue. The matrix of facts set out by the HC in its order reveals a confusing set of primary and secondary laws applicable to the issue and administered by multiple authorities. A clearer articulation of this framework would have been a positive contribution by the HC towards dispelling some of the uncertainty created by the fragmented actions of the legislature and the executive.

Secondly, by ignoring the NGT's demand that the MoEFCC explain the legal authority for issuing the notification in question, the HC missed another opportunity to set out stricter conditions for the exercise of executive discretion. In chapter 3, the indicator assessing the legislative quality of executive orders refers to the ability of the executive to ground these in primary legislation. The HC failed to appreciate that its reliance on the higher Constitutional authority of Article 21 was not at odds with the NGT's demand that the MoEFCC explain the legal authority of its notification waiving the requirement to obtain clearance for the tree felling. When broadly worded Constitutional provisions are used as an imperative to excuse compliance with regulatory provisions, this leaves room for personal judicial predilections about the relative importance of different interests to trump a procedure already prescribed by the legislature and the executive. This increases the likelihood of the subjective or arbitrary exercise of discretionary power, thereby weakening the environmental rule of law. These predilections are evident in the justification offered by the HC below.

The HC read the right to good roads into the right to life under Article 21. As its order demonstrates, this generous interpretation of Article 21 was more a reflection of its own judgment regarding the value of well-functioning highways to the

economic development of the country, and less the protection of individual life and personal liberty that Article 21 traditionally guarantees.⁴²⁸ When it failed to examine the validity of the notification waiving the requirement of obtaining clearance for the tree felling, the HC allowed its own judgment about the balancing of economic and environmental interests to substitute that of the legislature. This is a classic example of a breach of the separation of powers contributing to a weakening in the rule of law. The balance that the legislature had struck between these interests was already expressed in the statutory procedure prescribed for forest clearances.

If the executive was attempting to bypass this procedure through a notification, it was the duty of the HC to strike it down or at least to determine whether the executive was exercising its discretion within the limits of its statutory authority. Instead, the HC encouraged fragmentation by allowing an executive instrument to introduce a piecemeal exception to a well-established legislative process. It did so by infringing on the jurisdiction of another body, the NGT and by substituting its own assessment of the urgency of road repairs in the country for that of the legislature's and the executive's, thereby also breaching the principle of separation of powers. The ultimate result was the dilution of environmental protection standards, and until the HC finally stayed proceedings before the NGT, the co-existence of two diametrically opposite directions to the authorities charged with implementation.

⁴²⁸ Interpreting the right to life to include the right to good roads may seem an overgenerous expansion of this fundamental right. However, the Indian higher judiciary has been praised for its expansion of Article 21 to include a broad range of positive rights such as the right to emergency health care, clean water, shelter, education and food. See Fredman (n 8) Chapter 3. One of the more unlikely additions to the right to life includes the right to sleep peacefully. See *Burrabazar Fireworks Dealers Association v Commissioner of Police* AIR 1998 Cal 121.

D. Conclusion

The Supreme Court has been central to the development of Indian environmental law and this makes it all the more important to bring its reasoning under scrutiny. The analysis of the cases in this section reveals that that it has a mixed record in strengthening the environmental rule of law. Through its reliance on Constitutional provisions, it misses the opportunity to engage with, and bring coherence to an already fragmented statutory and regulatory framework. The inconsistency in the standards of review that it applies does not furnish adequate guidance to the executive, and is evidence of poor communication by the Court with other institutions. However, the nature of the Court's orders and directions are also strongly influenced by the manner in which public interest litigation is framed. Addressing fragmentation may not therefore be merely a question of adding rigour to the Court's reasoning; it might additionally require strategically rethinking environmental public interest litigation. Finally, the establishment of the NGT creates the scope for greater fragmentation, and institutional reform proposals must think carefully about clearly demarcating jurisdiction between courts and tribunals.

CHAPTER SEVEN: FEDERALISM AND FRAGMENTATION

A. Introduction

In this chapter, I describe the distinct influence of India's federal structure of government on the fragmentation of Indian environmental law. The fragmentation that manifests because of this division of legislative and executive power between the Centre and the States is distinct from that caused by the failure of the institutions of government to maintain the environmental rule of law and to respect the separation of powers, in the manner conceptualised in chapter 2. Fragmentation as a product of this Centre-State division is of a somewhat different character from that created by the processes of law-making, law-implementing and law-interpreting described in chapter 3. This merits examination in closer detail in a separate chapter, especially since an account of the incoherent development of Indian environmental law would be incomplete without a description of federalism.

Section B provides a brief overview of India's federal system of government and some key challenges that this has created for the implementation of the law in general, and environmental law in particular. I follow this with a more detailed discussion of specific issues where Centre-State divisions have exacerbated fragmentation, and resulted in uneven implementation. Section C is reserved for a case study on the compensatory afforestation mechanism and the problems that Centre-State fragmentation poses for its effective implementation.

In the conclusion, I briefly consider how the fragmentation described in this chapter ought to be taken into account while considering institutional reform proposals in Part III.

B. Federalism and its Challenges

1. The Federal Structure of India's Government

The Indian Constitution sets up a scheme of government that is most commonly described as federal, with a unitary bias.⁴²⁹ It is largely modeled on the pre-Independence Government of India Act, 1935,⁴³⁰ parts V and VI of which divided legislative and administrative powers respectively between the Federation, Provinces and States as they then were.⁴³¹ Part XI of the Indian Constitution now governs relations between the Union and the States. Articles 245-255, read with the Seventh Schedule specifically govern the division of legislative powers and demonstrate the weight given by the Constitution-makers to the Centre over the States.⁴³² The Seventh Schedule contains three Lists—the Union List (List I), the State List (List II) and the Concurrent List (List III)—that set out the different subjects to which the legislative competence of the Centre and States extends. The Centre, through Parliament has exclusive competence in relation to List I, the States, through their legislatures, have similar exclusive competence in relation to List II, while both the Centre and the States may legislate on subjects enumerated in List III.⁴³³

The unitary bias is demonstrated through: a) vesting residual powers of legislation in Parliament for subjects that do not find mention in any of the Lists⁴³⁴; b)

⁴²⁹ Granville Austin, *The Constitution of India* (Clarendon Press 1966) 186; *State of Karnataka v Union of India* (1977) 4 SCC 608 [64]; VM Dandekar, 'Unitary Elements in a Federal Constitution' (1987) 22 *Economic and Political Weekly* 1865.

⁴³⁰ HM Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing 2008 rep) 294.

⁴³¹ The distinction between Provinces and States no longer exists, and Article 1 of the Indian Constitution declares that India shall be a Union of States.

⁴³² HM Rajashekhara, 'The Nature of Indian Federalism: A Critique' (1997) 37 *Asian Survey* 245.

⁴³³ Article 246.

⁴³⁴ Article 248.

the dominance of Central over State laws in case of inconsistency;⁴³⁵ and c) the power of Parliament to legislate on subjects in List II in the national interest,⁴³⁶ when a proclamation of Emergency is in operation,⁴³⁷ with the consent of two or more States,⁴³⁸ and to give effect to international agreements.⁴³⁹

In a sense, Articles 245-255 represent the Constitutional safeguard against fragmentation. In adopting the ‘superbly drawn legislative Lists’ of the Government of India Act, 1935, the constitutional scholar, HM Seervai, contends that the Indian Constitution ensured that there was very little overlap between the legislative powers of the Centre and the States.⁴⁴⁰ Drafting the Lists in a manner that ensured that the entries were ‘mutually exclusive as far as possible’ had prevented litigation about the conflict of powers between the Federation and the Provinces under the earlier Act.⁴⁴¹ Litigation on legislative competence is limited under the Indian Constitution as well.

As the next section demonstrates, the Constitutional division of legislative powers between the Centre and the States in relation to the environment has also largely avoided litigation regarding legislative competence. Uncertainty about the division of legislative powers between the Centre and the States, then, does not appear to contribute significantly to fragmentation. However, litigation on the conflict between Central and State laws is not the only way in which the impact of federalism on fragmentation is manifested. As the next paragraphs demonstrate, differences in

⁴³⁵ Article 251.

⁴³⁶ Article 249.

⁴³⁷ Article 250.

⁴³⁸ Article 252.

⁴³⁹ Article 253.

⁴⁴⁰ Seervai (n 430) 288.

⁴⁴¹ *ibid.*

political will and financial resources also have a bearing on the implementation of Central and State laws. These differences are exacerbated when accompanied by the other manifestations of fragmentation developed in chapter 3. The next paragraphs briefly explore some of the contemporary challenges posed by Indian federalism, and the extent to which these reflect weak legislative mechanisms and administrative processes.

I do not claim to offer a comprehensive account of the working of Indian federalism in this section. There is already extensive literature that situates India's particular brand of federalism within broader political and economic theories.⁴⁴² I provide only an overview of the basic features of this federalism in order to provide a backdrop to the discussion of the case study later in this chapter. More nuanced considerations are necessarily omitted.

An appreciation of fiscal federalism, or the division of the sources of revenue between the Centre and the States is essential in locating the implementation of Indian environmental law in its proper context, especially in light of the reports on financially beleaguered State PCBs that constitute a prominent strand in the academic literature.⁴⁴³ Singh and Rao remark that this division is 'the starting point for the examination of efficiency in the delivery of public services.'⁴⁴⁴ Part XII of the Indian Constitution, read with the Seventh Schedule, defines the taxing powers of the Centre and the States as well as the manner in which revenue from these taxes is to be

⁴⁴² Nirvikar Singh and Govinda Rao, *The Political Economy of Federalism in India* (OUP 2006); Lawrence Sáez, *Federalism Without a Centre: The Impact of Political and Economic Reform on India's Federal System* (Sage Publications 2002); Ashutosh Varshney, 'How has Indian Federalism done?' (2013) 1 *Studies in Indian Politics* 43-63.

⁴⁴³ (n 38).

⁴⁴⁴ Singh and Rao (n 442) 123.

divided.⁴⁴⁵ States share in the revenues from Central taxes⁴⁴⁶ and also receive grants-in-aid from the Centre.⁴⁴⁷

The Finance Commission, a Constitutional body, is charged with the responsibility of recommending the distribution of the net proceeds of taxes between the Centre and the States, and of laying down principles governing the grants-in-aid to the States. The 14th Finance Commission released its report in 2015 ('14th Finance Commission report'),⁴⁴⁸ and recommended a significant increase in States' shares in net proceeds from tax collections.⁴⁴⁹ It also imposed a greater fiscal responsibility on States for the implementation of Centrally Sponsored Schemes. These Schemes are wholly or partially funded by the Centre, but implemented by States because they cover subjects on List II like health, education, employment, housing and agriculture.⁴⁵⁰ Although this recommendation purportedly represents an increase in

⁴⁴⁵ For a comprehensive list of the different taxation heads, see Table A6.1 in Singh and Rao (n 442) 145.

⁴⁴⁶ Articles 269 and 270.

⁴⁴⁷ Article 275. For a more comprehensive description of India's fiscal federal system, see Sharmila Murthy and Maya Mahin, 'Constitutional Impediments to Decentralization in the World's Largest Country' (28 February 2015) *Duke Journal of Comparative and International Law* (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589471> accessed 28 February 2016.

⁴⁴⁸ Report of the Fourteenth Finance Commission of India (24 February 2015) <<http://fincomindia.nic.in/ShowContentOne.aspx?id=9&Section=1>> accessed 27 February 2016.

⁴⁴⁹ For a summary of the key recommendations of the report, see 'Highlights of the 14th Finance Commission Report' *Business Standard* (24 February 2015) <http://www.business-standard.com/article/economy-policy/highlights-of-the-14th-finance-commission-report-115022400743_1.html> accessed 27 February 2016.

⁴⁵⁰ For an overview of the division of fiscal responsibilities for the implementation of Centrally sponsored schemes before the recommendations of the 14th Finance Commission, see Joyita Ghose, 'Centrally Sponsored Schemes' PRS Legislative Research (4 October 2013) <http://mla.prsindia.org/sites/default/files/policy_guide/Centrally%20Sponsored%20Schemes.pdf> accessed 28 February 2016.

the fiscal autonomy of States, the capacity of States to utilise these funds and ensure continued commitment to social sector programmes has been questioned.⁴⁵¹

These recommendations of the Finance Commission have the following consequences for the environment. Two schemes for wildlife conservation—Project Tiger and Project Elephant—continue to be fully supported by the Centre,⁴⁵² reflecting the prominence that wildlife conservation has generally enjoyed on the environmental agenda of the Government, in contrast to issues like industrial pollution. The National Afforestation Programme as well as the National Plan for Conservation of Aquatic Eco-System will require States to contribute a higher share. Significantly, the Commission also recommended for the very first time that weight be assigned to the forest cover in a State while developing a formula to allocate taxes. The application of this formula has caused an increase in the share of taxes to States like Madhya Pradesh, Chattisgarh and Odisha that have large areas under forest cover and also have large indigenous populations.⁴⁵³

The Commission was responding to concerns raised by States about declining forest revenues since the implementation of the National Forest Policy, 1988. In combination with the Forest Conservation Act, the Policy prevents States from using forest resources without the approval of the Centre.⁴⁵⁴ This recommendation is an

⁴⁵¹ Yamini Aiyar, 'In the Garb of Promoting Federalism, has the Centre Diluted its Duty to National Priorities?' *The Wire* (21 February 2016) <<http://thewire.in/2016/02/21/in-the-garb-of-promoting-federalism-has-the-centre-diluted-its-commitment-to-national-priorities-22243/>> accessed 28 February 2016; GR Reddy, 'Finance Commission Proposes, The Union Disposes' (2015) 50 *Economic and Political Weekly* 27.

⁴⁵² For the entire list of restructured Schemes, see Press Information Bureau, Government of India, Ministry of Finance, '8 Centrally Sponsored Schemes Delinked from Support of the Centre' (28 February 2015) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=116152>> accessed 28 February 2016.

⁴⁵³ Jairam Ramesh, 'Green Devolution Formula for Taxes' *LiveMint* (3 March 2015) <<http://www.livemint.com/Opinion/6yw61BZhGR5ckXIwk9Eu1H/Green-devolution-formula-for-taxes.html>> accessed 27 February 2016.

⁴⁵⁴ 14th Finance Commission Report 94 [8.27].

important step towards fulfilling the Commission's mandate to balance ecology with sustainable economic development, but has been criticised for not also linking the devolution of taxes to the actual preservation of forest cover.⁴⁵⁵

Another recommendation that the Commission made in the context of the environment was to call for local bodies to have a greater share in the royalties from mining activities within their jurisdiction. This was intended to enable them to take effective steps to ameliorate the damages that mining causes to the local environment.⁴⁵⁶ Finally, and very crucially from the point of view of fragmentation, the Commission recommended setting up a high-level consultative mechanism between the Centre and the States in order to integrate environmental and economic concerns in decision-making and also 'provide policy thrust cutting across several line ministries and agencies.'⁴⁵⁷

The Finance Commission's report offers a window into the principal sources of fiscal tension between the Centre and the States. It reveals that States have long felt the financial burden of compliance with Centrally-determined developmental goals.⁴⁵⁸ It also demonstrates the pressure on States to earn revenue from industrial activities at the expense of the environment. The Government has usually responded by strengthening centralised control to counter these externalities.⁴⁵⁹ However, as the case study demonstrates later in this chapter, strong Central commands alone cannot address fragmentation that manifests as uneven implementation across the States.

⁴⁵⁵ Ramesh (n 453).

⁴⁵⁶ 14th Finance Commission report 119 [9.101].

⁴⁵⁷ *ibid* 167 [12.35].

⁴⁵⁸ *ibid* 60 [6.6].

⁴⁵⁹ Singh and Rao (n 442) 246-7.

Stronger administrative processes, genuinely consultative mechanisms, and the clearer articulation of objectives and principles must also accompany them.

Some of these recommendations are already being proposed as responses to the challenges of Indian federalism in other areas of the law. A recent report on cooperative federalism, released by an independent thinktank, the Vidhi Centre for Legal Policy ('Vidhi report'),⁴⁶⁰ recommends a series of reforms across different areas such as security, public administration, financial markets and natural resources that are suited to India's federal framework. The reforms are grouped into the following categories: a) clarifying the demarcation of powers between the different levels of government; b) devolving powers to the States and local authorities while capacity-building; c) incentivizing cooperation; and d) guiding discretionary powers.⁴⁶¹ These recommendations mirror the approach to reforms that I recommend in Part III, where I argue for a clearer expression of legislative intent and the reasoned use of executive orders that are grounded in statutes.

These broad recommendations in the Vidhi report are also translated into more specific measures that are analogous to the responses to fragmentation that are suggested by the indicators established in chapter 3. For example, the Vidhi report recommends the amendment of Part XXI of the Indian Constitution (which deals with the backwardness of regions in some States) to include *specific procedures* for the devolution of funds to local bodies as well as an *enumeration* of the determinants of backwardness.⁴⁶² Parliamentary intent is thereby articulated and appropriate guidance

⁴⁶⁰ Vidhi Centre for Legal Policy, 'Cooperative Federalism: From Rhetoric to Reality' (24 September 2015) < <http://vidhilegalpolicy.in/reports-1/2015/9/24/cooperative-federalism-from-rhetoric-to-reality> > accessed 28 February 2016.

⁴⁶¹ Vidhi Report, Introduction.

⁴⁶² *ibid* 15.

is provided to executive authorities to guide implementation and eliminate regional disparity. Similarly, to address the problem of differing State approaches to e-commerce regulation, the report recommends the enactment of a comprehensive Central code that will *lay down principles and define concepts*, allowing States to develop details of implementing regulatory mechanisms.⁴⁶³ *Pre-legislative consultation* is recommended before changes are made to the adjudicatory process governing water disputes between the Centre and the States.⁴⁶⁴

The reforms recommended in the Vidhi report demonstrate the close link between fragmentation and federalism, in particular, the manner in which federalism creates separate regimes, self-contained regime, across which there is incoherence. This is reflected in recommendations made by other academics and bodies in other areas of the law where Centre-State tensions have an impact on implementation. Strengthening the governance capabilities of States and *enabling their participation* in the framing of national laws and policies relating to social sector reforms in healthcare, education and welfare forms a strong theme running through this literature.⁴⁶⁵ Such participation may lead to a clearer articulation of legislative intent, therefore more capable of guiding the behaviour of the States.

This need to promote Centre-State consultation is finding greater expression in the current Government through a renewed emphasis on the idea of cooperative

⁴⁶³ *ibid* 26.

⁴⁶⁴ *ibid* 35.

⁴⁶⁵ Balveer Arora, 'India's Experience with Federalism: Lessons Learnt and Unlearnt' Paper presented at international seminar on 'Constitutionalism and Diversity in Nepal' (22-24 August 2007) <<http://www.uni-bielefeld.de/midea/pdf/Balveer.pdf>> accessed 1 March 2016; Yamini Aiyar et al, 'Rules vs. Responsiveness: Towards Building an Outcomes-Focused Approach to Governing Elementary Education Finances' (2014) PAISA, Accountability Initiative, Centre for Policy Research; 'Chapter 8: Union-State Relations' Report of the National Commission to Review the Working of the Constitution (2002).

federalism.⁴⁶⁶ As its principal push towards cooperative federalism, the Government touts the replacement of the Planning Commission⁴⁶⁷ with the NITI (National Institution for Transforming India) Aayog.⁴⁶⁸ The major change that the Government claims to have brought to the NITI Aayog is the creation of a Governing Council composed of the Chief Ministers of all the States. This is expected to build a partnership between the Centre and the States in contrast to the heavy-handed, top-down approach that the Planning Commission was often accused of.⁴⁶⁹

However, the NITI Aayog might not be as different from the Planning Commission as its proponents claim,⁴⁷⁰ with suggestions that it might actually create a greater centralisation of power.⁴⁷¹ From the point of view of the discussion in this thesis, the most telling similarity between the two bodies remains that they were both constituted by executive instruments in the form of Cabinet Resolutions.⁴⁷² Chapter 4 demonstrated that the overuse of such instruments contributes to fragmentation by

⁴⁶⁶ Indrani Dutta, 'Modi Calls for Cooperative Federalism' *The Hindu* (11 May 2015) <<http://www.thehindu.com/todays-paper/tp-national/modi-calls-for-cooperative-federalism/article7191442.ece>> accessed 1 March 2016.

⁴⁶⁷ The Planning Commission was first set up in 1950 through a resolution of the Government of India Secretariat. Composed of a mix of Union Ministers and bureaucrats with subject-matter expertise, the Planning Commission was set up as a specialised body to 'formulate a Plan for the most effective and balanced utilization of the country's resources.' (Cabinet Resolution No.1-P(C)/50). It soon came to occupy a powerful role in the disbursement of funds to the States and has even been said to have 'functioned as an alternative Cabinet'. See Rao and Singh (n 323) 54.

⁴⁶⁸ 'Planning Commission is now 'Niti Aayog'' *The Economic Times* (2 January 2015) <http://articles.economictimes.indiatimes.com/2015-01-02/news/57611317_1_narendra-modi-government-think-tank-niti-aayog> accessed 1 March 2016.

⁴⁶⁹ 'Reforming the Planning Commission' An Assessment by the Independent Evaluation Office (23 June 2014).

⁴⁷⁰ Rajesh Pandathil, 'Spot the Difference: NITI Aayog Looks Quite Like the Planning Commission' *Firstpost* (2 January 2015) <www.firstpost.com/business/spot-the-difference-niti-aayog-looks-quite-like-the-planning-commission-2026409.html> accessed 1 March 2016.

⁴⁷¹ Prabhat Patnaik, 'From the Planning Commission to the NITI Aayog' (2015) 50 *Economic and Political Weekly* 10.

⁴⁷² A series of Cabinet Resolutions have reconstituted the Planning Commission since 1950. A notification constituting the NITI Aayog was published in the Official Gazette on 7 January 2015.

creating legal uncertainty. The creation of the Planning Commission through a Cabinet resolution has long raised questions about its legal status, including constitutional propriety and accountability.⁴⁷³

This must also be considered in light of Article 263 of the Indian Constitution, which sets up the Inter State Council to facilitate precisely the kind of Centre-State consultation that the Planning Commission, and now the NITI Aayog are supposed to promote. Despite its superior Constitutional status, the Inter State Council has remained largely underutilised.⁴⁷⁴ Even now, despite the current Government's promises to revive the Inter State Council,⁴⁷⁵ it is the NITI Aayog—a non-statutory, extra-constitutional body—that continues to receive more attention than an existing constitutional mechanism.

The favour that previous Governments have shown the Planning Commission, and the current Government has bestowed on the NITI Aayog is very telling of their approach to institutional reform. Rather than analyse the working of existing institutions and strengthen them, there is a tendency to start over and set up new authorities. This tendency is displayed with worrying frequency in chapter 8 where I critically analyse environmental institutional reform proposals. As I argue in that chapter (in the context of the High-Level Committee Report), the *manner* in which reforms are introduced are as vital as their *content*.

With the Planning Commission/NITI Aayog reform, the Government has focused attention on institutional *structure*, rather than *process*, a theme that is

⁴⁷³ Independent Evaluation Office (n 469) 4-6.

⁴⁷⁴ Vidhi Report 18.

⁴⁷⁵ 'Cooperative Federalism Crucial for India's Progress, Says Home Minister Rajnath Singh' *The Indian Express* (12 December 2015) <<http://indianexpress.com/article/india/india-news-india/cooperative-federalism-crucial-for-indias-progress-says-home-minister-rajnath-singh/>> accessed 1 March 2016.

repeated in the reform proposals discussed in chapter 8. It has also chosen to effect this through an executive instrument rather than an existing Constitutional provision, casting doubt on its commitment to more permanent institutional reform. There is no attempt to clarify and demarcate the role and functions of the NITI Aayog in relation to the existing Inter-State Council,⁴⁷⁶ evidence of the tendency to contribute to fragmentation by creating multiple bodies with overlapping jurisdiction.

In this section, I have attempted to describe the manner in which India's federal system of Government might have a particular impact on fragmentation. The most obvious way in which this might manifest is through parallel Central and State regimes, although this is less likely to be a source of conflict in the Indian context. Nevertheless, even though there might be few direct clashes between Central and State laws, there are still multiple State regimes that are unevenly implemented and contribute to fragmentation. Tensions between Central and State political and economic goals also affect the uniform operation of laws across the country, especially those provisions that are concerned with the protection of social rights.

This is aggravated by the financial dependency of States on the Centre. Although there is strong Central assistance for schemes related to education, health and welfare, similar support has not been forthcoming to strengthen environmental administration at the State level. As a consequence, States are likely to sacrifice environmental concerns at the altar of revenue interests, a challenge that is discussed in more detail in the next section.

Institutional responses to federalism have usually taken the form of stronger consultative mechanisms, although the Government tends to favour superficial changes in structure over substantive changes to process. While academic literature on

⁴⁷⁶ Shyamlal Yadav, 'Lost in Translation: Is NITI Aayog a Commission or an Institution?' *The Indian Express* (18 February 2015) <indianexpress.com/article/india/india-others/lost-in-translation-is-niti-aayog-a-commission-or-an-institution/> accessed 2 March 2016.

federalism also focuses on creating more genuinely consultative procedures, attention on the role of legislation in addressing federalism remains limited. As I argue in Part III, a key response to fragmentation ought to be through a sharper articulation of objectives and principles. The expressive role that a clearly framed set of legislative goals can play in unifying Centre-State differences deserves more consideration.

The next section explores some of the ways in which these differences manifest and fragment Indian environmental law.

2. Federalism and Indian Environmental Law

The ‘environment’ as a discrete subject does not appear in any of the Lists in Schedule VII of the Indian Constitution. Instead, entries related to the environment are fairly evenly divided across all three Lists,⁴⁷⁷ a reflection of its inherent interconnectedness with other subjects. The entries in the Lists that have a bearing on the environment include atomic energy, maritime shipping, airways, inter-state rivers and mines in List I; public health and sanitation, water, and fisheries in List II; and factories, forests⁴⁷⁸ and the protection of wild animals and birds in List III.

Despite this relatively equal division of legislative power, the key environmental statutes occupying the field are all Central statutes.⁴⁷⁹ The Air Act, Environment Protection Act and Wildlife Protection Act were all passed by Parliament by exercising its legislative power under Article 253 of the Indian Constitution to give effect to decisions made at an international conference, the United Nations Conference on the Human Environment, 1972. Since ‘water’ is a

⁴⁷⁷ Divan and Rosencranz (n 8) 42-45.

⁴⁷⁸ ‘The Constitution (Forty-Second) Amendment Act, 1976 moved ‘Forests’ from List II to List III, extending the power to legislate on the subject to Parliament as well.

⁴⁷⁹ These are the Air Act, Environment Protection Act, Forest Conservation Act, Water Act and Wildlife Protection Act.

subject within the exclusive legislative competence of States under List II, the Water Act was passed by Parliament under Article 252 with the consent of two or more States. After the transfer of ‘forests’ from List II to List III by the Constitution (Forty-Second) Amendment Act, 1976, Parliament exercised its legislative competence to enact the Forest Conservation Act in 1980.

The other prominent laws related to the environment—the Indian Forest Act, the Biological Diversity Act, and the Forest Rights Act—are all Central laws as well. State legislation on environmental issues is restricted primarily to forest laws that regulate private forest land and the sale of timber and other forest produce. In more recent times, States have also passed laws or introduced bills to regulate and manage groundwater. Apart from these, there has been very little initiative on the part of States to legislate on environmental issues, and the manifestation of fragmentation as separate *statutory* regimes is limited, apart from the different State forest laws.

In an instance in which a State did demonstrate legislative initiative, the law was challenged on the grounds of legislative competence. The Kerala Protection of River Banks and Regulation of Removal of Sand Act 2001 was enacted by the State Government of Kerala purporting to exercise its legislative powers under entry 17 of List II.⁴⁸⁰ The challenge to the Act claimed that the real object of the legislation was not the protection of the ‘biophysical environment’ as its preamble claimed, but the regulation of sand mining, a subject that was already regulated under a Central law, the Mines and Minerals Act, which ‘occupied the field’ on the subject.⁴⁸¹ The Kerala

⁴⁸⁰ Entry 17 reads: ‘Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.’

⁴⁸¹ The doctrine of ‘occupied field’ is used to refer to those legislative entries in the State List that are subordinated to corresponding entries in the Union or Concurrent List. The example relevant to the case under discussion is Entry 23 of the State List, which confers power on State legislatures to regulate mines and mineral development, subject to Entry 54, List I, which empowers Parliament to regulate mines and mineral development in the public interest. When Parliament exercises this power, the State is deprived of legislative competence in that sphere. See V Niranjan, ‘The Constitution Bench

High Court disagreed and upheld the legislative competence of the State Government.⁴⁸² Its reasoning is a good example of the paradoxes that fragmentation exhibits, especially in the context of federalism.

The Court held that the ‘pith and substance’⁴⁸³ of the legislation related to environmental protection, rather than mineral extraction. Its reasoning signals that environmental protection concerns are not ancillary or incidental to the purpose of resource extraction. On the contrary, the result of the case demonstrates that these concerns can be of such overriding importance as to constitute the primary objective of the statute in question. Fragmentation is inherent in the scheme of separate legislative entries in Schedule VII. The Court’s response to this was to recognise the intrinsic connection between the protection of the environment and mining activities.

Paradoxically, this holistic interpretation of the Court also upheld multiple regimes on the same subject i.e. mining. In addition to the Mines and Minerals Act passed by Parliament, there would now be an additional State law governing the same activity in Kerala. The Government of Kerala would have the benefit of more progressive provisions that did not have counterparts in the Central law.⁴⁸⁴ The Court’s deliberate separation of the Central and State regimes thus allowed a higher standard of sustainable development to be applied by the Kerala Legislature with arguably more expert knowledge of the local environment than Parliament.

elides repugnance and occupied field’ *IndiaCorpLaw* (14 July 2012) <indiacorplaw.blogspot.in/2012/07/constitution-bench-elides-repugnance.html> accessed 18 August 2015.

⁴⁸² *Subramanian v State of Kerala* (2009) (1) KLT 77

⁴⁸³ Indian courts have borrowed the doctrine of ‘pith and substance’ from a Canadian case, *Union Colliery Co. of British Columbia Ltd. v Bryden* [1899] AC 580, 587. It is applied to resolve conflicts about legislative competence. Courts examine the ‘true character, object, scope and effect’ of a law in order to determine which of the entries on which of the three Lists in Schedule VII it relates to.

⁴⁸⁴ These included provisions for drawing up River Bank Development Plans (s 16) and fixing the price for sand removal only after taking into account the recommendations of expert committees (s 14).

The Court's reasoning also sends a strong signal to State Governments to take greater initiative in passing legislation on natural resources. It demonstrates that there is less likelihood of conflict with Parliamentary legislative competence if State legislation recognises and gives effect to the link between environmental and economic activities. Laws on mining need not address only administrative and commercial questions like the grant of licences and the fixing of royalties, but also ought to take into account the environmental effects of such activities.

In this particular decision, the Court upheld, with positive effect, a separate State regime on mining despite the existence of a Central law on the subject. However, separate State regimes may just as easily dilute environmental protection standards. Although the key environmental statutes are all Central laws, most of them, especially the Air Act, Water Act and Environmental Protection Act, delegate crucial functions to State authorities. State PCBs, for example, have the power to lay down standards for the discharge of emissions and effluents⁴⁸⁵ as well as the authority to grant licences for the operation of industries.⁴⁸⁶ They also have the power to specify more stringent standards for particular industries.⁴⁸⁷ It is revealing that a 2009 study by the Centre for Science and Environment⁴⁸⁸ evaluating the functioning of State Pollution Control Boards only assessed the time spent by the Boards on inspecting and monitoring. So rarely do Boards lay down or modify standards⁴⁸⁹ that this parameter was not even considered while analysing their functions.

⁴⁸⁵ S17(g) of both the Air Act and the Water Act.

⁴⁸⁶ Ss 21 and 25 of the Air and Water Acts respectively.

⁴⁸⁷ Environment (Protection) Rule, Rule 3.

⁴⁸⁸ Turnaround: Reform Agenda for India's Regulators (n 38).

⁴⁸⁹ 'CAG Raps Punjab Pollution Control Board' *The Hindu* (23 July 2014) <<http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/cag-raps-punjab-pollution-control-board/article6239426.ece>> accessed 4 March 2016. See also Comptroller and Auditor General of India,

State Boards function poorly in part because of the lack of skilled personnel and financial resources. Another reason highlighted in the report of the Centre for Science and Environment that is important in the context of federalism is the absence of guidance for the State implementation of Central legislation.⁴⁹⁰ Consequently, there are varying interpretations, across State Boards, of their minimally defined functions in Central laws. This bears out the point made in chapter 3 about bare-boned legislation contributing to fragmentation. In this example, this particular manifestation of fragmentation only becomes more pronounced because of the Centre-State dynamic.

There is more scope for fragmentation because of the division of regulatory powers between the Centre and the States under the EIA Notification. As mentioned in chapter 4, the Centre, through the MoEFCC, has the power to grant environmental clearances for Category A projects, while State Environment Impact Assessment Authorities perform the same function for Category B projects.⁴⁹¹ There have been several clashes between the Centre and the States regarding these clearances. The Centre has often put a stop to projects that have received clearance at the State level, although there are indications that this might have more to do with strategic

'Performance Audit of Water Pollution in India' Report No. 21 of 2011-12. An example of a rare exception is the decision of the West Bengal Pollution Control Board to issue more stringent noise pollution control standards. See Polash Mukherjee, 'Bengal Shows the Way Forward to Reduced Fireworks Noise Standard on Diwali' *Down to Earth* (30 October 2015) <<http://www.downtoearth.org.in/news/bengal-shows-the-way-forward-to-reduced-fireworks-noise-standard-51653>> accessed 4 March 2016.

⁴⁹⁰ Turnaround: Reform Agenda for India's Regulators (n 38) 39.

⁴⁹¹ The Schedule to the EIA Notification classifies projects into these categories 'based on the spatial extent of potential impacts and potential impacts on human health and natural and man-made resources.' Category A projects, that require environmental clearance from the Centre, are either larger in capacity or more likely to have an impact on the environment because of their special nature or location. Examples include the petroleum refining industry or projects at inter-State boundaries.

considerations rather than a higher regard for environmental protection than the States.⁴⁹²

The influence of such strategic considerations on State authorities while granting environmental clearances is more evident, and has been advanced by civil society activists as an argument against the devolution of more regulatory powers to the States.⁴⁹³ Although, in theory, the Centre ought to be less susceptible to local political and economic pressures than State Governments,⁴⁹⁴ there is nothing in the operation of the EIA Notification to suggest that the Centre is more willing to enforce environmental safeguards.⁴⁹⁵ In the northeastern States in particular, a tussle is taking place between the Central and State Governments for the control of natural resources, with commercial interests masquerading as concern for the community rights of the indigenous people of that region.⁴⁹⁶

The weak implementation of environmental legislation is not exclusively a Central or a State problem. Implementation clearly varies across State Governments, and in that sense, creates multiple, fragmented regimes, although there is an underlying uniformity in their weakness. There are few incentives at the State level to enforce even minimum levels of protection, leave alone prescribe more stringent ones.

⁴⁹² Sidhhartha Saikia, 'Government rejects Vedanta's Niyamgiri Mining Project' *The Hindu Business Line* (12 January 2014) <<http://www.thehindubusinessline.com/economy/govt-rejects-vedantas-niyamgiri-mining-project/article5570028.ece>> accessed 21 April 2016. One of the earliest instances of this was the Silent Valley electricity generation project in Kerala, which was ultimately scrapped by the State Government, responding to pressure from the then Indian Prime Minister, Indira Gandhi. For a fuller account of the influence of the Prime Minister and her apprehension of international disapproval, see Darryl D'Monte, *Temples or Tombs: Industry versus Environment, Three Controversies* (Centre for Science and Environment, 1985).

⁴⁹³ Shibani Ghosh, 'Demystifying the Environmental Clearance Process' (2013) 6 National University of Juridical Sciences Law Review 433, 460.

⁴⁹⁴ *ibid* 462.

⁴⁹⁵ Manju Menon and Kanchi Kohli, 'From Impact Assessment to Clearance Manufacture' (2009) 44 *Economic and Political Weekly* 20.

⁴⁹⁶ Kumar Sambhav Srivastava, 'Battle Over Oil, Coal and Forest' *Down to Earth* (31 October 2014) <<http://www.downtoearth.org.in/coverage/battle-over-oil-coal--forests-46903>> accessed 5 March 2016.

Central laws that lack detail and are unable to provide direction to State Governments only make these fault lines sharper. Competing legislative competencies and the lack of coordination between Central and State authorities contribute to this fragmentation. Some of these observations are fleshed out in the case study in the next section.

C. Case Study: Compensatory Afforestation

1. Statutory and Regulatory Framework

The Centre and the States both have the legislative competence to pass laws relating to compensatory afforestation by virtue of Entry 17A—Forests—in List III of the Seventh Schedule of the Indian Constitution. As mentioned in section B, many States have already exercised this power to pass laws that regulate forest produce and private forests. In 1980, the Centre also exercised this power and enacted the Forest Conservation Act, which transformed the governance of forests in the country until the Supreme Court’s order in the landmark *Godavarman* case in 1996.

The Forest Conservation Act vested virtually near-complete control over the use of forests in the Central Government. S 2 of the Act requires the State Government or any other authority to obtain the prior approval of the Central Government before making the following orders: a) for the dereservation of a reserved forest b) allowing the use of forest land for a non-forest purpose; c) permitting the lease of forest land to a private person, corporation or agency; and d) clearing naturally grown trees in forest land for the purpose of reforestation.

The Act defines ‘non-forest purpose’ as the ‘breaking up or clearing of any forest land or portion thereof’ for the cultivation of certain specified crops or for any purpose other than reforestation. Works that are incidental to forest conservation such as the maintenance of communication lines and fences do not constitute a non-

forest purpose. S 3 of the Act constitutes a Forest Advisory Committee⁴⁹⁷ to make recommendations to the Central Government regarding the grant of approvals to State Governments for the diversion of forest land.

The statute makes no mention of compensatory afforestation. Until 2014, the Forest (Conservation) Rules, 2003 referred to compensatory afforestation only in an Appendix that contained the form to be submitted in order to obtain approval for the diversion of forest land. Part-I of the form required the ‘user agency’⁴⁹⁸ to submit an undertaking to bear the cost of raising and maintaining compensatory afforestation according to the terms of the scheme prepared by the relevant State Government.

Part-II of the form required the Deputy Conservator of Forests to set out the details of the compensatory afforestation scheme⁴⁹⁹ for a particular project, as well as the progress made on compensatory afforestation in the district/division as a whole. These details were then to be forwarded to the Central Government, represented by the MoEFCC, which would make its decisions after considering the recommendations of the Forest Advisory Committee.⁵⁰⁰

It was only as recently as 2014 that a more concrete reference to compensatory afforestation was made in the Forest Conservation Rules through an amendment. The 2014 amendment expands the various factors that the Forest Advisory Committee ought to have due regard to while making recommendations for the diversion of forest land. One of these, listed in Rule 7(4)(e)(iv) requires the Committee to consider

⁴⁹⁷ The Forest Conservation Rules define the composition of the Forest Advisory Committee. Its members either occupy official Government positions or are experts in mining, civil engineering and development economics. There is no representative from civil society or indigenous communities.

⁴⁹⁸ Rule 2(h) defines this term to include any person, organisation or department of Government seeking the diversion of forest land for non-forest purposes.

⁴⁹⁹ These details included a map of the area identified for compensatory afforestation, species to be planted, timelines and total financial outlay.

⁵⁰⁰ Rule 6 of the Forest (Conservation) Rules, 2003 before amendment in 2014.

whether the State Government in question undertakes to provide, at its own cost, for the acquisition of an equivalent area of land and its afforestation. If a private user agency, rather than the State Government is applying for the diversion of forest land, it will bear the cost of compensatory afforestation.

Under the new procedure, the Central Government, through the MoEFCC, grants in-principle approval or refuses an application for the diversion of forest land after taking into account the advice of the Forest Advisory Committee.⁵⁰¹ Carrying out compensatory afforestation is one of the conditions on the basis of which this approval is granted. The approval is then relayed to the relevant Divisional Forest Officer, appointed by the State Government. It is this officer who prepares a comprehensive demand note of the amount of compensatory levies⁵⁰² that the user agency must pay, along with a list of documents, certificates and undertakings that the user agency must submit. The user agency must pay these levies within 30 days and demonstrate documentary evidence of such payment.

A report of this compliance by the user agency then makes its way up a chain of authorities until it is finally approved or rejected by the Central Government. The report must demonstrate compliance not only with the conditions set down in the in-principle approval, but also with statutes, circulars and directives that may come into force after the in-principle approval is granted.⁵⁰³

⁵⁰¹ In case of proposals involving less than 40 hectares of land, the Central Government makes its decision based on the recommendations of a Regional Advisory Group that comprises officials from the same departments as those on the Forest Advisory Committee, the only difference being that the former are all officials of the State, rather than Central Government.

⁵⁰² Rule 8 (1) (b) sets out the break-up of these levies: cost of creating and maintaining compensatory afforestation, Net Present Value (a term defined by the Indian Supreme Court in a 2005 judgment, discussed later), and the cost of the implementation of a catchment area treatment plan or wildlife conservation plan.

⁵⁰³ Rule 8 (3) (b).

The Forest Conservation Rules represent only one half of the legal framework on compensatory afforestation. Until 2014, when the law on compensatory afforestation was consolidated somewhat through the amendment to the Forest Conservation Rules, the orders of the Supreme Court in *Godavarman* governed the diversion of forest land and compensatory afforestation. These are critically analysed below, but first, some observations on the framework under the Forest Conservation Act and its connection with fragmentation and the environmental rule of law are in order.

Compensatory afforestation is the bedrock of the forest diversion process. In practice, forest land cannot be diverted unless an undertaking to carry out compensatory afforestation is obtained from the user agency. Yet, the centrality of this obligation, both for the Government (which must demand compensatory afforestation before allowing diversion) and for the user agency (which must provide a financial undertaking for it), is not reflected in the primary legislative text. Instead, this important condition is expressed as such only in *guidelines* on compensatory afforestation issued by the MoEFCC in 2004.⁵⁰⁴ The failure to express this crucial obligation in a *legislative* instrument assumes significance in light of the widespread non-compliance across different State Governments described in a later section.

The guidelines themselves are easily amended. Since 2004, when the first set of guidelines were issued by the MoEFCC, clarifications and amendments related to these guidelines have been issued at least 24 times until March 2016.⁵⁰⁵ The nature of these clarifications and amendments reflects one of the problems of Indian federalism discussed earlier in this chapter i.e. when uniform, Centrally-imposed provisions are

⁵⁰⁴ Guidelines for Compensatory Afforestation (Ministry of Environment and Forests 2004).

⁵⁰⁵ A complete list of the guidelines is available on the MoEFCC website at <<http://forestsclearance.nic.in/Guidelines.aspx>> accessed 13 March 2016.

unable to take into account regional variations. More than half the clarifications were issued in response to State Governments requesting accommodation for the particular topography and vegetation within their jurisdiction.

For example, the 2004 guidelines require compensatory afforestation to be carried out on non-forest land of an equivalent area. Only when non-forest land is not available may compensatory afforestation be carried out on degraded forest land, subject to other conditions specified in the guidelines. One of these conditions is that State Governments are required to provide certification of the non-availability of non-forest land. However, only State Governments where the forest land covered more than 50% of the total geographical area were allowed to provide this certification (although this particular condition found no mention in the original 2004 guidelines). This restriction had to be modified following representations by several State Governments, who argued that it would be more realistic to allow States with areas that had more than 33% forest cover to provide certification of the non-availability of forest lands.⁵⁰⁶

Similarly, States have also requested repeated clarifications regarding the manner in which rates for compensatory afforestation are fixed for different categories of forests,⁵⁰⁷ although this is more the result of a top-down Supreme Court order (discussed below) rather than Central guidelines. Nevertheless, it is yet another example of Centre-State differences creating problems with implementation—in this case, because of the Supreme Court’s lack of local knowledge.⁵⁰⁸

⁵⁰⁶ ‘Guidelines for diversion of forest land for non-forest purpose under Forest (Conservation) Act, 1980-Non-availability of non-forest land for creation of compensatory afforestation-*reg* (7 November 2014)

⁵⁰⁷ ‘Guidelines for diversion of forest land for non-forestry purposes under Forest (Conservation) Act, 1980-Guidelines for collection of Net Present Value (NPV) (5 February 2009)

⁵⁰⁸ See also Lele (n 109) 2381, who argues that the Supreme Court’s simple binary distinction between ‘forest’ and ‘non-forest’ failed to capture the ecological and social complexities of forests.

Fragmentation is also evident in the number of piecemeal exemptions that have been made to the guidelines. These exemptions usually take the form of relaxing the requirement to produce a certificate of non-availability of non-forest land from the State Government and allowing compensatory afforestation to be undertaken on degraded forest land instead. These exemptions are usually provided for particular kinds of projects like strategic defence projects and border infrastructure projects.⁵⁰⁹ The circulars relaxing the requirements of compensatory afforestation do not provide a considered statement of reasons for the relaxation, apart from perfunctory acknowledgment of the need to expedite defence-related projects.

The lack of reasoned decision-making by the executive can be traced to the complete absence of direction or guidance in the Forest Conservation Act or Rules. Neither of these instruments provides any indication of the different factors that ought to be taken into account in order to determine whether a particular scheme of compensatory afforestation is sufficient to offset the ecological loss caused by the diversion of forest land. The specifications that such schemes must comply with are set out in the guidelines, but even here, the emphasis is on technical details. There is no higher order principle that expresses the balance struck by the legislature or by the courts between forests and developmental interests, and which is capable of guiding the exercise of discretion by the MoEFCC. Apart from federalism, these are all also examples of the weakening of the environmental rule of law according to the indicators established in chapter 3.

⁵⁰⁹ Guidelines issued under the Forest (Conservation) Act, 1980 for diversion of forest land for non-forest purpose- Special provision for creation of compensatory afforestation in lieu of forest land diverted for creation of strategic defence projects (including infrastructure and road projects) being taken up in the area located within 100 km. aerial distance from of the Line of Actual Control (LAC) by any user agency identified by the Ministry of Defence (4 July 2014).

Moreover, given the essentiality of the obligation of compensatory afforestation to the process of forest diversion, it is difficult to point to the legal authority under which the MoEFCC awards exemptions from, or dilutes the requirements of the obligation.⁵¹⁰ (Of course, in part this also stems from the fact that the obligation to conduct compensatory afforestation itself does not find satisfactory expression in the primary or secondary legislative text, and until 2014, had virtually no expression at all except through Supreme Court orders and *ad hoc* guidelines).

Changes to the guidelines have also been piecemeal because the MoEFCC, in most instances, has been responding to orders of the Supreme Court⁵¹¹ in the *Godavarman*.⁵¹² The orders in this case constitute the second half of the legal framework on compensatory afforestation, and the provisions discussed above cannot be understood without appreciating the manner in which these orders have framed the regime on compensatory afforestation.

⁵¹⁰ For example, para 3.2(viii) of the 2004 MoEFCC Guidelines provides that compensatory afforestation is not to be insisted upon in certain enumerated cases (underground mining below 3 metres, renewal of mining leases) without providing any rationale for the exemption.

⁵¹¹ See F.No. 5-1/98-FC (Pt. II), 'Guidelines for Collection of Net Present Value-in case of Projects Engaged in Production of Wind Energy by Developing of Wind Farming on Forest Land' (29 December 2008) and F.No. 5-2/2006-FC, 'Recovery of Net Present Value (NPV) of the Forest Land Diverted under the Forest (Conservation) Act, 1980 in Compliance of the Order dated 15th September 2006 of the Hon'ble Supreme Court of India' (3 October 2006).

⁵¹² This case, which constituted a turning point in the forest governance of the country, initially began with a petition filed by a public-spirited individual who came across timber being felled in violation of legal provisions as he travelled through the Nilgiri forests in south India. The Supreme Court dramatically expanded the scope of the petition and in a far-reaching order passed on 12 December 1996, redefined the manner in which forests were understood under the Forest Conservation Act. It also effectively wrested superintendence of forest management functions from the executive and skewed the balance of power even more in favour of the Central Government over the State Governments. For a comprehensive account of the case, see Dutta and Yadav (n 107).

2. Court Orders in *Godavarman*

The literature already contains excellent factual reports of the Court's orders on compensatory afforestation and their implementation.⁵¹³ Since it is beyond the scope of this thesis to present an exhaustive account of each of the Court's orders (numbering well into the hundreds), I draw on these existing reports for the limited purpose of analysing some of the most prominent orders of the Court and considering whether they have had a fragmenting or unifying effect on the law on compensatory afforestation. The first of these orders is analysed in depth along the lines of the judgments analysed in chapter 6 to demonstrate the manner in which judicial reasoning weakens the environmental rule of law as well as to highlight fragmentation in cases involving Centre-State issues. The remaining orders are considered more briefly.

One of the first orders of the Court on compensatory afforestation is dated 8 September 2000 and was passed in Interim Application No. 574, filed by M/s. South Eastern Coalfields Ltd. The applicant requested permission to fell trees on forest land diverted for mining activities. It argued that permission ought to be granted since it had already deposited the money required to undertake compensatory afforestation with the relevant State Government. This application was filed when the Forest (Conservation) Rules, 1981 were in force. These rules were similar to the 2003 version that required the State Government applying for approval to furnish details of the compensatory afforestation scheme to the Central Government.

The Court carefully set out the legal framework contained in the Rules. The question that the Court framed for consideration was whether the practice by which

⁵¹³ Kanchi Kohli, Manju Menon, Vikal Samdariya and Sreetama Guptabhaya, 'Pocketful of Forests: Legal Debates on Valuating and Compensating Forest Loss in India' (Kalpavriksh and WWF-India 2011); Srilekha Sridhar, 'Compensatory Afforestation and Net Present Value Payments for Diversion of Forest Land in India' (Kalpavriksh 2012).

the applicant deposited money for compensatory afforestation with the State Government, following which the responsibility for carrying out such afforestation vested in the State Government, was in compliance with the Forest Conservation Act and Rules. It is important to note that at the time in question, there was no provision in the Act or rules that set out the manner in which compensatory afforestation was to be undertaken. The convention under which the applicant bore only the financial obligations of compensatory afforestation, rather than carrying out the activity itself, had arisen wholly independently of any statutory or regulatory provisions.

The question before the Court, then, was one that required it to determine whether this practice complied with the spirit, rather than the letter of the law. This was an important interpretive question, and had the Court applied its mind to it rigorously, it would have had the opportunity to define the contours of important environmental principles like sustainable development and clarify the object and purpose of the Forest Conservation Act with specific reference to compensatory afforestation. However, there is no mention of any Constitutional provision or environmental principle in the Court's order, nor is there any reliance on a specific provision of the Forest Conservation Act to justify the directions that the Court ultimately issued.

Instead, the order seems based purely on the judges' own sense of what the process of compensatory afforestation ought to entail. The judges stated that they *felt* (emphasis supplied) that the primary responsibility for carrying out compensatory afforestation ought to vest in the applicant, rather than the State Government. What the Court did in effect was to recommend an amendment to the Rules to create a new obligation that did not currently find expression there. The Court essentially performed a legislative function, and made other recommendations to the Central

Government about updating rules and guidelines on compensatory afforestation that were even more detailed.

It recommended that: a) an environmental audit be conducted annually and its results published; b) that the non-forest activity be suspended if the survival rate of trees did not meet the specified mark; and c) that the Central Government ought not to grant permission to dereserve forest land until it had satisfied itself that the applicant really was in a position to carry out compensatory afforestation.

One of the recommendations of the Court even contradicted a provision in the existing guidelines that required the State Government to create a special fund in which an applicant could deposit the money required for compensatory afforestation. Given that the Court had recommended that the applicant should bear more than merely the financial responsibility for the afforestation, it suggested that such a fund might not be necessary. The Additional Solicitor General requested, and was granted time to consider the recommendations of the Court before amending the Rules and guidelines.

There are mixed effects that this order of the Court has on the fragmentation of the legal framework on compensatory afforestation. On the one hand, its meticulous detailing of the Forest Conservation Rules in the initial part of the order indicated a willingness to engage with the statutory and regulatory framework, an important indicator of adherence to the environmental rule of law. However, the Court did not maintain this engagement. It did not ground its recommendations for amending the Rules and guidelines in legal norms of any order, whether international, Constitutional or statutory.

Secondly, the language of the Court's order (another indicator identified in chapter 3 as related to the environmental rule of law) contributed to the already

uncertain legal hierarchy. The practice that was in question before the Court (i.e. the State Government carrying out compensatory afforestation after the applicant had fulfilled the financial undertaking) had no legal backing and was not grounded in the Forest Conservation Act, Rules or guidelines. When the Court made *recommendations* to amend the provisions of the Rules and guidelines, it compounded this uncertain legal hierarchy. Instead of making an authoritative pronouncement on the question at hand, the Court threw into doubt existing provisions in the Rules and guidelines by suggesting new changes that were not demonstrably linked to any legal source.

It could be argued that the Court was only facilitating dialogue between the institutions of government by making *recommendations* to amend the Rules and guidelines. However, the specificity of its suggestions does not bear this argument out. Through this order, the Court virtually usurped the functions of the legislature and executive rather than providing principled guidance and direction to them. As I have already described in the previous section, it is orders like this that have had an impact on the haphazard, fragmented manner in which the MoEFCC has gone about framing and updating Rules and guidelines under the Forest Conservation Act.

Through its later orders, the Court almost single-handedly drove the regime on compensatory afforestation. First, it appointed the Central Empowered Committee⁵¹⁴, which filed a report on the state of compensatory afforestation in India and highlighted the fact that a significant proportion of compensatory afforestation funds remained unutilised by State Governments. The recommendations of this Committee ultimately prompted the Court to order the creation of a Compensatory Afforestation

⁵¹⁴ *Godavarman* Order dated 9 May 2002.

Management and Planning Authority ('CAMPA')⁵¹⁵ to oversee the collection, disbursal and utilisation of compensatory afforestation funds across the Centre and the States. The MoEFCC finally responded to this order in 2004 by issuing a notification to create the CAMPA.⁵¹⁶ This notification was challenged in Court on various grounds including the question of parliamentary control that could be exercised over a body created through a notification.⁵¹⁷ The Court dismissed this challenge on the ground that there were sufficient provisions in the notification to ensure accountability,⁵¹⁸ thereby perpetuating the *ad hoc* mode of governance that has characterised compensatory afforestation.

Even after this order of the Court, the MoEFCC failed to set up the CAMPA. Concerned about the non-utilisation of compensatory afforestation funds that had been collected, the Court passed yet another order⁵¹⁹ directing the MOEFCC to create an *ad hoc* CAMPA. It took another two years for the MoEFCC to comply and set up this *ad hoc* body.⁵²⁰ In the meantime, debate about the formal institutionalisation of CAMPA continued with the introduction of the Compensatory Afforestation Fund Bill 2008. The Bill was rejected by a Parliamentary Standing Committee Report,⁵²¹ which criticised the centralisation of power and authority that the Bill created as a

⁵¹⁵ *Godavarman* Order dated 30 October 2002.

⁵¹⁶ CAMPA Notification 2004 dated 23 April 2005.

⁵¹⁷ Sridhar (n 513) 5.

⁵¹⁸ *ibid.*

⁵¹⁹ *Godavarman* Order dated 15 September 2006.

⁵²⁰ Sridhar (n 513) 5.

⁵²¹ Department-Related Parliamentary Standing Committee on Science, Technology and Forests, 'One Hundred and Ninety Fourth Report on Compensatory Afforestation Fund Bill 2008' (2008).

violation of the federal spirit of the Indian Constitution.⁵²² The Bill was also criticised for its ‘economic or quantitative lens’ by attaching a monetary value to the loss of biodiversity.⁵²³

Apart from this tussle between the Centre and the States over the management of compensatory afforestation funds, the 2013 CAG Report mentioned in chapter 4⁵²⁴ reveals a woeful lack of coordination between the MoEFCC and State Governments and highlights the effect that this has had on the successful implementation of the compensatory afforestation mechanism. The CAG report highlighted serious problems with the unauthorised diversion of forest land, especially in the case of mining operations, as well as the operation of the compensatory afforestation process.

Seven States had carried out no compensatory afforestation at all and the overall rate of utilisation of compensatory afforestation funds was only 61 percent.⁵²⁵ There was considerable discrepancy in the data maintained by the MoEFCC and State Governments regarding the areas of forest land diverted and non-forest land received for compensatory afforestation. The MoEFCC had failed to monitor compliance with the conditions attached to forest clearance, and despite evidence of gross violations, had failed to take any enforcement action. Finally, the CAG observed that the failure

⁵²² It is important to note that this centralisation of power has its origins in a Supreme Court order dated 25 September 2005, where the Court rejected the claims of State Governments that compensatory afforestation payments be made to them rather than to a Central body. See Kanchi Kohli, ‘Institutionalising Compensation for Lost Forests’ *India Together* (17 August 2008) <<http://indiatogether.org/campa-environment>> accessed 20 April 2016.

⁵²³ Kanchi Kohli and Manju Menon, ‘Forest Clearance Made Sulabh’ *Business Standard* (14 September 2008) <http://www.business-standard.com/article/opinion/kanchi-kohli-manju-menon-forest-clearance-made-sulabh-108091401014_1.html> accessed 20 April 2016.

⁵²⁴ CAG report (n 328).

⁵²⁵ Executive Summary, CAG Report.

to provide a legal framework for the CAMPA had in its opinion ‘severely hampered the compensatory afforestation activities in India.’⁵²⁶

The observations in the CAG Report are therefore a good example of the manner in which already existing tensions and poor communication between the Centre and the States in India’s federal system may be aggravated by a system of governance that is predominantly dependent on instruments of uncertain legal status. In 2015, Parliament made one more attempt to institutionalise the regime on compensatory afforestation and introduced the Compensatory Afforestation Fund Bill 2015. This Bill creates permanent Central and State authorities to receive and disburse compensatory afforestation funds, and therefore partially addresses the criticism that was leveled against the 2008 Bill for disrespecting the federal division of powers. However, the thrust of the Bill remains the reform of *structures* rather than *processes* related to compensatory afforestation, a common theme of environmental institutional reform in India, as I describe in chapter 8. Bearing in mind the findings of the CAG report, the reforms that are required are the imposition of stricter controls over the diversion of forest land, to be accomplished at least partially by converting existing guidelines to binding legal obligations both for the Government as well as for private actors.⁵²⁷

D. Conclusion

In this chapter, I have demonstrated that fragmentation assumes new dimensions in the context of India’s federal structure of government. In particular, the implementation of environmental law across Central and State regimes reveals that a

⁵²⁶ *ibid* xiv.

⁵²⁷ Vidhi report, ‘Tightening Forest Diversion and Compensatory Afforestation Processes’ 34.

certain degree of fragmentation is desirable. As the consequences of the Supreme Court's orders in the case study on fragmentation demonstrate, a centralising effect, even if it produces uniformity, can have negative implications for implementation. Some measure of separation must be maintained between Central and State regimes, to allow State Government the autonomy to make decisions about their local environments. The challenge lies in maintaining uniformly high standards of environmental protection, and ensuring constructive dialogue between the Centre and the States. Environmental institutional reform proposals must particularly take account of this latter requirement.

While multiple regimes and authorities might be a healthy outcome in the context of Indian federalism, the absence of statutes with clearly articulated goals and the issuing of unreasoned executive orders have the same effects on the environmental rule of law across Central and State regimes as they do in other contexts. Therefore, the critique of environmental legal and institutional reform proposals in chapter 8 is of equal relevance to Centre-State fragmentation. However, the inherent limitations of *legal* solutions to the kind of fragmentation described in this chapter must be recognised, since federalism cannot be divorced from its socio-political context.

**PART III: ADDRESSING THE WEAKENING OF THE ENVIRONMENTAL
RULE OF LAW**

CHAPTER EIGHT: ENVIRONMENTAL LEGAL AND INSTITUTIONAL REFORM PROPOSALS

A. Introduction

Part II demonstrated the link between the rule of law, the separation of powers, fragmentation, and the poor implementation of Indian environmental law. In particular, it showed the connection between the failure of the institutions of government in performing their respective roles in the development of environmental law and its coherence. The absence of clearly articulated legislative goals, the overuse of executive instruments to substantively advance the law, and judicial decisions that are weakly rooted in the existing statutory and regulatory framework were identified as some of the specific contributors to the law's fragmentation.

It is evident that the manner in which the legislature, the executive and the judiciary frame, implement and interpret the law respectively has a vital bearing on its coherent development. An analysis of institutional reform proposals and their capacity to address fragmentation is therefore a logical extension of the discussion in Parts I and II, and forms the focus of this chapter.

Reform proposals that have been made so far have not deliberately targeted fragmentation or identified its underlying reason as institutional failure in maintaining the environmental rule of law as it has been conceptualised in this thesis. The reforms have all, however, attempted to address some aspect of the poor implementation of Indian environmental law, broadly mirroring some of the specific examples of fragmentation described in Part II. A discussion of key features of these reforms therefore sheds light on the manner in which the Government, academia and civil society (all of whom have contributed to these reforms), understand this problem.

In section B, I provide an overview of key institutional reforms proposed in the context of Indian environmental law. These are primarily Government-initiated proposals in the form of expert committee reports and changes suggested by the Planning Commission and the Law Commission of India. Where relevant, I also discuss the responses of civil society organisations to such proposals and briefly mention reform measures that have been suggested by the courts over the years. The aim of this exercise is to assess whether these proposals grasp the underlying nature of the problem posed by fragmentation, i.e. the inability of the legal instruments of the three institutions of government to match the indicators of a strong environmental rule of law established in chapter 3.

In section C, I examine in depth the most recent reforms that were proposed in a report released in October 2014 by the High-Level Committee ('HLC') constituted by the MoEFCC.⁵²⁸ The Parliamentary Standing Committee on Science, Technology, Environment and Forests has since comprehensively rejected this report.⁵²⁹ However, the current Government has indicated that the reforms proposed by the HLC will still remain under consideration,⁵³⁰ and has also drafted legislation that partially gives effect to them.⁵³¹ This makes the HLC report relevant for the purposes of the discussion in this chapter.

⁵²⁸ Report of the High Level Committee to Review Various Acts Administered by Ministry of Environment, Forests and Climate Change (2014) ('HLC report').

⁵²⁹ Department-Related Parliamentary Standing Committee on Science and Technology, Environment and Forests, 'Two Hundred Sixty Third Report on High Level Committee Report to Review Various Acts Administered by Ministry of Environment, Forest and Climate Change' (July 2015)

⁵³⁰ Nitin Sethi, 'House Panel rejects Subramanian report on overhaul of green laws' *Business Standard* (New Delhi 25 July 2015) <www.business-standard.com/article/economy-policy/house-panel-rejects-subramanian-report-on-overhaul-of-green-laws-115072401351_1.html> accessed 4 November 2015.

⁵³¹ The draft Environment Laws (Amendment) Bill 2015 was published by the MoEFCC on its website on 7 October 2015.

I examine the HLC report separately and in greater detail than the other expert committee reports in section B because of the different political climate in which it was produced. Under the current Government, there has been a lot of rhetoric about institutional reforms that will reduce the regulatory barriers to investment that are created by environmental laws.⁵³² The reforms proposed in the HLC report, such as introducing a ‘single window’ environmental clearance system as well as enacting an ‘umbrella’ law both *appear* to be targeting fragmentation, with their emphasis on simplification, streamlining and unification. However, given that the underlying motivation of these reforms appears to be the creation of a more business-friendly environment,⁵³³ I question whether these reforms are able to appreciate the complexity of fragmentation or whether they are merely cosmetic attempts to consolidate and speed up disparate aspects of the environmental regulatory process.

B. Criteria for Analysis

In this section, I explain the criteria that are employed to critically analyse environmental institutional reform proposals and assess their capacity to address the underlying reason of fragmentation. I classify the principal recommendations in these proposals using criteria that are designed to assess the extent to which reform

⁵³² Mayank Aggarwal, ‘Environment Ministry Says Now up to Industry to Perform’ *LiveMint* (7 January 2015) <<http://www.livemint.com/Home-Page/dNoiuh81C0RfKHrVQC57qN/PMGreenClearance.html>> accessed 4 November 2015; Nitin Sethi, ‘Centre to Overhaul Green Laws for ‘Ease of Business’’ *Business Standard* (New Delhi 6 April 2015) <http://www.business-standard.com/article/economy-policy/centre-to-overhaul-forest-laws-for-ease-of-business-115040600024_1.html> accessed 4 November 2015.

⁵³³ The incumbent Minister of Environment, Forests and Climate Change, Prakash Javadekar, has made several public statements of his Ministry’s intention to shed the label of ‘roadblock Ministry’. He claims that this label was acquired under the previous Government because of the number of development projects that were held up because environmental clearances were pending. See ‘Environment Ministry No More a Roadblock Ministry: Prakash Javadekar’ *The Economic Times* (New Delhi 16 October 2015) <<http://economictimes.indiatimes.com/news/politics-and-nation/environment-department-no-more-a-roadblock-ministry-prakash-javadekar/articleshow/49422027.cms>> accessed 11 November 2015.

proposals recognise, understand and are designed to address the institutional weaknesses that have contributed to fragmentation.

Government-appointed expert committees have primarily framed reform proposals, and I focus on four, major reports that have been published within the last fifteen years by the Planning Commission, the Law Commission of India ('LCI') and two other discussion papers/studies commissioned by the MoEFCC.⁵³⁴ There have, of course, been other proposals,⁵³⁵ but I choose to focus on these because they are the most comprehensive in their breadth. The responses of civil society and academia are discussed in response to these proposals, especially the last two reports of the MoEFCC. I conclude with some directions and observations made by the Supreme Court in its judgments in the specific context of environmental regulatory reform.

The proposals are categorised according to the institution of Government that they address—legislative, executive or judicial. In this chapter, I demonstrate that reforms have focused on the latter two institutions, with legislative changes only forming a necessary adjunct to the changes within the other two institutions. In some instances, even these instrumental legislative changes (in the form of amendment and repeal) that the appointment of a new regulator or court require, are absent.⁵³⁶

Each institutional reform is further classified into structural and process reforms. Structural reforms refer to those that focus on the composition and manner of appointment of different authorities. These reforms are assessed according to the

⁵³⁴ The Planning Commission and LCI are Government-appointed bodies rather than expert committees, but have been grouped together with the other committees for the sake of convenience.

⁵³⁵ Department-Related Parliamentary Standing Committee on Science, Technology, Environment and Forests, 'One Hundred and Ninety Second Report on Functioning of Central Pollution Control Board' (Rajya Sabha Secretariat 2008); Reports of the Task Forces on Governance, Transparency, Participation and Environmental Impact Assessment and Urban Environmental Issues (Shekhar Singh Committee Report, Planning Commission 2007). For a chronological list of proposals to set up independent environmental regulatory authorities, see Shibani Ghosh, 'The National Environment Assessment and Monitoring Agency: A Step Forward?' (2011) 46 *Economic and Political Weekly* 12.

⁵³⁶ Section D(2).

weight given to technical expertise in the composition of authorities, the degree of independence of these authorities (usually from the executive), and their regional distribution (whether the effect of the reform is to centralise environmental administration or to devolve greater power to the States and local authorities). As I demonstrated in Parts I and II, all of these factors are integrally linked to the environmental rule of law and the separation of powers. I also attempt to document whether the structural reforms in question add to, or reduce the number of existing authorities, an important factor in the context of fragmentation, which is characterised by a multiplicity of authorities.

Process reforms refer to recommendations regarding the manner in which environmental authorities ought to carry out their role in developing and administering environmental law. Thus, reforms are assessed according to the clarity with which the role and jurisdiction of these authorities is defined, the extent to which participatory decision-making is encouraged (the different kinds of stakeholders that authorities are required to consult), the degree of accountability required of these authorities (whether they are required to furnish reasons for their decisions, whether their decisions are subject to review), and the guidance that they offer for environmental decision-making (the principles that ought to be applied, the factors that ought to be taken into account). All these criteria have a bearing on the legal *quality* of legislative, executive and judicial instruments and as is evident, are linked to the indicators established in chapter 3.

C. Overview of Reform Proposals

Pollution Control Boards ('PCBs') have traditionally formed the focus of expert committee reports as well as independent recommendations on environmental

regulatory reform.⁵³⁷ The recommendations in these reports primarily relate to the technical qualifications and security of tenure of members of the PCBs, and have not been adopted.⁵³⁸ This sustained, but ultimately narrow focus of reform proposals on PCBs is itself revealing of the fragmented approach towards environmental institutional reform. It is not until 2003 that the LCI turned its attention to judicial reform measures and recommended the creation of specialised environmental courts. Similarly, it was only in 2007 that the Working Group of the Planning Commission adopted a more holistic approach to environmental institutional reform.⁵³⁹ This was followed by a series of discussion papers on environmental regulatory authorities released by the MoEFCC between 2009 and 2011 and prompted by the directions of the SC in *Lafarge* discussed in chapter 6. The principal recommendations in these reports are discussed below.

1. Working Group of the Planning Commission

Although it did not explicitly use the term ‘fragmentation’, the Working Group appeared to have at least identified it as a problem that prevented the effective enforcement of environmental standards. In particular, it mentioned the ‘cross cutting nature of various issues, inter-ministerial jurisdiction and lack of unified authority’ as contributing factors.⁵⁴⁰ With specific reference to the problem of vehicular pollution, the Working Group highlighted the challenge presented by the ‘multiplicity of

⁵³⁷ For a complete list of these reports, see Armin Rosencranz and Videh Upadhyay, ‘Some Suggestions Towards a Model State Pollution Control Board (SPCB) in India’ (2011) 1 *Environmental Law and Practice Review* 106, 109.

⁵³⁸ Nidhi Jamwal, ‘Realities Unmasked’ *Down to Earth* (31 October 2002) <<http://www.downtoearth.org.in/news/realities-unmasked-15346>> accessed 4 April 2016.

⁵³⁹ Report of the Working Group in Environment and Forests for the Eleventh Five Year Plan (2007-2012), ‘Environment and Environmental Regulatory Mechanisms’ (Planning Commission 2007).

⁵⁴⁰ *ibid* 4.

authorities at the Central and State levels with no clear process...to support policy making’ and the lack of mechanisms to enable Ministries and agencies other than the MoEFCC and the PCBs to ‘contribute either directly or indirectly to the process of determining norms and standards for emissions.’⁵⁴¹

Having recognised that fragmentation was an obstacle to the development and implementation of environmental law, the report of the Working Group is one of the few proposals that recommends legislative reform as an end itself. It called for a ‘uniform and structured approach’ to law and policy-making, which it labeled ‘regulatory impact assessment.’⁵⁴² This required taking into account the following: a) options to law-making; b) cost-benefit analysis; c) stakeholder involvement; and d) enforcement and compliance.⁵⁴³ The report also recommended a periodic review of existing Acts and rules.

Later on in the report, in a section devoted specifically to the review and reform of law and policy, the Working Group recognised ‘an imperative need to...bring in cohesion, overcome overlaps, avoid inconsistencies, conflicts and contradictions.’⁵⁴⁴ It recommended replacing a sectoral approach with a holistic one and giving centrality to the Environment Protection Act so that it might truly be able to ‘guide, steer, enable and facilitate better environment and governance.’⁵⁴⁵ While the report made some concrete recommendations like the repeal of outdated laws and provisions⁵⁴⁶ and the codification and consolidation of existing environment-related

⁵⁴¹ *ibid* 11.

⁵⁴² *ibid* 41.

⁵⁴³ *ibid*.

⁵⁴⁴ *ibid* 129.

⁵⁴⁵ *ibid*.

⁵⁴⁶ *ibid*. The report provides the example of the right to pollute under the Indian Easements Act, 1882.

laws, it was somewhat thin on details regarding its recommendation to transform the Environment Protection Act into a truly overarching law. The report made a vague call to ‘recast, reclassify all the rules, notifications and authorities created under EPA,’⁵⁴⁷ but did not provide more substantive suggestions regarding the changes that were necessary to make the Environment Protection Act function as an umbrella law.

Instead, the Report reserved specificity for its recommendations regarding improved mechanisms for consultation and the institutionalisation of technical expertise. For example, in the context of water pollution, it recommended the creation of a ‘formal mechanism and means of co-operation and information exchange.’⁵⁴⁸ It suggested the establishment of a permanent cross-sectoral committee that would allow policy-framing to be synchronised, set national standards for water quality and resolve conflicts between Central and State Government bodies.⁵⁴⁹

In fact, the creation of more permanent authorities and consultative mechanisms represents a central theme running through the Working Group’s report. For instance, it suggests the creation of a permanent mechanism to ensure compliance with India’s obligations under international conventions,⁵⁵⁰ the creation of an expert body to advise existing authorities about the assessment of ecological damage⁵⁵¹ and the setting up of different policy groups within existing environmental regulatory

⁵⁴⁷ *ibid* 130.

⁵⁴⁸ *ibid* 85.

⁵⁴⁹ *ibid* 86.

⁵⁵⁰ *ibid* 37.

⁵⁵¹ *ibid* 41.

institutions in order to aid scientific and technical research and ‘consolidate the current fragmentary advisory structure.’⁵⁵²

On the whole, the report of the Working Group represents sensitivity to fragmentation that is matched to a limited extent by process-related reforms that seek to improve the quality of environmental law development and implementation. Especially noteworthy in this regard is the attention to law-making processes. However, the report does not go far enough in translating its approach into specific recommendations that are anchored in existing legislative, executive and judicial processes. The emphasis remains on the creation of new authorities that are representative of different kinds of technical expertise. Structure-related reforms, therefore, occupy a predominant role in the report. There is no corresponding guidance on the substantive principles and factors that ought to influence environmental decision-making or an exploration of the manner in which the three institutions of government might interact with each other more meaningfully through their instruments.⁵⁵³

2. Law Commission of India

Since the constitution of the first LCI in independent India in 1955, the body has produced only two reports that deal with environmental matters—the 171st Report on the Biodiversity Bill and the 186th Report on the Proposal to Constitute Environment

⁵⁵² *ibid* 61.

⁵⁵³ The report did not discuss judicial reforms at all. Although it did mention that the EPA should be ‘the real overarching law, as to ...*absorb the content and intent of the decisions* given by the Supreme Court’ (*ibid* 130, emphasis supplied), there was no explanation of how this was to be effected.

Courts ('LCI report').⁵⁵⁴ It is the latter that is relevant for the purposes of this thesis and I discuss some of its key recommendations below.

Although the LCI has the power to take up issues for legal reform of its own accord, its consideration of the constitution of environment courts was prompted by the directions of the Supreme Court in *Nayudu*. The Court, in turn, was motivated by the need for scientific expertise in deciding environmental matters.⁵⁵⁵ Consequently, this is also the primary focus of the LCI report. The LCI report described in detail the various appellate authorities under different environmental statutes, and recommended that special environment courts be constituted to consolidate these.⁵⁵⁶ The varying composition of these authorities is set out in detail in the LCI report in order to point out the lack of adequate technical expertise and the overwhelming dominance of members from the bureaucracy. There is not quite as much emphasis on the inherent fragmentation created by the existence of multiple authorities and the problems that this might pose for the implementation of environmental law.

Although the LCI report did not make an explicit link between multiple statutory authorities and fragmentation, it nevertheless acknowledged that environmental law is a body of law with distinct objectives of its own that require administration by a set of persons capable of understanding these objectives. Of the other institutional reforms discussed in this Chapter, the LCI report is one of the few that set out a relatively detailed set of objectives of environmental law and linked them to the need not only for specialised expertise, but also a court with *dedicated*

⁵⁵⁴ Law Commission of India, 'One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts' (2003) ('LCI report').

⁵⁵⁵ The Supreme Court has commented on the need to institutionalise specialised expertise in other cases as well. See *MC Mehta v Union of India* AIR 1987 SC 965, where the Court recommended setting up not only environment courts, but also an independent centre called the Ecological Sciences and Research Group that would serve as an information bank for courts and government departments.

⁵⁵⁶ LCI report Chapter V.

jurisdiction over environmental matters. If the problem were merely one of the lack of expertise, it would have been sufficient to make procedural recommendations allowing for the reliance on experts in environmental matters. However, the LCI report recognised the need to strike a balance between sustainable development, industrial pollution and the loss of livelihood as well as the need for an authority with the ability to make a final pronouncement on EIA and to ‘develop a jurisprudence in this branch of law.’⁵⁵⁷

Even though the LCI did not express it in quite these terms, its recommendation to create a court with the ability to develop environmental jurisprudence, suggests that it was conscious of the normative inconsistency in Indian environmental law caused by multiple authorities. It also recognised that this could be addressed not only by a specialised court that merely consolidated these different authorities, but also by a law that provided clear direction regarding the manner in which the court ought to interpret the balance struck by the legislature.

This is evident from the fact that the LCI report defined the jurisdiction of the proposed specialised environmental courts not only in terms of the *kind of matters* that they would be empowered to adjudicate upon, but also in terms of the *objectives* that the court ought to strive to achieve. The LCI report stated that the court ought to have the jurisdiction to ‘protect...the right to an environment that is not harmful to one’s health or well being’ as well as to ‘have the environment protected for the benefit of present and future generations.’⁵⁵⁸ It also recommended that an explanation be inserted in the statute conferring jurisdiction on these specialised courts to include the jurisdiction to protect the natural environment, preserve natural resources, prevent

⁵⁵⁷ *ibid* 8.

⁵⁵⁸ *ibid* 146.

and control pollution, and enforce legal and constitutional rights relating to the environment.⁵⁵⁹

This recommendation to incorporate an extensive statutory definition of the jurisdiction of the proposed courts also suggests that the LCI recognised the valuable role that legislation can play in guiding the development of environmental law.⁵⁶⁰ For example, it also recommended that the statute setting up the specialised environmental courts contain a direction to such courts to apply environmental principles.⁵⁶¹ However, the LCI report merely reproduced decisions of the Supreme Court laying down these principles and made no attempt to clarify the content of the principles.⁵⁶²

The LCI report focused on judicial reforms, but also treated legislation as more than a vehicle for the creation of specialised courts. The report missed an opportunity to demonstrate the manner in which legislation might be used not only to offer guidance to courts, but also to the various authorities from which the proposed courts would hear appeals. Executive and judicial authorities can both benefit from clear legislative guidance.

For the most part, however, the LCI report was clear about the role that the proposed specialised courts would play. It also demonstrated a more mature understanding of fragmentation in as much as it did not attempt to vest every kind of environmental jurisdiction in the specialised courts. The ordinary jurisdiction of the

⁵⁵⁹ *ibid.*

⁵⁶⁰ This recommendation to define jurisdiction in terms of the object that the statute sought to achieve was not adopted when the National Green Tribunal Act, 2010 was enacted. S 14 of the Act states that the NGT has jurisdiction over any ‘substantial question relating to environment’ including questions relating to the implementation of enumerated laws.

⁵⁶¹ *ibid* chapter VIII.

⁵⁶² This recommendation was partially incorporated in section 20 of the National Green Tribunal Act, 2010, which directs the NGT to apply three principles while passing orders —the principle of sustainable development, the precautionary principle and the polluter pays principle.

civil courts, criminal appellate jurisdiction and the judicial review functions of the High Courts were preserved, with the report demarcating the hierarchical relationship between the proposed and existing courts reasonably clearly.⁵⁶³ The report also set out the different amendments to existing legislation that would be necessary to give effect to its proposals, once again demonstrating attention to legislative detail. It recommended setting up specialised environmental courts in every State, thereby balancing the need for accessibility—a vital element of the rule of law—against the inevitable fragmentation created by multiple dispute resolution fora.

The LCI report recognised the need for a coherent body of jurisprudence and the impediment created by multiple appellate authorities. Its recommendation to set up specialised courts is grounded in the belief that uniformity in expertise would engender uniformity in jurisprudence. This only goes partially towards understanding the deeper reason of fragmentation, which is not only a problem of varying expertise, but also of varying conceptions of the role of the law across different institutions. The LCI report goes some way towards harmonising this conception across the legislature and the judiciary, but does not do enough to offer guidance to the executive authorities that it identifies as the principal sources of fragmentation.

3. National Environment Protection Authority and National Environment Assessment and Monitoring Authority

In this section, I discuss the key features of two similar environmental institutional reform proposals initiated by the MoeFCC. The first was a discussion paper circulated in 2009 regarding the setting up of a National Environment Protection Authority

⁵⁶³ LCI report Chapter IX. The report only made a soft recommendation to the High Courts not to intervene should environmental questions be brought before them, asking them to cite the existence of an effective alternative remedy in the specialised courts.

(‘NEPA’),⁵⁶⁴ while the second was a study commissioned by the MoEFCC regarding the creation of a broadly similar body called the National Environment Assessment and Monitoring Authority (‘NEAMA’).⁵⁶⁵ Evidently, both these reports sought to explore the possibility of setting up a nodal environmental authority, and therefore, the emphasis in both the reports is on executive, rather than legislative or judicial reform.

The NEPA paper justified this emphasis by clearly demarcating the roles of the legislative, executive and judicial authorities. It stated that legislation and policy-making were to be the responsibility of the MoEFCC, that the adjudication of environmental disputes would be undertaken by the NGT, while NEPA would concern itself with regulation, monitoring and enforcement.⁵⁶⁶ While this demarcation of functions was helpful, it ignored the reality of environmental law and policy-making, particularly the substantive advancement of the law through executive instruments described in chapter 5 and did not offer any guidance for drawing the often very fine line that separates legislation from regulation.

The paper also set out vague principles for the establishment of NEPA. It stated that NEPA would be a statutory body with ‘original powers’ under the Environment Protection Act,⁵⁶⁷ without any explanation of what such powers were

⁵⁶⁴ Ministry of Environment and Forests, ‘Towards Effective Environmental Governance: Proposal for a National Environment Protection Authority’ (2009) (‘NEPA paper’).

⁵⁶⁵ Kanika Bhal and Ravi Shankar, ‘Report on Scope, Structure and Processes of National Environment Assessment and Monitoring Authority for Ministry of Environment and Forests, Government of India’ (Department of Management Studies, Indian Institute of Technology, Delhi 2011) (‘NEAMA report’). The MoEF circulated another discussion paper on the basis of an interim version of the NEAMA report, but I choose to focus on the later and more comprehensive version of the NEAMA report. For the discussion paper, see ‘Reforms in Environmental Governance with Special Reference to Establishment of National Environment Assessment and Monitoring Authority’ (Ministry of Environment and Forests, Government of India 2010).

⁵⁶⁶ NEPA paper 3.

⁵⁶⁷ NEPA paper 4.

meant to encompass. NEPA was to subscribe to the polluter pays principle and the precautionary principle in its functioning,⁵⁶⁸ with no rationale offered for the exclusion of other equally important environmental principles that formed an established part of Indian environmental law.

The functions of NEPA proposed in the paper also betrayed confusion about its role. The six categories into which the functions of NEPA were divided were EIA, enforcement and compliance, research and development on sustainability, environmental health, waste management and chemical safety.⁵⁶⁹ Of these, the first three categories relate to the *type* of function that NEPA was expected to perform, while the latter three are devised on the basis of the *subject area* of NEPA's operation. Ideally, a body like NEPA ought to perform the first three types of functions across all subject areas. The basis for the division proposed by the NEPA paper was not immediately clear and was not based on a systematic assessment of existing authorities, the functions that they performed, and the manner in which these contributed to fragmentation.

The bulk of the paper, however, was given over to discussing the degree of independence that NEPA would enjoy from the MoEFCC. The paper stated that despite the widespread impression of 'institutional fatigue', the need of the hour was an 'empowered, professionally managed, independent institution for environmental protection in India.'⁵⁷⁰ The paper offered four different options for structuring NEPA: a) a NEPA that performed only monitoring and compliance functions, while the MoEFCC continued to grant environmental clearances and PCBs continued to

⁵⁶⁸ *ibid.*

⁵⁶⁹ *ibid* 4-5.

⁵⁷⁰ *ibid* 10.

develop environmental standards; b) a super-NEPA that would take over the granting of regulatory clearances from the MoEFCC and subsume the functions of the PCBs; c) a NEPA that granted environmental clearances, while the PCBs continued to function and report to the MoEFCC; and d) a variant of the third option, where the PCBs reported to NEPA instead of the MoEFCC.

These different options were debated at a roundtable discussion organised by academics and members of civil society.⁵⁷¹ According to participants at the discussion, these proposals displayed a limited understanding of the problems with environmental governance in the country. With its emphasis on the structure of NEPA and its relationship with the MoEFCC, the NEPA paper stated that there was an adequate set of laws in place, but the real problem lay with the ‘lack of clarity about roles, responsibilities and lines of control.’⁵⁷² The participants, however, argued that the problem lay in ‘the lack of a clear set of implementable guidelines which specify how choices between development projects, concerns of natural resource-dependent communities and broader environmental impacts are to be made.’⁵⁷³ They also called for a clearer articulation of the criteria on which NEPA would base its decisions and also pointed that out that NEPA would remain ineffective without corresponding amendments to existing environmental laws.⁵⁷⁴

This neatly encapsulates the argument that I have advanced through this thesis i.e. that fragmentation and weak implementation is not just the product of poorly coordinated regulatory authorities, but also represents a weakening of the

⁵⁷¹ For a write-up of this discussion, see Sharachchandra Lele, Navroz Dubash and Shantanu Dixit, ‘A Structure for Environment Governance: A Perspective’ (2010) 45 Economic and Political Weekly 13.

⁵⁷² *ibid* 14.

⁵⁷³ *ibid*.

⁵⁷⁴ *ibid*.

environmental rule of law as expressed through poorly articulated legislative content. This was reaffirmed in solutions to environmental governance offered by other independent organisations. For instance, the Centre for Science and Environment pointed out that an important factor contributing to the incoherent implementation of pollution control laws across different State PCBs was the lack of comprehensive guidance on interpreting statutes and regulations, so much so that there was no standard definition of ‘compliance.’⁵⁷⁵ Similar suggestions have recently been made for ‘legal instruments tied to clearly stated outcomes’ that are able to ‘offer clear directions to regulatory institutions.’⁵⁷⁶

This emphasis on structural reforms continued with the 2011 NEAMA report, where the MoEFCC commissioned the Department of Management Studies, Indian Institute of Technology, Delhi to design the form and scope of a national environmental authority—NEAMA—and to clarify its relationship with existing authorities like the State PCBs, State EIA authorities and national and State Coastal Zone Management Authorities.⁵⁷⁷ The management-oriented focus of the report is evident in the nature of the recommendations that are all designed to make the environmental clearance process efficient and streamlined, along the lines of the HLC report discussed in section D below.⁵⁷⁸ Although the report stated that problems with environmental governance in India were both structural and process-related, the process-related recommendations that it proposed were primarily concerned with the

⁵⁷⁵ Turnaround: Reform Agenda for India’s Regulators (n 38) 39.

⁵⁷⁶ Principles for Environmental Regulatory Reform (n 281).

⁵⁷⁷ NEAMA report 103.

⁵⁷⁸ For a similar critique of the management approach to the draft EIA and Coastal Regulation Zone Notifications, see Manju Menon and Kanchi Kohli, ‘Re-Engineering the Legal and Policy Regimes on Environment’ (2008) 43 Economic and Political Weekly 14.

quality of data, the expertise of decision-makers and the speed of the clearance process.⁵⁷⁹

The principles that the report applied for the design of the NEAMA were conceived with the convenience of project proponents in mind, rather than with the objective of providing coherent guidance to decision-makers. Independence, predictability and transparency were three of the four key principles that the report identified as crucial to the functioning of the NEAMA.⁵⁸⁰ The fourth principle—statutory foundation for the NEAMA—was one of the few references that the report made to legislative reform. The other reference included recommending amendments to the Environment Protection Act, but only for the limited purpose of conferring more financial powers on the NEAMA. The report also laid down three elements for the design of conditions that the NEAMA could attach to environmental clearances. It recommended that conditions ought to be: a) objective and measurable; b) consistent, with similar projects being given similar conditions; and c) practical and reasonable in terms of finances and costs.⁵⁸¹ These elements were clearly designed with the convenience of the project proponent in mind. It is telling that the report lays down guidance for the grant of conditions attached to environmental clearances rather than set out the key elements that the NEAMA ought to bear in mind while determining whether to grant environmental clearances or not.

The report also diluted the independence and autonomy of the NEAMA in comparison to the proposals in the NEPA paper. It recommended that the final authority to grant environmental clearances continue to vest with the MoEFCC, rather

⁵⁷⁹ NEAMA report vi-vii.

⁵⁸⁰ *ibid* iii.

⁵⁸¹ *ibid* 36.

than be transferred to the NEAMA, and thereby did not make any significant change to the existing relationship between authorities under the EIA Notification currently in force and the MoEFCC. The report also failed to furnish criteria on the basis of which the MoEFCC ought to grant or reject the recommendations of the NEAMA,⁵⁸² pointing again to the lack of attention to capacity of the law to guide the behaviour of authorities.

The overview of environmental institutional reform proposals in this section reveals the following trends. One, problems with the uncoordinated development and poor implementation of environmental law are largely viewed as failures of executive authorities, rather than the inadequacy of legislation or the weakness of judicial institutions. Second, reforms to executive authorities and judicial bodies focus overwhelmingly on technical expertise. Third, the creation of a supra-structure that subsumes existing authorities is regularly advanced as a solution to the uncoordinated development and implementation of the law. This move towards the centralisation of regulatory authority inevitably has implications for Centre-State relations,⁵⁸³ although environmental institutional reform in the specific context of federalism has not received significant attention.⁵⁸⁴ Fourth, the primary purpose of legislation is to provide a firm, statutory foundation for new regulatory authorities. Even when reforms propose inter-institutional linkages, these are not embedded in existing

⁵⁸² See Ghosh (n 535) 14, criticising the ‘lack of guiding principles in environmental decision-making’.

⁵⁸³ *ibid* 14, suggesting the possibility that the discussion paper of the MoEF based on the NEAMA report had not interfered with the functioning of State authorities like the PCBs and the Environment Impact Assessment Authorities because of political constraints in the form of resistance from State Governments.

⁵⁸⁴ Some of the issues that have been raised in the context of ‘green federalism’ include capacity constraints of State authorities, fiscal imbalances between the Centre and the States and balancing the need for uniform standards with the needs of local communities. See ‘Strengthening Green Federalism: Sharing International Practices’ (Summary of Proceedings, The Energy and Resources Institute-Forum of Federations Conference supported by the Ministry of Environment and Forests, Inter-State Council and the World Bank, 29-30 October 2012) <<http://interstatecouncil.nic.in/downloads/gfc-summary-proc.pdf>> accessed 6 April 2016; PG Dhar Chakrabarti and Nidhi Srivastava (eds), *Green Federalism: Experiences and Practices* (The Energy and Resources Institute and Forum of Federations 2015).

legislative processes. Finally, reform proposals devote more attention to structure, rather than process. There is little discussion of the principles that decision-makers ought to observe, the factors that they ought to take into account, the manner in which they ought to provide reasons for their decisions, and the basis on which such decisions might be reviewed or appealed. All these trends are evidence of weaknesses in the environmental rule of law, as conceptualised in chapters 2 and 3. These shortcomings are mirrored in the most recent institutional reform proposals discussed in the next section.

D. Report of the High-Level Committee to Review Environmental Acts

1. Context

Since the current Government assumed office in May 2014, it has repeatedly emphasised its commitment to improving India's position in the 'Ease of Business' rankings,⁵⁸⁵ an index developed by the World Bank Group to score countries according to how conducive their regulatory environment is to the setting up of businesses.⁵⁸⁶ Obtaining environmental clearances is widely regarded as holding up vital development and infrastructure projects,⁵⁸⁷ although research suggests that this is

⁵⁸⁵ Shishir Sinha, 'Modi Governance Plan: 10 Priorities, 100-day Agenda' *The Hindu BusinessLine* (New Delhi 29 May 2014) <www.thehindubusinessline.com/news/modi-governance-plan-10-priorities-100day-agenda/article6061021.ece> accessed 16 November 2015; 'PM Modi Asks Ministers to Fix 100-Day Agenda, Lists Top 10 Priorities' *NDTV* (30 May 2014) <'Committed To Provide Easy and Effective Governance: Narendra Modi' *The Economic Times* <articles.economictimes.indiatimes.com/2014-09-25/news/54318190_1_digital-india-prime-minister-narendra-modi-reliance-industries> accessed 16 November 2015; Nayanima Basu, 'India Eyeing Top 30 Slot in world Bank's Ease of Doing Business Report' *Business Standard* (New Delhi 9 June 2015) <www.business-standard.com/article/economy-policy/imp-india-eyeing-top-30-slot-in-world-banks-ease-of-doing-business-report-115060800845_1.html> accessed 16 November 2015.

⁵⁸⁶ See <<http://www.doingbusiness.org/rankings>> accessed 16 November 2015. Some of the indicators that are employed include 'starting a business' and 'getting construction permits.' It is evident that Indian environmental laws that require different kinds of clearances would have an impact on both these indicators.

⁵⁸⁷ Vishwa Mohan, 'Javadekar for Faster Clearance to Infrastructure Projects' *The Times of India* (New Delhi 30 May 2014) <<http://timesofindia.indiatimes.com/india/Javadekar-for-faster-clearance-to-infrastructure-projects/articleshow/35747338.cms>> accessed 17 November 2015.

not borne out by actual practice.⁵⁸⁸ Some of the first steps taken by the new MoEFCC since May 2014 were aimed at reducing what were perceived to be unnecessary regulatory hoops that project proponents were required to jump through. These included raising the threshold to waive the requirement of EIA for certain categories of projects, exempting defence-related infrastructure from obtaining separate forest clearances, and setting up an online portal for submitting applications for environmental and forest clearances.⁵⁸⁹

In September 2014, the Prime Minister's Office ordered 60 changes to environmental regulations after consulting secretaries in the ministries of petroleum and natural gas, coal, steel, power, road transport and highways and shipping.⁵⁹⁰ Given the authorities consulted, it is evident that the focus of these changes was the creation of a 'development-friendly' environment. Civil society activists have expressed their alarm at what they see as a swift dismantling of already weak environmental safeguards.⁵⁹¹ It is in this context that the constitution of the High Level Committee ('HLC') by the Government in August 2014 must be viewed.

⁵⁸⁸ Vaibhav Chaturvedi, Vaibhav Gupta, Nirmalya Choudhery, Sonali Mitra, Arunabha Ghosh and Rudresh Sugam, 'State of Environmental Clearances in India: Procedures, Timelines and Delays across Sectors and States' (Council on Energy, Environment and Water 2014) <<http://ceew.in/pdf/ceew-report-on-state-of-environmental-clearances-in-india-12dec14.pdf>> accessed 17 November 2015.

⁵⁸⁹ The MoEFCC issued a press release on 2 September 2014 to highlight the initiatives taken by it since May 2014. More details can be found at <pib.nic.in/newsite/PrintRelease.aspx?relid=109249> accessed 17 November 2015.

⁵⁹⁰ Nitin Sethi, 'PMO Ordered 60 Changes to Green Clearances, Environment Ministry Delivered on Most' *Business Standard* (New Delhi 20 January 2015) <www.business-standard.com/article/economy-policy/pmo-ordered-60-changes-to-green-clearances-environment-ministry-delivered-on-most-115012001495_1.html> accessed 17 November 2015.

⁵⁹¹ Nayantara Narayanan, 'Modi Government has Launched a Silent War on the Environment' *Scroll.in* (12 September 2014) <scroll.in/article/678380/modi-governmnet-has-launched-a-silent-war-on-the-environment> accessed 17 November 2015; Sunita Narain, 'Green Clearance Test for NDA' *Down To Earth* (15 September 2014) <www.downtoearth.org.in/blog/green-clearance-test-for-nda-45961> accessed 17 November 2015; Rohini Mohan, 'Narendra Modi's War on the Environment' *AlJazeera America* (10 April 2015) <<http://america.aljazeera.com/multimedia/2015/4/narendra-modis-war-on-the-indian-environment.html>> accessed 17 November 2015.

According to the terms of reference of the Office Memorandum under which the HLC was constituted,⁵⁹² it was set up to: (i) assess the status of implementation of six major Acts—the Environment Protection Act, the Wildlife Protection Act, the Forest Conservation Act, the Indian Forest Act, the Water Act and the Air Act, in relation to the *objectives* (ii) examine judgments relating to these Acts and (iii) recommend and draft specific amendments to each of the Acts to ‘to bring them in line with *current requirements to meet objectives* (emphasis supplied).

The vagueness of these terms of reference promptly came under attack. The Memorandum failed to clarify what ‘current requirements’ meant or even what was understood by the objectives of the different statutes being examined. Given the pro-industry measures that the Government had already taken by the time the HLC was set up (and that have been described above), the genuineness of its intentions in strengthening the environmental regulatory architecture was called into question.⁵⁹³ The Government’s motives became doubly suspect because of three other factors—doubts about the expertise and credibility of the members of the HLC,⁵⁹⁴ the lack of opportunity for fair and comprehensive public consultation,⁵⁹⁵ and the disproportionately short period of time (3 months) that the HLC was given to

⁵⁹² OM No. 22-15/2014-IA.III dated 29th August, 2014

⁵⁹³ Mridula Chari, ‘Panel Reviewing Green Laws is More Focussed on Development Than Environment, Claim Activists’ *Scroll.in* (17 October 2014) <scroll.in/article/682767/panel-reviewing-green-laws-is-more-focussed-on-development-than-environment-claim-activists> accessed 18 November 2015.

⁵⁹⁴ Akanksha Jain, ‘Environment Activists Question Committee Formed to Review Green Laws’ *The Hindu* (2 December 2014) <<http://www.thehindu.com/news/cities/Delhi/environment-activists-question-committee-formed-to-review-green-laws/article6654077.ece>> accessed 17 November 2015.

⁵⁹⁵ Meena Menon and Sruthisagar Yamnunan, ‘An Unequal Battle’ *The Hindu* (2 November 2014) <www.thehindu.com/sunday-anchor/review-of-green-laws-an-unequal-battle/article6555778.ece> accessed 18 November 2015; Lawrence Liang, ‘High Level Committee of Ministry of Environment and Forests and Climate Change Walks Out of Public Consultation in Bangalore: Press Release’ *Kafila* (30 September 2014) <kafila.org/2014/09/30/high-level-committee-of-ministry-of-environment-and-forests-and-climate-change-walks-out-of-public-consultation-in-bangalore-press-release/> accessed 18 November 2015.

undertake a comprehensive overview of all of the country's major environmental laws.

The controversy surrounding the HLC demonstrates that the *process* of initiating institutional reforms is as important as the *content* of the reforms themselves. The same lessons apply to fragmentation—as Parts I and II demonstrated, the *process* of communication among institutions through their legal instruments is as vital to ensuring the coherence of the law as its actual *substance*. The constitution of the HLC was criticised because it was hasty, inadequately consultative, had ill-defined objectives, and because its legal standing was in question.⁵⁹⁶ These are precisely some of the characteristics that define fragmentation—closed-off methods of legal development, conflicting ideas about the objective of the law, and the use of instruments of uncertain legal hierarchy to advance the law.

The reforms recommended by the HLC and discussed in the next section therefore demand critical scrutiny. Their ability to effectively address fragmentation and the weakening of the environmental rule of law is likely to be affected by the fact that the very *manner* in which the reforms were recommended exhibited fragmentary tendencies.

2. Recommendations and Critique

In this section, I summarise some of the key recommendations made in the HLC Report, focusing on those that have the closest association with fragmentation and the environmental rule of law as understood and demonstrated in the earlier chapters. In

⁵⁹⁶ In response to an application filed by an environmental activist under the Right to Information Act, 2005, it was revealed that the setting up of the HLC had not received the approval of the Prime Minister's Office, as is usually required; nor was there any indication of the statute under which it had been set up. See 'Green panel not Formed as per Norms: RTI Reply' *The Times of India* (New Delhi 21 November 2014) <timesofindia.indiatimes.com/city/delhi/Green-panel-not-formed-as-per-norms-RTI-reply/articleshow/45224294.cms> accessed 18 November 2015.

particular, I highlight one key reform made in connection with each of the three institutions of government. The recommendations of the HLC are a mixture of the general and the specific. For example, side by side with recommending the enactment of a new model ‘umbrella’ law, the HLC has also made more detailed recommendations, such as the percentage of canopy cover that ought to qualify a forest as a ‘no go’ or inviolate zone. I focus only on the more general recommendations since these are more closely linked to the institutional reforms that form the focus of Part III.

However, it ought to be noted that the HLC Report understands ‘institutional reforms’ in a different way from the manner in which they are understood in this thesis. Rather than comprehensive changes to legislative, executive and judicial functioning (which is the sense in which I employ the phrase), chapter 9 of the HLC Report titled ‘Institutional Reforms’ appears to focus more on technical manpower and capacity building. It recommends the creation of a statutory Environment Research Institute, a dedicated environmental wing within the Indian civil services, and the development of specialised expertise within the already existing Indian Forest Service as part of its proposed institutional reforms.

Of course, the HLC also proposes legislative, executive and judicial changes that are discussed below, but these must be viewed in light of the institutional reforms described above. The reforms proposed by the HLC indicate that it regards institutional challenges more as a question of *expertise* than one of *process*. In this section, I argue that this fails to fully appreciate the role of institutional functioning through legal instruments in addressing fragmentation and the environmental rule of law. It is undoubtedly important to improve the *structure* of the legislative, executive and judicial arms of government by improving the competence of the persons that

man them; equally important is the *manner* in which their legal instruments share a common and coherent understanding of the role and purpose of environmental law. It is this standard that is used to assess three key reforms proposed by the HLC in addition to the criteria set out in section B above.

a. Overarching Environmental Law

The major general legislative reform that the HLC recommends is the enactment of an Environmental Laws Management Act ('the ELMA'). The ELMA is intended to supplement, not replace existing environmental statutes like the Environment Protection Act, the Water Act and the Air Act. The primary purpose of the ELMA appears to be to serve as a statutory vehicle for the setting up of the new environmental authorities—the National Environment Management Authority ('NEMA') and State Environment Management Authorities ('SEMAs') that the HLC Report also proposes. These authorities (which are discussed in greater detail in the next section) are intended to harmonise different clearance procedures required under scattered rules and regulations and create a single window regulatory system. The ELMA is intended to provide the statutory basis for this system.

Another important function that the HLC Report also sees the ELMA fulfilling is giving statutory effect to the concept of 'utmost goodfaith', a concept that the Report borrows from insurance law.⁵⁹⁷ According to the HLC, project proponents applying for clearances under environmental laws ought to be required to disclose all relevant information about a project in utmost goodfaith. Should the proponents later be found to have misrepresented any information, their clearances ought to be revoked and serious penal consequences ought to apply. The Report states that these

⁵⁹⁷ HLC report, Chapter 8.

changes cannot be accomplished through executive orders and that ‘amending different statutes and harmonizing them will be cumbersome and time consuming.’⁵⁹⁸

This is the reason that it cites for enacting the ELMA, which it dubs an ‘umbrella law.’

The HLC Report also contains a draft version of this model legislation,⁵⁹⁹ the preamble to which states that it is intended to provide for the better management of environmental *laws*, rather than the environment. This suggests that the HLC has at least identified the problem of fragmentation in a limited sense, even though it might not refer to it explicitly. Consequently, it recommends that the Water Act, the Air Act and any secondary legislation passed under these statutes eventually be harmonised and subsumed under the EPA.⁶⁰⁰

This demonstrates that the HLC considers the streamlining and downsizing of environmental laws and regulations an important step in ensuring effective enforcement. However, the reasoning employed by the HLC in reaching this conclusion is thin, and the reforms that it proposes are only superficial changes in *form*. For example, the HLC is unable to explain why existing environmental laws cannot be amended and consolidated to bring about the changes that it desires, rather than enacting new legislation.⁶⁰¹ In fact, the process of drafting a new bill, introducing and tabling it in Parliament, referring it to a Parliamentary Standing Committee, incorporating the Committee’s recommendations, and ultimately passing it is likely to

⁵⁹⁸ *ibid* 63.

⁵⁹⁹ *ibid* 65-77.

⁶⁰⁰ *ibid* 64 [8.5].

⁶⁰¹ Leo Saldanha and Bhargavi Rao, ‘The Report of the High Power Committee to Review Various Environmental Acts administered by Ministry of Environment, Forests and Climate Change, Government of India: A Non-Trivial Threat to India’s Ecological and Economic Security, A Critique’ (December 2014) 3.

be far more time consuming⁶⁰² than the process of amendment and harmonisation that the Report seeks to avoid.

The very fact that the ELMA is intended only to supplement, rather than supplant existing environmental statutes indicates that it does not fulfill one of its key functions as an ‘umbrella law.’ An umbrella law, as commonly understood in the context of Indian legislative reform,⁶⁰³ is a comprehensive, consolidating statute that replaces piecemeal laws within a particular subject area. Of the several environmental statutes that the HLC is charged with reviewing, it makes no attempt to identify provisions that are capable of being grouped together or authorities with overlapping functions that might be combined, although it does recommend the repeal of limited provisions under the Water Act and Air Act. The ELMA is proposed as an overarching law only as a convenient tool through which to set up yet another set of regulatory bodies and courts and to introduce more stringent penal provisions.

Even though the ELMA does not amalgamate existing environmental statutes, it might have served the function of an umbrella law if it had clearly articulated objectives capable of guiding the administration of the other environmental laws. In fact, as mentioned earlier, one of the submissions by a policy thinktank to the HLC points to this very need for legislatively defined objectives and explicitly recommends

⁶⁰² This is not helped by the repeated disruption of parliamentary proceedings. The productivity of successive Lok Sabhas has declined since the first Lok Sabha, which passed 333 bills over five years to the 15th Lok Sabha, which could pass only 151. On an average, the success rate of getting bills passed during the last Lok Sabha was 39 percent. See Shreya Singh, ‘Status of Legislation in the 15th Lok Sabha’ *The PRS Blog* (19 August 2013) <www.prsindia.org/theprsblog/?p=2890> accessed 30 January 2016.

⁶⁰³ References to an ‘umbrella law’ have been made in relation to guardianship and custody laws, occupational health and safety legislation, as well as the regulation of educational institutions. See Law Commission of India, ‘Report No. 257: Reforms in Guardianship and Custody Laws in India’ (May 2015); Maitrayee Handique, ‘India Needs Umbrella Law for Safer Workplace’ *LiveMint* (9 October 2009) <<http://www.livemint.com/Home-Page/ZJtFc6rIw8WBIUI4LuDzXN/India-needs-umbrella-law-for-safer-workplace.html>> accessed 28 December 2015; Akshaya Mukul, ‘Umbrella Law to Set up Universities Soon?’ *The Times of India* (New Delhi 25 April 2015) <<http://timesofindia.indiatimes.com/home/education/news/Umbrella-law-to-set-up-universities-soon/articleshow/47046374.cms>> accessed 28 December 2015.

that ‘abstract preambular objectives’ in existing environmental laws be replaced with laws that ‘clearly define positive, tangible, social and environmental outcomes.’⁶⁰⁴ Although Indian legislation has traditionally been prescriptive rather than goal-oriented, there have recently been some moves in areas other than the environment towards the statutory incorporation of broader policy goals.⁶⁰⁵ The ELMA, however, does not articulate any such goals, either qualitative or quantitative, and therefore fails to live up to its appellation of umbrella law on this count as well.

On the whole, the ELMA, if passed, is likely to further fragment Indian environmental law than contribute to its coherent and coordinated development. The HLC is accurately able to diagnose some of the problems ailing Indian environmental law, but is unable to go a step further and recommend the appropriate institutional response. It recognises that the different environmental statutes operate in ‘isolated and monochromic regulatory milieus’⁶⁰⁶ as well as the fact that ‘piecemeal and sectoral legislations...have failed to comprehend the need to address the holistic nature of the environment.’⁶⁰⁷ It even identifies the appropriate approach to what it terms ‘ad-hocism’—‘a systemic, comprehensive, non-arbitrary, transparent and accountable procedure for environmental conservation and management practices.’⁶⁰⁸

⁶⁰⁴ Principles for Environmental Regulatory Reform (n 281).

⁶⁰⁵ Clause 3 of the Juvenile Justice (Care and Protection of Children) Bill, 2014, which was passed by the Rajya Sabha on 22 December 2015, sets out 16 fundamental principles that Government authorities and agencies ought to have regard to while administering the Bill. These include the principles of positive measures, of non-stigmatising semantics, and of institutionalization as a measure of last resort. Similarly, the draft Delhi Charter of Women’s Rights Bill 2015 guarantees broadly defined civil, political and socio-economic rights that set the standard for corresponding obligations of government authorities and private citizens. Principles-based regulation has already been recommended for the financial sector, see Government of India, ‘Report of the Financial Sector Legislative Reforms Commission, Volume I: Analysis and Recommendations’ (March 2013) 13-14.

⁶⁰⁶ HLC Report 6.

⁶⁰⁷ *ibid* 7.

⁶⁰⁸ *ibid*.

Unfortunately, this approach is not actually applied, at least not in the context of the legislative reform that the HLC proposes in the form of the ELMA. This supposedly overarching environmental statute complicates existing regulatory hierarchy by creating yet another set of authorities. It does not lay down a set of common environmental objectives with the capacity to guide behaviour, and thereby uphold the environmental rule of law. It even fails at the relatively more mechanical function of identifying legislative and regulatory overlap and recommending amendment, consolidation and repeal. The different manifestations of fragmentation identified in Part I—multiple authorities and overlapping provisions—would all be exacerbated, rather than effectively addressed by the ELMA. It fails to match the legislative indicator established in chapter 3 for the strengthening the environmental rule of law—the capacity of statutes to guide behaviour by goal-setting or balancing competing interests.

b. New Regulatory Authorities

As I demonstrated in section B, institutional reform proposals have focused largely on the restructuring of environmental executive authorities. A significant proportion of the HLC Report is also similarly given over to discussing the composition, powers and functions of the new regulatory authorities that it recommends—the NEMA and the SEMAs. The HLC Report is largely a variation on the reshuffling of powers and authorities recommended in the past. The next paragraphs discuss the key elements of the existing regulatory process and compare it with the restructuring proposed by the HLC.

The HLC Report concentrates mainly on the flaws of the environmental clearance process. The design and duties of the NEMA and SEMAs that it outlines are

therefore aimed primarily at correcting these flaws. In particular, the NEMA and SEMAs are intended to address the following principal deficiencies—delay,⁶⁰⁹ duplication of procedures, and the lack of deterrence against environmental violations.⁶¹⁰ The HLC Report identifies multiple authorities with shared jurisdiction as a major limitation of the existing process.⁶¹¹ In particular, it criticises the fact that parallel applications are required, with one aspect of the clearance process often dependent upon another.⁶¹² Other weaknesses identified by the HLC include the lack of transparency and accountability within institutions, as well as a shortage of professional expertise.⁶¹³ A brief account below of the existing environmental clearance process helps determine whether the HLC has accurately been able to capture the reasons for poor implementation.

Under the existing EIA Notification, different categories of projects, depending upon the magnitude of their impact on the environment and human health, are granted clearances either by Central or State authorities. At the Centre, it is the MoEFCC that grants clearances on the basis of recommendations made by an Expert Appraisal Committee ('EAC'). A similar pattern is followed at the State level. State Environment Impact Assessment Authorities ('SEIAAs') that are set up by the MoEFCC grant clearances on the basis of recommendations made by State-level EACs. The EACs, both at the Central and the State level, comprise technical and

⁶⁰⁹ Cf Ritwick Dutta, Debi Goenka, Manoj Mishra and Himanshu Thakkar, 'The High Level Committee Report on Environmental Law: A Recipe for Climate Disaster and Silencing People's Voice' *South Asia Network on Dams, Rivers and People* (8 January 2015) <<https://sandrp.wordpress.com/2015/01/08/the-high-level-committee-report-on-environmental-law-a-recipe-for-climate-disaster-and-silencing-peoples-voice/>> accessed 6 April 2016. The authors refer to court decisions that have in fact criticised the MoEFCC for hasty clearances.

⁶¹⁰ HLC Report, Chapter 7.

⁶¹¹ *ibid* 47.

⁶¹² *ibid*.

⁶¹³ *ibid*.

professional experts specialising in different aspects of the EIA process.⁶¹⁴ However, these technical experts have only recommendatory powers; as mentioned above, the final decision-making power to grant or refuse clearances is vested either directly in the executive arm of government at the Centre in the form of the MoEFCC or in Centrally-appointed bodies (SEIAAs) at the State level.

The State PCBs constitute the third set of actors in the environmental clearance process. They are responsible for conducting the public consultation component of the EIA process, and to a certain extent, also monitor projects after clearances have been granted, in conjunction with regional offices of the MoEFCC.⁶¹⁵

Apart from the HLC's critique, there have been other problems with the EIA process identified over the years. These include concerns about the poor quality of the assessment conducted by the EACs, biased EIA reports, and the ineffectiveness of the public consultation requirement.⁶¹⁶ Even as government and the courts have taken some steps to address these problems, a host of 'second generation EIA issues' have cropped up.⁶¹⁷ For instance, the simplistic, one-dimensional way in which the EIA process has been traditionally been conducted fails to grasp the complexity of impact in areas that are inhabited by indigenous peoples.⁶¹⁸ Secondly, the fact that the EIA process is conducted much later on in the entire decision-making process relating to a particular project means that there is great pressure on environmental authorities to

⁶¹⁴ Appendix VI, EIA Notification.

⁶¹⁵ Ghosh (n 493) 433, 440.

⁶¹⁶ *ibid.* See also Kanchi Kohli and Manju Menon, (n 298); Leo Saldanha, Abhayraj Naik, Arpita Joshi and Subramanya Sastry, *Green Tapism: A Review of the Environmental Impact Assessment Notification- 2006* (Environment Support Group 2007).

⁶¹⁷ Kanchi Kohli and Manju Menon, 'Environmental Regulation in India: Moving 'Forward' in the Old Direction' (2015) 50 *Economic and Political Weekly* 20.

⁶¹⁸ *ibid.* 21.

grant clearances. This is on account of approvals already obtained from other authorities and vast amounts of money and resources already invested by project proponents and government alike that impede unbiased assessment by environmental authorities.⁶¹⁹ Finally, systematic cumulative impact assessments are not conducted under the existing regulatory framework, a deficiency that has had devastating impacts on the environment particularly in areas where hydroelectric dams have come up indiscriminately.⁶²⁰

The above paragraphs indicate that the problems with the existing EIA process may be divided into roughly two categories—lack of independence (relating to the separation of powers) and the lack of a holistic approach. Regulatory authorities are unable to withstand pressure from powerful industrial actors and governments. However, even when they do, their method of conducting EIA continues to treat the ‘environment’ as a separate entity, to be considered in isolation from other related areas such as indigenous rights and land use. As mentioned in chapter 4, even the impact of projects on forests (that are such an integral part of the environment) is assessed independently of the EIA process, and there is a parallel machinery and process devoted to forest clearances, distinct from environment clearances under the EIA Notification.

The answer to these problems, then, paradoxically lies in contrasting approaches. On the one hand, fragmentation is desirable in a certain context, in as much as some measure of separation between the regulatory authorities and the

⁶¹⁹ *ibid.* See also Vidhi report, ‘Strengthening the Environment Impact Assessment Process’ in *Cooperative Federalism: From Rhetoric to Reality* (2015) 33. The Supreme Court also speaks with concern of this *fait accompli* while recommending the creation of a National Regulator in *Lafarge*.

⁶²⁰ Sonali Mitra, ‘Environmental Impact Assessment Studies- Fait Accompli?’ (2012) 9 Energy News Monitor <<http://www.observerindia.com/cms/sites/orfonline/modules/enm-analysis/ENM-ANALYSISDetail.html?cmaid=44575&mmacmaid=44576>> accessed 11 January 2016; Shripad Dharmadhikary, ‘Hydropower: Will New Committee Break New Ground’ *India Together* (29 October 2013) <<http://indiatogether.org/damspower-environment>> accessed 11 January 2016.

executive is necessary in order to ensure that environmental and developmental concerns are balanced against each other fairly, an expression of the link between the separation of powers and the rule of law articulated in chapter 2. On the other hand, a certain degree of unification is also required in order to counteract the inconsistency created by multiple authorities discretely assessing different aspects of a project that are integrally connected to each other. Striking this balance between separation and unification is tricky, and as the next paragraphs demonstrate, the recommendations in the HLC Report are not very successful at achieving this nuance.

The big-ticket reform suggested by the HLC is the creation of a composite environmental clearance or single window system through the creation of the NEMA and the SEMAs that will replace the existing EIAs and SEIAAs.⁶²¹ The proposed agencies are intended to be strictly technical organisations that will not only process applications for environmental clearances, but will also monitor compliance with the conditions attached to such clearances, and ensure that any violations are duly accompanied by penal sanctions.⁶²² Apart from this already extensive list of functions, the HLC also recommends that the NEMA be entrusted with standard setting, research and development, prosecution, and the administration of programmes for the reconstruction of the environment.⁶²³ Some elements of all three governmental functions—legislative (through standard setting), executive (through monitoring and prosecuting violations) and quasi-judicial (through the imposition of sanctions)—have all been rolled into a single body, the NEMA. These are in addition to the purely expert functions that the NEMA is expected to perform by advising the MoEFCC on

⁶²¹ HLC Report 49.

⁶²² *ibid.*

⁶²³ *ibid.* 50.

the development of green technology and by creating a database in the form of a comprehensive environmental map of the country.⁶²⁴ A broadly similar range of duties is imposed on the SEMAs, with a greater emphasis on data collection, research and planning.⁶²⁵

The manner in which different powers and functions have been vested in the NEMA and SEMAs demonstrate that the HLC has been unable to negotiate the fine balance between the articulated governance demanded by the separation of powers and the consolidation necessary in addressing poor implementation under the current regulatory system. As mentioned earlier, it is desirable that the authority granting environment clearances maintain some degree of independence from the executive. However, the HLC report ensures that the final power to grant environment clearances continues to vest in the MoEFCC, which is to make its decisions after taking into consideration recommendations submitted by the NEMA.⁶²⁶ The HLC report makes no difference to the division of powers under the existing EIA Notification and the recommendation of the HLC.

As with most of its other recommendations, the approach adopted by the HLC to consolidation lays far more emphasis on structure than process. The automatic answer to fragmentation created by multiple authorities and processes is not, as the HLC recommends, the creation of a super body that is able to subsume all these functions in one. If the NEMA were to be created along the lines recommended by the HLC, it would be an unwieldy body with far too much power concentrated in it,⁶²⁷

⁶²⁴ *ibid* 51.

⁶²⁵ *ibid* 52.

⁶²⁶ *ibid* 56.

⁶²⁷ This criticism was leveled at the Jan Lokpal Bill or Citizen's Ombudsman Bill that was drafted by a civil society movement in 2011 in response to a weaker Bill along the same lines that was introduced in

given that it would be exercising legislative, executive and at least quasi-judicial powers all at once. A genuine attempt to tackle fragmentation does not require the same body to perform the functions of all three institutions of government. What it does require is that these different functions be linked to each other and that within each of the three institutions, separate aspects of the same *kind* of function be integrated to ensure normative consistency.

In practical terms, this means that the NEMA need not, as recommended by the HLC, have *both* specialised technical cells and professional legal enforcement cells. Standard setting (which is presumably to be carried out by the technical cells) and prosecution (which is entrusted to the legal enforcement cells) do not necessarily have to be conducted by the same body in order to address fragmentation. Multiple authorities, that are a key feature of fragmentation, are problematic because they duplicate functions, sometimes contradicting each other and producing incoherence. Prosecuting authorities ought to be guided by the norms framed by standard setting authorities; it does not necessarily follow that they must be conducted under the same authority (although opportunities for consultation might conceivably improve within the same authority).

Instead, the NEMA is mostly likely to be able to address fragmentation effectively if it is able to ensure normative consistency among bodies that perform similar functions. For example, under the current system, different authorities grant different kinds of clearances, with virtually no formal requirement that each authority must take into account decisions taken by the other. As demonstrated in Part II, this is a poorly designed system that prevents the environmental impact of a project from being considered holistically. To address this kind of fragmentation, the HLC could

Parliament. See Sriram Panchu, 'Lokpal: Where Do We Stand Now, and How We Got Here?' (2011) 46 Economic and Political Weekly 19.

have recommended a closer integration of the decision-making process of these various authorities. Yet, despite its repeated emphasis on a single-window clearance system and unification, the HLC does not, at any point, explicitly explain how the processes of granting environment, forest and coastal regulation zone clearances are proposed to be combined, nor does it set out procedures for consultation among the various authorities responsible for granting these clearances.

If the HLC genuinely intended to integrate the different processes, this would have required a significant restructuring of existing authorities, not to mention extensive amendments to existing primary and secondary legislation like the Forest Conservation Act, the EIA Notification, and the CRZ Notification 1991. These aspects, apart from a throwaway statement that the NEMA and SEMAs will subsume the CPCB and SPCBs respectively,⁶²⁸ remain untouched in the HLC report. Some of this lack of detail may be excused on the grounds that the HLC report was only intended to set out broad-brush reforms. Nevertheless, glossing over the crucial question of the manner in which authorities and laws need to be re-organised misses a key objective of the report—to provide concrete and coherent suggestions for amendment, rather than ‘a mere tinkering with the Acts.’⁶²⁹

The lack of substance in the HLC report forces the conclusion that it is primarily concerned with external, symbolic changes in structure, rather than truly reforming the manner in which environmental law is implemented. The heavy reliance placed by the HLC on technical expertise is revealing of the significance that it attaches to *persons*, not *processes*. Civil society has made similar critiques about the HLC’s proposals on the NEMA and SEMAs. Some fear that this ‘techno-bureaucratic

⁶²⁸ HLC report 53.

⁶²⁹ *ibid* 6.

approach' to environmental governance reduces the complexity of environmental issues to problems that are to be 'managed' rather than negotiations with actors that have the agency to take decisions about the environment they live in.⁶³⁰ In fact, one of the most troubling features of the HLC report is its restriction of public participation.⁶³¹ Others worry that this technocratic decision-making is antithetical to the inherently interdisciplinary nature of environmental law.⁶³²

The 263rd Report of the Parliamentary Standing Committee on Science, Technology, Environment and Forests ('263rd report'), which is scathing in its criticism of the HLC report, points out that its recommendations only serve to aggravate fragmentation. It views the NEMA and SEMAs only as contributing to a 'multiplicity of institutions and authorities with little strength, power and capacity.'⁶³³ The HLC is also guilty of promoting the very ad-hocism in existing environmental regulatory processes that it is so critical of. Apart from the relaxation of public hearing requirements in different categories of cases, the HLC also carves out exemptions and special procedures for 'linear' projects (such as gas pipelines, irrigation canals and transmission lines), power and mining projects, as well as strategic projects along the country's border,⁶³⁴ thereby contributing to incoherence.

It recommends that a 'fast-track' procedure be created specifically for such projects, which will also be assessed by a specially created cell within the NEMA or

⁶³⁰ Manju Menon and Kanchi Kohli, 'Executive's Environmental Dilemmas: Unpacking a Committee's Report' (2010) 49 *Economic and Political Weekly* 10, 13.

⁶³¹ Dutta et al (n 609). The HLC report waives the requirement of conducting public hearings for projects of 'strategic' or 'national importance', in areas where the cumulative pollution load is predetermined, and in cases where settlements are 'located away' from project sites.

⁶³² Saldanha and Rao (n 601) 9.

⁶³³ 263rd report [7.4].

⁶³⁴ HLC report 57.

SEMAs,⁶³⁵ thereby creating yet another authority. Evidently, a very wide range of projects would be eligible for the simplified assessment procedure proposed by the HLC. The only reasoning offered by the HLC for this differentiation is that such projects ‘are for the benefit of the community at large’ or ‘are the growth engines for national economy.’⁶³⁶ This power to exempt, when coupled with a lack of guiding principles for the exercise of the power, also contributes to fragmentation by creating specialised, *ad hoc* regimes for a particular sub-set of projects to which a different set of criteria are applied by a different set of actors. It also weakens the rule of law by allowing executive authorities to exercise unreasoned discretion.

The failure of the HLC to provide a principled basis for the exclusion of projects likely to have significant environmental effects from a full-fledged EIA only serves to deepen existing fragmentary tendencies in the regulatory process. Such blanket exemptions are not the product of a carefully considered balancing of environmental and development interests. They also vest enormous discretionary powers in the executive, which is likely to wield them unevenly given its susceptibility to pressure from different interest groups. Finally, the diluted public hearing and consent requirements for these exempt projects privileges politically and economically powerful voices and prevents the meaningful consultation that is so integral to addressing a fragmented regulatory system.⁶³⁷

Just as the ELMA was found to fall woefully short of constituting an appropriate legislative reform to address fragmentation, so also the NEMA and SEMAs proposed by the HLC are inadequate and positively damaging attempts at

⁶³⁵ *ibid.*

⁶³⁶ *ibid.*

⁶³⁷ Menon and Kohli (n 630) 13.

reforming existing executive authorities. As mentioned earlier, the institutional reforms recommended by the HLC are to be assessed by their ability to provide consistent, unifying norms to the authorities responsible for the development of environmental law. The NEMA and SEMAs, while purportedly bringing together many separate clearance functions under the umbrella of one organisation, do not create such avenues for a more holistic assessment of projects, thereby promoting coherence. Just as the HLC failed to provide a strong justification for proposing the enactment of the ELMA instead of amending existing legislation, so also it is unable to adequately explain the creation of a new set of authorities, rather than the integration of similar kinds of functions performed by existing authorities.⁶³⁸ The HLC also fails to explain the manner in which the NEMA and SEMAs will interact with each other, thereby encouraging the development of self-contained regimes that is such a key feature of fragmentation.

Finally, allowing the executive, in the form of the MoEFCC to retain the ultimate power to approve or reject a project aggravates the existing arbitrariness of the environment clearance process. The HLC report states that this final discretion ought to vest in the MoEFCC in order to allow 'sensitive' considerations like national security, foreign relations and the vaguely phrased 'regional disparity issues' to be taken into account.⁶³⁹ Moreover, the HLC report even recognises the right of the MoEFCC to decide to keep these considerations confidential. Rather than creating transparent and accountable institutions as it recommends in its report, the HLC ends up proposing a system with only the outward semblance of integration, while its internal processes still bear the characteristics of fragmentation like overlapping

⁶³⁸ See Shibani Ghosh, 'Assessing the Subramanian Committee Report' *Center for the Advanced Study of India, University of Pennsylvania* (26 January 2015) < <https://casi.sas.upenn.edu/iit/shibanighosh> > accessed 6 April 2016.

⁶³⁹ HLC report 58.

functions and continue to weaken the rule of law by allowing the administering of sweeping, unreasoned exemptions by the executive. The next section will now examine the major judicial reforms proposed by the HLC.

c. Creation of an Appellate Mechanism

In chapter 6, I demonstrated the manner in which judicial reasoning can weaken the environmental rule of law. One of them is by failing to engage with or clarify an already fragmented statutory and regulatory framework. The second is by encouraging ad hocism and uncertainty through the use of higher order legal provisions without analysing their relationship with statutory and executive instruments lower in the hierarchy. The third is by adopting inconsistent standards to balance competing interests. Through the discussion in *NHAI*, I demonstrated that inconsistent judicial reasoning could also take place across courts and tribunals with competing jurisdiction.

In order to address this judicial weakening of the rule of law, reforms to judicial institutions ought to take the following factors into account. They ought to be clearer about defining and demarcating jurisdictional limits. They should also ensure that institutions are equipped with the right kind of expertise in order to enable them to effectively settle disputes that fall within their jurisdiction. Statutes that are clearer about the sources and tools of legal reasoning that judicial authorities may apply are also likely to promote judicial discipline and more consistent judicial reasoning. It is against these criteria that I assess the judicial reforms proposed in the HLC report.

As explained in chapter 3, The principle of separation of powers has been stretched to the limit and often breached in environmental matters, with the judiciary

frequently playing the role of the legislature as well as the executive.⁶⁴⁰ This overstepping of its bounds by the judiciary, especially the Supreme Court, is often considered necessary in the face of executive apathy.⁶⁴¹ The HLC report also remarks on the prominent role played by Court-appointed committees in developing Indian environmental law.⁶⁴² According to the HLC, these committees (which constitute a peculiar feature of public interest litigation in India) have ‘reduced the MoEF&CC to a passive spectator, with little initiative except waiting for the Court to say what next.’⁶⁴³ One of the avowed aims of the HLC, then, is to ‘restore to the Executive the will and tools to do what it is expected to do by the statutes’⁶⁴⁴ and thereby restore the idea of articulated governance required by the separation of powers.

However, apart from this brief statement, the HLC does not systematically analyse the manner in which the higher judiciary and the NGT might have breached the principle of separation of powers or discuss problems with judicial reasoning. Instead, the judicial reforms that it proposes are tacked on as incidental to the ELMA and the creation of the single-window NEMA and SEMAs. The changes that these reforms would make to the existing system are described below.

⁶⁴⁰ TR Andhyarujina, ‘The Unique Judicial Activism of the Supreme Court of India’ (2014) 130 *Law Quarterly Review* 53; Shubhankar Dam, ‘Vineet Narain v Union of India: “A Court of Law and not Justice” - is the Indian Supreme Court Beyond the Indian Constitution?’ (2005) *Public Law* 239; Ramaswamy Iyer, ‘Linking of Rivers: Judicial Activism or Error?’ (2002) 37 *Economic and Political Weekly* 4595; see also Rosencranz and Jackson (n 11) and Dam (n 11).

⁶⁴¹ Address by the Hon’ble K.G. Balakrishnan, Chief Justice of India at a Seminar on ‘Law and Environment’, organised by the Asia-Pacific Jurists Association (Punjab and Haryana Chapter), Chandigarh (23 May 2009) <http://www.supremecourtfindia.nic.in/speeches/speeches_2009/law_environment_seminar_chd_23-5-09.pdf> accessed 5 February 2016; Max Martin and Rajat Banerji, ‘Courting Green’ *Down to Earth* (15 May 1997) <<http://www.downtoearth.org.in/coverage/courting-green-23695>> accessed 5 February 2016.

⁶⁴² HLC Report 8.

⁶⁴³ *ibid.*

⁶⁴⁴ *ibid.*

Under the NGT Act, decisions made by the MoEFCC regarding environmental and forest clearances may be challenged before the NGT, which exercises both merits and judicial review. The HLC suggests the creation of an additional tier—an Appellate Tribunal, appointed by the executive, and comprising a retired judge of a HC and two other members. These members ought to have either expert knowledge on environmental matters or be bureaucrats of a specified designation within the Indian government.⁶⁴⁵ The HLC recommends that this Appellate Tribunal hear appeals from decisions on clearances made by the MoEFCC on the recommendations of the NEMA or the SEMAs.⁶⁴⁶ These appeals are to be speedily disposed of within three months, with the HLC recommending that the Appellate Tribunal have the power to impose heavy costs for instituting frivolous appeals. Crucially, the HLC recommends the powers of the NGT be restricted to conducting judicial review of the decisions made by these Appellate Tribunals.⁶⁴⁷

In addition to the Appellate Tribunals, the HLC report also recommends setting up specially designated environmental courts. S 12 of the draft Environmental Laws (Management) Act drawn up by the HLCs states that every district should have a Special Environmental Court to hear complaints and try offences under it. Judges having the rank of an additional sessions judge or sessions judge should be designated to preside over such special courts. Cases ought to be speedily dealt with and disposed of, as far as possible, within six months. When ‘serious offences’ are involved, the specially designated environmental courts are to take cognizance of them only on the complaint of officers of the NEMA. S 2(j) of the draft ELMA defines ‘serious

⁶⁴⁵ *ibid* 64-65.

⁶⁴⁶ *ibid*.

⁶⁴⁷ *ibid*.

offences' as violations of the utmost goodfaith obligations that proponents undertake when they apply for clearance. Such offences might also violate the conditions imposed by the authorities granting clearance, especially when this causes or is likely to cause serious damage to the environment or public health.

The recommendation to designate Special Environmental Courts is not well thought through. For one, the poor track record of specially designated courts in other fields⁶⁴⁸ casts doubt on the ability of Special Environmental Courts to effectively tackle environmental cases. Moreover, there does not appear to be any rationale for restricting the jurisdiction of these Special Courts to 'serious offences' only. The rationale for the creation of special courts or tribunals is usually the demand for subject-matter expertise or the speedy disposal of a particular category of cases.⁶⁴⁹ One of the principal reasons for the poor implementation of environmental law in India is the inordinate delay in prosecuting environmental cases before criminal courts.⁶⁵⁰ If special courts are to be designated as a response to this delay, there appears to be no reason why they ought to be reserved only for a nebulously defined category of 'serious offences.'

The failure to clearly demarcate the contours of these offences only serves to vest greater discretion in the executive regarding their classification into serious and non-serious offences. Should the executive in power have a weak commitment to environmental protection, there is a danger that serious offences will not be categorised as such, will consequently not be tried by Special Courts, and will

⁶⁴⁸ Jayna Kothari and Aparna Ravi, 'The Myth of Speedy and Substantive Justice: A Study of the Special Fast Track Courts for Sexual Assault and Child Sexual Abuse Cases in Karnataka' (Centre for Law and Policy Research 2015).

⁶⁴⁹ Raghav Sharma, 'Green Courts in India: Strengthening Environmental Governance?' (2008) 4 *Law, Environment and Development Journal* 50.

⁶⁵⁰ Centre for Science and Environment, 'Strengthen Institutions, Reform Laws and Streamline Processes: Agenda for Improving Environmental Governance in India (2014).

continue to languish their way through the slower criminal justice system. Similar fears have been expressed with regard to the creation of ‘substantial’, ‘non-substantial’ and ‘minor violations’ in the recent draft Environmental Laws (Amendment) Bill 2015 drawn up by the MoEFCC and discussed below.⁶⁵¹

However, it is not the special courts, but the paring down of the powers of the NGT that has attracted the sharpest criticism from environmental practitioners and activists.⁶⁵² The recommendation of the HLC to transfer the NGT’s powers of merits review to a new Appellate Tribunal contributes to fragmentation and weakens the environmental rule of law in the following ways. First, it creates another layer of authority without offering a reasoned explanation. Past experience in setting up special environmental authorities,⁶⁵³ including the NGT indicates that the executive is likely to drag its feet again over the investment of time, resources and infrastructure in yet another quasi-judicial body.

Secondly, it creates uncertainty by potentially excluding a significant set of environmental questions from the purview of any court or tribunal whatsoever. The HLC report recommends that the NGT be stripped of *all* its existing powers and instead be permitted to conduct only judicial review of decisions made by the Appellate Tribunal. Not only does this recommendation take away the power of the NGT to conduct merits review, but it also takes away its power to provide relief and

⁶⁵¹ Lawyers’ Initiative for Forests and Environment, ‘Comments on the Draft Environmental Laws (Amendment) Bill 2015’ <<http://www.ercindia.org/index.php/latest-updates/news/1693-comments-on-the-draft-environmental-laws-amendment-bill-2015>> accessed 6 April 2016.

⁶⁵² Saldanha and Rao (n 601); Ghosh (n 638); Menon and Kohli (n 630).

⁶⁵³ Armin Rosencranz, Geetanjoy Sahu and Vyom Raghuvanshi, ‘Whither the National Environment Appellate Authority’ (2009) 44 Economic and Political Weekly 10.

compensation to the victims of environmental damage and order restitution of the environment.⁶⁵⁴

S 15 of the draft ELMA states that decisions of the Government as well as the NEMA and SEMAs are not to be questioned before any court or tribunal on any ground whatsoever. The limited power of judicial review that is reserved for the NGT under S 16 of the draft law is restricted to the review of decisions of the Appellate Tribunal sitting in appeal from the approval or rejection of environmental clearances by the NEMA and SEMAs. The ELMA therefore effectively leaves the victims of environmental damage with no civil remedy to obtain relief or compensation.

Presumably, such cases will only be tried as ‘serious offences’ under the criminal jurisdiction of the Special Environmental Courts. However, as I mentioned earlier, criminal remedies have proved to be ineffective tools for the enforcement of Indian environmental law. The NGT, by entertaining civil claims for relief for environmental damage, plugged a telling lacuna in the judicial system. The HLC report unplugs this hole, and weakens the rule of law by creating uncertainty about the appropriate forum to approach for a particular category of environmental harms.

In the absence of this systematised redressal system, it is likely that *ad hoc* solutions will spring up to fill the gap that would be created if the recommendations of the HLC were to be adopted. For example, it is possible that the High Courts might see a resurgence of claims for environmental damage. Rather than allow a single, expert body like the NGT to develop jurisprudence on the principles governing compensation for environmental damage, the large number of different High Courts across the country would lay down their own, potentially conflicting versions of the law. The HLC, by restricting the NGT’s powers, is not streamlining jurisdiction. On

⁶⁵⁴ It currently derives this power from s 15 of the National Green Tribunal Act 2010.

the contrary, it is leaving it open for multiple, competing authorities to incoherently develop the law.

This section has demonstrated the inadequacy of the institutional reforms recommended by the HLC in tackling fragmentation. Although the HLC identifies the manifestations of fragmentation in Indian environmental law fairly accurately, the recommendations made by it do not go to the root of the problem i.e. the need to promote normative consistency among the three institutions of government in their development of environmental law. The ill-disguised motivation of these reforms is the promotion of business interests at the expense of rigorous environmental protection. This is reflected in the superficial structural reforms of executive authorities that do not find backing in clearly articulated legal principles.

The draft ELMA is vaguely worded, allowing room for unbridled executive discretion. This discretion is unlikely to be checked by an Appellate Tribunal that has a preponderance of members from the executive, and whose independence is therefore called in question. Authorities are merged and abolished with the apparent aim of streamlining enforcement. However, the manner in which this is accomplished is cosmetic at best (since opportunities for inter-institutional communication are not created), and damaging at worst (since this merging and abolishing is simultaneously accompanied by doing away with specialised environmental expertise and reducing opportunities for public participation). It is unsuccessful even at the more technical task of ‘clarification and consolidation of the legal framework of acts, rules, definitions and operational guidelines’ which one commentator has labeled the ‘lowest denominator of problems in environmental governance.’⁶⁵⁵ These shortcomings have all been critiqued by environmental lawyers, civil society,

⁶⁵⁵ Menon and Kohli (n 617).

academics, and parliamentarians, who have called for a wholesale rejection of the HLC report.

Despite this backlash, in September 2015, the Government introduced the draft Environment Laws (Amendment) Bill ('the Draft Bill') that proposes key changes to the manner in which environmental law and justice is currently administered. Although the changes proposed in the Draft Bill do not go quite as far as the HLC report in damaging the fabric of environmental governance, they are evidently a step in that direction, and have attracted much of the same criticism.⁶⁵⁶

For one, the language of the Draft Bill is unclear and has led to much confusion regarding the precise purport of its provisions. This is particularly evident in the manner in which the Draft Bill proposes a new set of bodies called Adjudicatory Authorities. Neither is the manner of appointment of these authorities clear, nor is their relationship with the existing regulatory authorities and the NGT neatly articulated,⁶⁵⁷ thereby potentially weakening the environmental rule of law.

Secondly, Clauses 14A-14E of the Draft Bill appear to confer power on the Adjudicatory Authorities to administer civil penalties. This is a regulatory reform that has long been recommended in the Indian context.⁶⁵⁸ However, the Draft Bill fails to provide guidance regarding the manner in which the jurisdiction of the Adjudicatory Authorities is expected to operate concurrently with the jurisdiction of the existing criminal courts to try offences and the jurisdiction of the NGT to award damages.

⁶⁵⁶ Dhvani Mehta, 'The Government's Environment Law Amendment Bill May Transfer More Power to the Executive and Weaken the NGT' *The Caravan (Vantage)* (18 January 2016) <<http://www.caravanmagazine.in/vantage/environment-laws-amendment-bill-transfer-power-to-executive-weaken-ngt>> accessed 6 April 2016; Manju Menon and Kanchi Kohli, 'What Lies Behind Environmental Law Making' *The Wire* (18 November 2015) < <http://thewire.in/2015/11/18/what-lies-behind-environmental-law-making-15833/>> accessed 6 April 2016; Lawyers' Initiative for Forests and Environment (n 651).

⁶⁵⁷ Mehta (n 656).

⁶⁵⁸ Centre for Science and Environment (n 650).

This uncertainty is compounded by the circular definitions of ‘substantial damage’, ‘non-substantial damage’ and ‘minor violations’ in Clause 2 of the Bill. The introduction to the Bill states that detailed criteria for categorising these offences will be prescribed in the rules, but this is likely to be struck down for excessive delegation.⁶⁵⁹ The Draft Bill therefore continues the trend of environmental institutional reform proposals that are quick to create new structures without accompanying attention to process.

E. Conclusion

The trajectory of environmental institutional reforms described in this chapter demonstrates that there is very little that has substantially changed since the first set of environmental laws and PCBs were introduced in the wake of international environmental law developments in the 1970s and 80s. The only major reform that has had a significant impact on the manner in which environmental law is administered is the constitution of the NGT. The restructuring of existing environmental regulatory authorities has consistently been at the focus of reform proposals, with Government-appointed committees, independent research groups and activists calling for an overhaul of India’s command-and-control dominated style of regulation.

Amid this clamour for regulatory reform, the attention to legislative change has been insubstantial. Legislative reform is still largely viewed as a necessary adjunct to the reform of executive and judicial authorities, and its ability to drive change in other institutions of government remains underestimated. However, the latest round of consultations on institutional reforms saw some groups arguing for a clearer articulation of objectives in the text of environmental legislation, and it is this

⁶⁵⁹ Mehta (n 656); Lawyers’ Initiative for Forests and Environment (n 651).

trend that ought to be encouraged in the quest for institutional reforms that are able to promote constructive dialogue among different authorities and stakeholders.

The discussion in this chapter also demonstrates that institutional reforms ought to pay at least as much attention to process, as they do to structure. Reform proposals, especially in the context of executive and judicial authorities, have focused heavily on their composition and manner of appointment. These are undoubtedly vital elements of any measure of institutional reform, in as much as they are closely linked to technical expertise and independence. However, as the conceptual framework developed in chapters 2 and 3 and the case studies described in chapters 4, 5 and 6 demonstrate, the manner in which these authorities carry out their functions is equally vital.

It is not sufficient that a competent, technical expert makes a decision about environmental clearance. The sources that he relies on, the stakeholders that he consults, and the reasons that he ultimately offers for his decision, are crucial to the coherent development of environmental law. However, these aspects have not been dealt with extensively as a part of institutional reforms, and it has been the aim of this chapter to centre attention on them. This lays the ground for an exploration, in the conclusion, of other ways in which the environmental rule of law may be strengthened.

CHAPTER NINE: CONCLUSION AND THE WAY FORWARD

The objective that I set myself in this thesis was ambitious—to provide an analytical framework for Indian environmental law in order to highlight weaknesses in its development that do not receive enough attention from scholars, practitioners and lawmakers. One weakness that I wished to highlight in particular was the poor quality of environmental legislation. I identified a gap in traditional Indian environmental legal scholarship and attempted to fill it by developing a conceptual framework called the environmental rule of law.

I considered competing conceptions, both formal and substantive of the rule of law in the legal literature, and identified those elements that belonged to both versions (Since the formal conception of the rule of law is a negative quality, it follows that the elements that make up this version are also necessary, though not sufficient components of the substantive conception). These elements were clarity, consistency, stability and predictability. In order to develop a conception of the environmental rule of law that would have more utility as an organising concept than the version first proposed by the United Nations Environment Programme, I considered whether the inherent polycentric and interdisciplinary nature of environmental law presented special challenges to the rule of law elements identified above.

I argued that the polycentric nature of environmental law was likely to make the articulation of legislative intent more difficult, thereby weakening the clarity of the law. The interdisciplinary nature of environmental law also had the tendency to make the law more complex and less intelligible. These two features of environmental law also brought into focus the appropriate role of the three institutions of government in developing environmental law. I relied on Waldron's theory of articulated governance, which demonstrated that the principle of separation of powers had a rule

of law justification, in as much as there were clarity and consistency-related values to the different institutions of government performing their respective roles.

Therefore, I developed a framework to assess whether the environmental rule of law in India was being strengthened or weakened through an analysis of the legal instruments of each of the institutions of government—statutes, executive orders, and judicial decisions. I developed indicators for each of these instruments that would evaluate their legal quality. These indicators were an attempt to discover features of the instruments that would strengthen or weaken the environmental rule of law.

These indicators were: a) the capacity of statutes to guide behaviour (one of the organising principles of the rule of law) by clearly articulating goals or balancing competing interests; b) the ability of the executive to take flexible but reasoned decisions grounded in primary legislation; and c) the ability of the judiciary to apply statutory interpretation and consistent standards of judicial review to give effect to environmental rights and principles. These indicators were developed in chapter 3 after providing a contextual background to law-making, law-implementing and law-interpreting processes in India. I described *ad hoc* and weakly consultative legislative drafting processes, irregularities in the exercise and scrutiny of delegated legislation, and an activist judiciary that often usurped the functions of the legislature and the executive with paralysing effect, and disregarded judicial processes and substantive reasoning in the context of public interest litigation.

I also argued that the failure to adhere to these indicators caused the fragmentation of environmental law, and proceeded to develop a secondary framework to explain the concept. I used the features of fragmentation as a phenomenon in the international legal literature as the basis for the secondary framework that I would use in the thesis to analyse Indian environmental law.

Through a discussion of the international legal literature on the subject, I concluded that the essence of fragmentation, which could also be applied to the Indian context, was multiple separate yet overlapping regimes, often conflicting with each other, sharing uncertain hierarchical relationships, and not unified by more general norms. These characteristics were used in the institutional accounts of Indian environmental law in Part II.

Through secondary accounts of violations and poor implementation, I observed that Indian environmental law was complex, messy, confusing and incoherent. There were too many statutes and rules and authorities that overlapped with each other in contradictory and inconsistent fashion. Statutory regimes that dealt with the same subject-matter were not sufficiently integrated with each other and there was a noticeable lack of coordination between authorities across these regimes. Chapters 4, 5 and 6 described fragmentation in the legislature, executive and judiciary respectively using case studies relating to mining and indigenous rights to natural resources. In each chapter, the underlying reason of the fragmentation was identified as the failure of the institutions of government to perform their roles in developing environmental law. This was assessed by the degree of adherence to the indicators of legal quality established for each of the instruments.

The description of Indian environmental law in Part II demonstrated that it lacked clarity and coherence and was substantively built by executive instruments of uncertain legal status. Through the select judgments of the Supreme Court that I analysed in chapter 6, I demonstrated that the Court, while it had been instrumental in compelling the executive to implement environmental law, had also contributed to the law's incoherent development. It repeatedly missed the opportunity

to resolve conflicts between different statutory regimes, applied inconsistent standards of review and often issued vague and imprecise directions.

I added another dimension to this framework in chapter 7 by demonstrating the link between India's uniquely federal system of government on the one hand and conflicting laws and poor coordination between Central and State authorities on the other.

I kept the account of Indian environmental law in Part II in mind as I turned my attention to an analysis of environmental institutional reform proposals in chapter 8. The dominant theme of these proposals was the form and structure that an ideal environmental regulatory authority ought to take, and the level of expertise that its members ought to have. I argued that these proposals gave disproportionate weight to the *structure* of environmental authorities, rather than the *institutional process* of development of environmental law, and that they failed to take into account the true nature of the challenges presented by fragmentation. Very few proposals discussed the manner in which environmental legislation ought to be drafted or what kinds of issues ought to be governed by instruments at which level in the legal hierarchy.

The comprehensive critique of institutional reform proposals that I undertook in chapter 8 automatically suggests the way forward for environmental legal and institutional reform measures. Nevertheless, I think it useful to present below a snapshot of measures for Indian environmental law as an alternative to the approach adopted by the High-Level Committee.

A. Snapshot of Potential Environmental Reform Measures

First, any exercise in reviewing environmental laws must be based on the strongest consultative processes that involve academics, practitioners, civil society,

administrative authorities, and legislators. In particular, State Governments ought to be consulted about challenges in implementing Central laws, especially if there are conflicting provisions in State legislation. Since there are competing versions of environmentalism, it is important that there is deliberative dialogue amongst all relevant stakeholders about the kinds of values that ought to be articulated in environmental statutes.

This brings me to the second step of the review exercise, which is the creation of a comprehensive database of Central and State environmental laws, rules and regulations. These should ideally be accessible through a single portal that categorises them according to subject area, territorial extent of application, and most importantly, according to hierarchy.

Apart from the accessibility to the law that such a portal allows, it is also a necessary prelude to identifying provisions across different statutes that are inconsistent with each other, redundant, or have been superseded by later law. As far as the environmental laws discussed in this thesis are concerned, the Indian Forest Act in particular should be considered for repeal in light of its anachronistic origins and provisions. Particular attention also ought to be paid to the harmonisation of the different legal categories that carve up the same physical space. Activities permitted and restricted within such spaces should also be harmonised. Another area that deserves attention is the consistency with which offences are defined and penalties prescribed across various regimes. The manner in which *non-obstante* clauses across statutes fit with each other should also be reviewed. The same exercise should be conducted with statutes from other regimes that are linked to the environment.

After having sorted the various legislative and executive instruments according to their hierarchy, they ought to be reviewed with the objective of

determining whether provisions in delegated legislation or in administrative rules belong more appropriately to the parent statute. In the context of environmental laws, these would include provisions that alter the policy objective of the parent statute or strike a balance between environmental and developmental interests inconsistent with the parent legislation. Substantive conditions that are attached to the grant of environmental and forest clearances ought not to be imposed through executive orders unless there are clear provisions in the parent statute from which such power may be derived. Authorities, schemes, plans and programmes that form an integral part of the environmental law matrix should receive some form of legal backing, even if it only involves defining them in primary or secondary legislation.

Different regulatory procedures across different authorities ought to be rationalised in order to avoid confusion and duplication and to enable authorities to make decisions on the basis of the most comprehensive information. Common guidance documents and flow charts explaining the process for obtaining different kinds of permits and clearances ought to be drawn up, circulated among administrative authorities and made more easily accessible.

The consultative review exercise ought to be aimed at reaching commonly shared understandings of the role and purpose of environmental law that ought to find expression in legislation. If environmental principles are statutorily incorporated, there must be an effort to define their scope, content and conditions of application with some level of detail. The expression of concrete legislative objectives also ought to be considered in order to provide guidance to decision-makers under the statutes. For instance, a forest conservation statute could set target-based objectives regarding tree cover and biodiversity and decision-makers would have to take these into account while granting forest clearances. The possibility of including statutory rules of

interpretation that direct authorities and judges to refer to other environmental statutes and legal principles should also be explored.

As discussed in the previous section, the potential of specifying grounds for the judicial review of administrative decisions and rules should also be explored without in any way reducing the existing powers of review exercised by the NGT and the High Courts and Supreme Court in the exercise of their writ jurisdiction. Comprehensive guidance documents to supplement these grounds of review as well as statutory principles and objectives should also be drawn up and used in training sessions with judges and administrative authorities.

B. Carrying Forward the Research Agenda

The focus of this thesis was conducting a qualitative assessment of the implementation of the rule of law in the context of environmental issues in India. There are other research projects that appear to be taking quantitative approaches to the measurement of the rule of law. For instance, the World Justice Project is developing a Rule of Law Index⁶⁶⁰ using 44 indicators organised around 8 themes: constraint on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice. The index is framed country-wise and the methodology adopted requires assigning numeric values to the items of questionnaires that are sent to country experts.

⁶⁶⁰ See <<http://worldjusticeproject.org/rule-of-law-index>> accessed 6 February 2017.

As part of this effort, there also appear to be steps being taken towards developing an environmental rule of law metric.⁶⁶¹ The approach to the rule of law adopted by the World Justice Project obviously subscribes to an explicitly substantive conception, just like the concept proposed by the United Nations Environment Programme, with its emphasis on achieving sustainable development. I think it is valuable to think of both the rule of law as well as the environmental rule of law in these quantifiable terms, especially in terms of the transparency and accountability that it brings to the functioning of the institutions of government. However, before common rule of law indicators are transplanted to different regions around the world and used to measure the state of environmental law, I think it important to embark with the exercise undertaken in this thesis. It is important first for every jurisdiction to the strengths and weaknesses of its institutions in light of the special challenges presented by environmental law. Only this will allow the creation of legal instruments that are capable of achieving whatever substantive notion of environmental justice a particular jurisdiction may settle on.

⁶⁶¹ See Juan Carlos Botero, Ronald Janse, Sam Muller and Christine Pratt (eds), *Innovations in Rule of Law-A Compilation of Concise Essays* (The Hague Institute for the Internationalisation of Law and the World Justice Project 2012).

APPENDIX: ANALYSIS OF SELECT ENVIRONMENTAL JUDGMENTS/ORDERS

S. NO	CASE	ISSUE	ENGAGEMENT WITH STATUTORY AND REGULATORY FRAMEWORK	USE OF TECHNICAL EXPERTISE	STANDARD OF REVIEW OR BALANCING OF COMPETING INTERESTS	NATURE OF ORDER OR DIRECTION
1.	<i>Ajay Singh Rawat v Union of India and Others</i> 1995 (3) SCC 266	PIL to draw attention to pollution, including the destruction of forests in Nainital.	No. The Court's order documented severe pollution and environmental degradation, but did not specifically mention a single statutory or regulatory provision being violated.	Appointment of a single advocate as Commissioner to conduct a fact-finding mission to determine the extent of pollution and make recommendations.	The Court adopted most of the Commissioner's recommendations, including making the illegal felling of trees a cognizable offence. No environmental principle was explicitly mentioned, but the Court stated that 'there cannot be two opinions about some preventive and remedial measures.' [para 7].	Vague as regards the binding nature of its directions. Phrases employed (emphasis supplied): 'the following steps <i>deserve</i> to be taken urgently' [para 7] 'we do <i>hope</i> that all concerned would take concerted steps.' [para 8] 'let all concerned <i>try</i> and <i>try hard</i> .' [para 10].

2.	<i>Ambica Quarry Works v State of Gujarat and Others</i> AIR 1987 SC 1037	Appellant challenged the refusal of the Gujarat State Government to renew its mining lease.	<p>Yes.</p> <p>The Court resolved the conflict between the Gujarat State mining rules and the Forest Conservation Act.</p> <p>It held that the object and purpose of the later Forest Conservation Act to prevent degradation and restore ecological imbalance trumped the provisions on renewal of mining leases in the rules.</p>	NA.	<p>No environmental principle explicitly invoked.</p> <p>The Court framed the issue as involving ‘common questions of the law’ and requiring a balance to be struck between mineral exploitation and the preservation of ecological balance.</p> <p>By relying on the Forest Conservation Act, it held that the obligation to society took precedence over the obligation to individuals.</p>	The Court dismissed the petition without ambiguity.
3.	<i>Animal and Environmental Legal Defence Fund v Union of India</i> AIR 1997	PIL challenging the order of Chief Wildlife Warden, Madhya Pradesh	<p>Minimal.</p> <p>The Court was asked to consider seemingly</p>	The Court acknowledged that it was not in a position to assess whether other	No explicit standard of review invoked against which the Chief Wildlife Warden’s actions were judged.	Clear directions to the State Government imposing additional conditions under which the fishing permits

	SC 1071	granting 305 fishing permits to tribals within the Pench National Park and tiger reserve.	conflicting provisions under the Indian Forest Act and the Wildlife Protection Act regarding the rights of tribals. The Court did not explicitly discuss whether or how these provisions conflicted or how they might be reconciled. It merely upheld the actions of the Chief Wildlife Warden granting the permits under the later Wildlife Protection Act.	fishing areas outside the National Park might have been more suitable.	Indirect discussion of whether the Warden's actions fall properly within the scope of his statutory authority. The Court held that while attempts to preserve the 'fragile ecology' were justified, the rights of tribals to 'keep body and soul together' also required consideration. No statutory or Constitutional provision invoked in support of these rights.	could be utilised.
4.	<i>A. Chowgule and Co. Ltd v Goa Foundation and Others</i> (2008) 12 SCC 646	Whether ex-post facto approvals could validate a mining lease for which prior approval of the Central Government had	Yes. The Court systematically set out the provisions of the Forest Conservation Act and Rules to	The Court relied on the affidavits of two Forest Officers to confirm the finding of fact that the area for which the mining lease had been executed	The Bombay High Court decision, cited by the Supreme Court, invoked the right to life and the principle of sustainable development to justify its decision not to permit the violation of a statutory provision.	Appeal dismissed. The Court made observations on the wisdom of pursuing a policy of re-forestation.

		<p>not been obtained in violation of Section 2 of the Forest Conservation Act.</p>	<p>confirm the Bombay High Court's order that no subsequent permission for mining could cure a prior illegality.</p> <p>The Court was also asked to consider whether the appellant's undertaking to reforest an identical area of land would be sufficient to validate the lease. Rather than rely on the statutory framework to reject this claim, the Court engaged in a technical debate on the value of afforestation and reforestation.</p>	<p>was forest land within the meaning of the Forest Conservation Act.</p>		

5.	<i>Banwasi Sewa Ashram v State of Uttar Pradesh</i> AIR 1987 SC 374	Indigenous <i>adivasis</i> challenged an order of the Uttar Pradesh State Government declaring the lands in which they resided to be reserved forests, thereby dispossessing them.	Yes. The Court did not interfere with the lands that had already been declared reserved forests under Section 20 of the Act. However, for lands in respect of which the declaration had not yet been made, but only a notification issued, the Court modified the prescribed statutory procedure for settling the rights of the <i>adivasis</i> and added conditions and safeguards of its own.	The Court initially sought to appoint its own high-powered committee to investigate the claims of the <i>adivasis</i> although the State Government had already constituted such a committee. Ultimately, the Court agreed to wait until the representations of the State Government-appointed committee were received. Board of Commissioners appointed to oversee the implementation of its directions, including one representative of the <i>adivasis</i>	The Court did not discuss whether Government officials had acted lawfully and within the limits of their authority while settling the claims of <i>adivasis</i> under the Indian Forest Act. The case demonstrated an obvious clash between provisions under the Indian Forest Act and the rights of <i>adivasis</i> . However, the Court did not explicitly frame the issue in this manner, nor did it cite any principles or Constitutional provisions in support of the right to life and livelihood of the <i>adivasis</i> . The Court was influenced by the use of the land for a thermal power plant. It balanced the importance of forests as national assets against the national importance of an electricity generation scheme and therefore lifted a previous ban on the dispossession of that land. Principle of sustainable development not explicitly invoked.	Clear, specific and very detailed directions issued to the State Government regarding the manner in which the claims of the <i>adivasis</i> were to be settled.
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6.	<i>Consumer Education and Research Society v Union of India</i> AIR 2000 SC 975	The petitioner had challenged a Gujarat State Government notification reducing the area of a sanctuary. The area had been reduced in order to permit the exploitation of mineral wealth. The petition had been dismissed by the Gujarat High Court and the question was now before the Supreme Court.	Minimal. The Court had to consider whether the State Government had acted within the scope of its authority under Section 26A(3) of the Wildlife Protection Act by reducing the boundaries of the sanctuary. Section 26A(3) states that the boundaries of a sanctuary are not to be altered except on a resolution of the State Legislature. No other conditions are laid down in the Act. The Court did not consider the	At least three different Expert Committees are referred to in the Court's order, but the Court did not engage substantively with the evidence in their reports. Instead, it stated that their reports 'only point out the ecological importance of the area' and noted that the reports apprehend that major mining operations in the area might adversely affect the 'ecological balance and bio-diversity of that area.' [para 7] The Court appointed a monitoring Committee to study	Did not explicitly define the standard against which the Government's decision is being reviewed. Found that the Government had not considered all relevant aspects, but that this is not sufficient to invalidate its decision. Members of the State Legislature who passed the resolution reducing the area were presumed to be able to better gauge the requirements of their areas. Even if the decision had been taken hastily, it would be reversed by the Court only if there was material to show that the reduction would have 'an irreversible adverse effect on the wildlife and the environment.' [para 6]. Stated that the principle of prohibition did not apply when there was a need to balance environmental and economic interests.	Detailed directions issued to the State Government to monitor the effects of pollution caused by the mining operations permitted by the Court. The Court prohibited the State Government from issuing mining permits within 10 kilometres of the periphery of the sanctuary without a Court order.
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			<p>object and purpose of the Wildlife Protection Act while reviewing the Government's decision.</p> <p>Section 18 of the Act sets out the criteria under which an area may be declared a sanctuary ('adequate ecological, faunal, floral...significance'). Court did not assess whether the area de-notified continued to meet these criteria.</p>	<p>the limited effects of the mining operation permitted by the Court near the sanctuary.</p>	<p>Instead, the Court applied the principles of protection, polluter pays, sustainable development and inter-generational equity. The Court did not explain the content of these principles and it remains unclear how they were ultimately applied given that the Court upheld the notification reducing the area of the sanctuary.</p>	
7.	<i>Dahanu Taluka Environment Protection Group Bombay Suburban Electricity Supply</i> v	Petitioners challenged the construction of a thermal power plant on the grounds of its adverse ecological	No. The Court did not discuss provisions of the Environment Protection Act or the EIA	Several expert reports formed part of the record in this case but the Court did not engage with their merits.	The Court stated that it was primarily for the Government to strike a 'just balance' between the conflicting objectives of environment and development. The Court's role was restricted to determining whether the Government had: a) taken into	The Court refused to set aside the clearance granted to the plant. However, it added a condition that the conditions under which the clearance was granted would not be

	<p><i>Company Ltd</i> (1991) 2 SCC 539</p>	<p>impact. The petition was dismissed by the Bombay High Court and then appealed before the Supreme Court.</p>	<p>Notification issued under it.</p> <p>Instead, it considered 'Environmental Guidelines for Thermal Power Plants' that laid down criteria for the location of thermal power plants. The petitioners alleged that the power plant at Dahanu had been constructed in violation of these guidelines.</p> <p>The Court did not discuss whether there was any inconsistency in the criteria laid down in these guidelines and the EIA Notification.</p> <p>However, it did discuss the</p>		<p>account relevant aspects; b) ignored material considerations; or c) been influenced by extraneous or immaterial considerations.</p> <p>Held that findings of an Expert Appraisal Committee rejecting the plant could not be considered binding on the Government.</p>	<p>relaxed without giving the petitioners a hearing.</p>
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			<p>binding nature of these guidelines, concluding that they were not intended to be 'rigid and inflexible, irrespective of local conditions.' [para 7]</p> <p>The Court also considered two notifications that potentially prohibited the construction of thermal power plants at the location in question. It concluded they were only intended for future projects.</p>			
8.	<i>Essar Oil Ltd. v Halar Utkarsh Samiti</i> AIR 2004 SC 1834	The Court considered whether a pipeline carrying crude oil could be	<p>Yes.</p> <p>The Court systematically set out all applicable provisions under</p>	The Court confined itself to statutory interpretation, noting that the damage that might be caused by laying	The Court applied the principle of sustainable development as an aid in statutory interpretation. Stated that the Court could not substitute its own opinion for that	The Court ultimately allowed the pipelines to be laid subject to the proponents preparing an environment management plan and

		<p>permitted to pass through a marine national park and sanctuary.</p>	<p>the different statutory regimes—the Wildlife Protection Act, the Forest Conservation Act and the Environment Protection Act.</p> <p>Carefully considered the object and purpose of the different statutory regimes and identified potential conflicts between provisions.</p> <p>Resolved this conflict (relating to the conditions under which the destruction of wildlife and habitat could be permitted in a sanctuary) by applying</p>	<p>pipelines in an ecologically sensitive area was a question of fact that would have to be determined on a case-to-case basis.</p>	<p>of experts, but also stated that activities could not be permitted within the sanctuary if they caused ‘irreversible damage.’ [para 35]</p> <p>Court also assessed whether the permission granted by the State Government had its basis in the appropriate statutory authority and whether the appropriate procedure had been followed.</p>	<p>securing the cost of reversing any damage. However, these were not clearly reflected in the final directions of the Court.</p> <p>The Court also called upon the State Government to have necessary resources to monitor the conditions under which the permit for the pipeline was granted. It also stated that such proposals ought to be made public in the future in order to allow those affected to be made aware. However, the Court’s language with regard to these last two directions was more in the nature of recommendations.</p>
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			Constitutional provisions for the protection of the environment and principles of the Stockholm Declaration.			
9.	<i>Karnataka Industrial Areas Development Board v C Kenchappa</i> AIR 2006 SC 2038	Challenge to the acquisition of the village lands by the Karnataka Industrial Areas Development Board ('Board') on the grounds that it violated the residents' right to life under Article 21 of the Indian Constitution and also damaged the environment. The residents also alleged that the Board violated zonal regulations and	Minimal. The challenge was first brought to the High Court which quashed the notification issued by the Karnataka State Government acquiring agricultural land under the Karnataka Industrial Areas Development Board Act ('Act'). The High Court also asked the Board to maintain a buffer zone of 1	NA.	The Court did not consider whether the appropriate statutory procedure had been observed while acquiring lands under the Act. Constitutional provisions on the environment, every environmental principle and international declarations and agreements all found mention in the Court's judgment. However, there was little to no attempt by the Court to link these principles explicitly to the facts of the case, especially not to the statutory and regulatory provisions under consideration. It ultimately set aside the High Court's direction of maintaining a	The Court directed that in the future, all lands would be acquired for development only if they did not 'gravely impair the ecology and environment'. It also directed that 'the consequence and adverse impact of development on the environment must be properly comprehended.' [para 43]. It did not link this direction to existing regulations on EIA. Similarly, it stated that development could proceed only after

		<p>thereby acted illegally and arbitrarily.</p>	<p>kilometre as a green belt between the village lands and the proposed project (a research and development centre in computer technology).</p> <p>Before the Supreme Court, the Board argued that this direction of the High Court amounted to 'judicial legislation' and effectively impeded the acquisition of land for industrial purposes.</p> <p>The Supreme Court did not consider whether the High Court's direction to maintain a green</p>		<p>buffer zone in a single line, stating that this requirement might prevent the acquisition of land for development.</p>	<p>clearance from the Karnataka State Pollution Control Board, without referring to the statutory provisions that make obtaining such clearance mandatory.</p>
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			buffer zone had any basis in the provisions of the Act or under any other statutory provision. It also reserved its opinion on the <i>non obstante</i> clause in Section 47 of the Act and did not consider how this might conflict with environmental legislation.			
10.	<i>Kennedy Valley Welfare Association v Ceylon Repatriates Labourers Welfare and Service Society</i> 2000 (2) SCALE 143	PIL seeking the closure of stone-crushing and quarrying operations in the vicinity of residential areas. A Single Judge of the Madras High Court placed a ban on operations within 500	No. There is no mention of any applicable statutory or regulatory provisions in the Supreme Court's order. However, the single Judge of the High Court stated that all	The directions of the High Court were based on the recommendations of an Expert Committee appointed by it.	The Supreme Court's order, which restored the original ban to 500 metres did not invoke any standard of review, environmental principle or Constitutional provision. However, the Single Judge of the High Court's order stated that quarrying could be allowed only at 'such places and in such area which do not in any manner endanger human life and if there	Decision of the Division Bench of the High Court set aside and order of the Single Judge restored.

		metres of the residential area. A Division Bench of the High Court reduced the ban to 50 metres.	stone-quarrying operations were required to comply with 'Mines and Safety Regulations' as well as pollution control measures recommended by the National Productivity Council.		is any likelihood of danger to grass or plant.' If such danger is apprehended, the Government, after considering the 'requirements of the community at large' may 'surrender the need of the environment to a limited extent.' [para 3]	
11.	<i>KM Chinnapa, Applicant in TN Godavarman v Union of India</i> AIR 2003 SC 724	Whether mining activities were being carried out illegally in forest areas by an iron ore company.	Yes. The Court was asked to consider conflicting provisions in the Forest Conservation Act, the Mineral Concessions Rules, 1960 and the Karnataka Municipalities Act, 1964. The Court resolved the conflict by pointing to the	The Court deferred to the findings of fact and recommendations of the two statutory committees that recommended that mining activities by the company ought to be wound up, subject to certain environmental safeguards.	The Court stated that the discretionary power of the Government under the Forest Conservation Act ought to be guided by international environmental legal obligations unless there were 'compelling reasons to depart therefrom.' [para 44]. However, this was not followed by a factual assessment of the actual exercise of discretion by the Government. The Court laid down other principles according to which the balance between environmental and developmental interests ought to be struck.	The Court's order gave effect to the recommendations made by the two statutory committees that had suggested an end date to the mining operations in question in addition to steps for the ecological restoration of the area. The Court left it to the State Government to work out the modalities for implementation of its order.

			<p><i>non obstante</i> clause in the Forest Conservation Act. The Court's exercise in statutory interpretation was supported by a lengthy exposition on India's environmental history, moral obligations to preserve the environment, as well as international legal obligations.</p>		<p>It stated that natural resources could be used for private, commercial interests only if the <i>courts</i> found it 'necessary, in good faith, for public good and in public interest.' [para 35].</p> <p>It also stated that while balancing environmental and development interests, the 'convenience and benefit to a larger section of people has to get primacy over comparatively lesser hardship.' [para 46]. It also noted that a commercial enterprise was likely to be 'far more useful' to the people.</p>	
12.	<i>MC Mehta v Union of India</i> 1991 SCC (2) 353	PIL challenging stone crushing operations in Delhi that had a damaging effect on the environment and the health of residents in Delhi	<p>No.</p> <p>The Court observed that it had been taken through the provisions of a wide range of statutes that included not only pollution control</p>	The Court took into consideration expert reports on air pollution while framing its directions.	The Court noted that various pollution control and development authorities had failed in the performance of their statutory duty to protect the environment. However, no specific statutory provisions were invoked. The Court noted that environmental change was an inevitable consequence of development, but that this could	The Court ordered the closure of several stone crushing units that were operating without valid licences as well as those in respect of which closure orders had been issued under the provisions of the Air Act and the Environment Protection

			<p>laws but also laws and regulations related to town planning and zoning.</p> <p>However, the Court reserved the reasons for its order, and there was no discussion of the relationship between these various statutory regimes.</p> <p>A final judgment in the case does not appear to have been passed.</p>		<p>not allow the quality of the environment to be damaged to such an extent that it became a health hazard for residents. [para 2].</p>	<p>Act.</p> <p>It also issued directions to authorities under different statutory regimes to ensure compliance with its order of closure.</p> <p>It also ordered relevant authorities to relocate the stone crushing units in a 'crushing zone' that was being demarcated by the concerned urban development authority.</p>
13.	<i>MC Mehta v Union of India</i> AIR 1996 SC 1977	PIL directing the Haryana Pollution Control Board to control pollution caused by stone-crushing and mining activities around tourist resorts at a lake in Haryana.	<p>Minimal.</p> <p>The Court quoted an inspection report that observed that mining activities were taking place without obtaining the statutory consent required</p>	The Court directed the Pollution Control Board to undertake an inspection of the impact of mining operations on the area around the lake. The Board recommended that Environment	<p>The Court did not undertake any balancing of developmental and environmental interests.</p> <p>It noted the environmental damage caused by the mining activities in the NEERI report, the possibility of disturbance to ground water aquifers and the fact that the Haryana Pollution Control Board had recommended that the</p>	<p>The Court ordered a halt to all mining operations within a 2 kilometre radius of the areas in question. Construction activities, however, were prohibited within a 5 kilometre radius.</p> <p>The Forest Department</p>

		<p>Specifically, the Court had to consider whether mining operations ought to be banned within a radius of 5 kilometres of the areas in question.</p>	<p>under the Air Act. The report also recommended that mines ought to be regulated in accordance with the provisions of the Explosives Act.</p> <p>The Court also took note of Ambient Air Quality Standards that had been notified by the Haryana Pollution Control Board. However, it did not mention the provisions of the EIA notification despite directing the Pollution Control Board to determine the impact of mining operations.</p> <p>Although the Court refers to the areas around</p>	<p>Management Plans be approved by the State Department of Environment before permitting mining operations to continue. It also recommended that mining be discontinued within a radius of 5 kilometres from the lake.</p> <p>The Court also asked the National Environmental Engineering Research Institute ('NEERI') to determine the extent of the restrictions that ought to be placed on the mining activities. NEERI made similar recommendations about the preparation of environment management plans</p>	<p>area around the tourist resorts be notified a sensitive area.</p> <p>The question, in the Court's mind, was not whether mining ought to be stopped, but the geographical extent of the restriction. The NEERI report had recommended a 200 metre green buffer to be developed at a radius of 1 kilometre around the lake i.e. a 1.2 kilometre buffer in total. The Court extended this to 2 kilometres to absorb air and noise pollution, but did not offer the basis on which it arrived at this distance.</p> <p>No Constitutional provisions or environmental principles found mention in the Court's order.</p>	<p>of the Haryana State Government was directed to develop a green belt along the lines recommended by NEERI and to 'make all efforts' to plant the trees before the upcoming monsoon.</p> <p>The Director, Mining and Geology, Haryana as well as the Haryana Pollution Control Board were ordered to implement all the recommendations in the NEERI report.</p> <p>These recommendations included the preparation of detailed mining plans that were to be approved by 'a designated authority with specialisation in environment' as well as the approval of environment management plans by a designated authority.</p>
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			Badkal lake and Surajkund as ‘ecologically sensitive’, it was unclear whether the term was employed in the same sense as the MoEFCC since 1989 in notifications designating certain areas as ‘ecologically sensitive.’	and the creation of green belts around mining operations. The Court reproduced the recommendations of both expert bodies in its order and relied on their factual representations to reach the conclusion that it was necessary to stop mining in the area.		NEERI also stated that the preparation of a Regional Environment Plan was necessary. The Court, while reproducing NEERI’s recommendations in its order did not indicate who these designated authorities were or how the recommendations to prepare plans and obtain approvals fit within the existing statutory and regulatory framework.
14.	<i>MC Mehta v Union of India</i> 1997 (3) SCC 715	As part of the same PIL in the previous case, a group of builders, the Haryana Urban Development Authority and the Municipal Corporation, Faridabad, specifically	No. The Court only cited previous cases and Constitutional provisions on the right to life and the duty of the State to protect public health and the environment	The Court continued to rely on the expert reports of the Central Pollution Control Board and NEERI to conclude that construction would have an adverse ecological impact.	The Court relied on previous cases to state that the precautionary principle applied to this case. This principle justified the limiting of the construction activity around the lakes. However, the Court said that construction may be permitted in ‘a very small area...for recreational and tourism purpose.’ [para 10]	The Court issued a general direction that the ecology of the area in question was to be ‘protected by all concerned.’ [para 10]. However, these concerned persons were not identified. It also imposed restrictions on

		<p>challenged the ban imposed by the Court in its previous order on construction activities within a radius of 5 kilometres of the lake.</p>	<p>to uphold its previous ban.</p> <p>One of the petitioners argued that the ban on construction was arbitrary and unreasonable, given that the Government had not imposed similar restrictions under the Environment Protection Act in respect of coastal zones. The Court, however, did not engage with these coastal zone regulations in order to distinguish them, apart from a statement that the functioning of eco-systems throughout the country could not be uniform.</p>			<p>constructions for personal use subject to building/bye-laws.</p> <p>It required all development schemes and construction plans for the area between 1 and 5 kilometres surrounding the lake to obtain prior approval from both the Central and Haryana State Pollution Control Board.</p>
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15.	<i>MC Mehta v Kamal Nath</i> (1997) 1 SCC 388	PIL challenging the encroachment by a private motel of forest land along the banks of the river Beas in Himachal Pradesh.	No. The factual record clearly demonstrates a violation of the Forest Conservation Act, specifically the requirement to obtain prior approval of the Central Government before diverting forest land. Although the Court talked about the illegality of Government action in regularising the encroachment by the motel, there was no explicit reference to exceeding statutory authority under the Forest Conservation Act.	The Court directed the Central Pollution Control Board to conduct an inspection of the site and file a report. The Court also appointed NEERI to undertake an assessment of the cost of restoring the ecological damage caused by the motel. The motel was ordered to pay compensation on the basis of this assessment.	The Court relied heavily on the public trust doctrine, beginning with its originals in Roman law and English common law and extensively discussing its application by courts in the United States of America ('US'). In some of the US cases cited by the Court, the State was held to have improperly exercised its <i>statutory authority</i> by failing to take into account that natural resources were held by the State in public trust for the enjoyment of the public. Although the Court relied on these cases, it did not specifically discuss whether the Government, in regularising the encroachment by the motel, had also improperly exercised its statutory power to regulate forest and non-forest uses of land under the Forest Conservation Act. The Court also noted that it was ordinarily the function of the legislature to strike a balance between the preservation of natural resources for public enjoyment and private,	The Court set aside the lease of forest land that had been executed in favour of the motel. The State Government was ordered to restore the environment to its original condition, with the motel owners bearing the costs. The motel was prohibited from discharging untreated effluents into the river and the Himachal Pradesh Pollution Control Board was ordered to take action against an violation.
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					<p>commercial use. Courts were then entitled to submit the exercise of such legislative power to judicial review under the Constitution. In the absence of legislation, the executive was still bound by the doctrine.</p> <p>However, in applying these principles to the facts of the case, the Court once again failed to discuss the object and purpose and provisions of the Forest Conservation Act and whether this legislation adequately gave effect to the public trust doctrine.</p>	
16.	<i>MC Mehta v Union of India</i> 1998 (9) SCC 589	PIL urging the stronger enforcement and implementation of environmental laws in the country.	<p>Minimal.</p> <p>The Court primarily referred to Constitutional provisions that imposed a duty on the State to protect and improve the environment.</p> <p>However, it also mentioned specific</p>	The Court merely noted that the <i>least</i> that the Government could have done was to constitute a ‘high-power committee at the national level of eminent persons.’ [para 4]. This committee could then have ensured that the Government fulfilled its	NA.	<p>The Court was clearly reluctant to issue specific, binding directions to the Government.</p> <p>Although it stated that it could not permit the Central Government to delay the performance of its statutory duties, it considered it appropriate to give it one more chance to demonstrate all the</p>

			provisions of the Environment Protection Act, particularly section 3(3), which empowers the Government to constitute an authority to carry out the purposes of the Act. The Court expressed its concern over the failure of the Government to constitute these authorities.	statutory mandate to set up Central and State authorities under Section 3(3) of the Environment (Protection) Act.		steps taken by it to fulfill its Constitutional obligations and statutory duties. It also directed the Government to place before it a national policy that indicated the steps taken by it to restore the quality of the environment to its 1977 state, along with a time-bound implementation programme.
17.	<i>MC Mehta v Union of India</i> AIR 2004 SC 4016	Whether mining activities in the Aravalli hills caused environmental degradation, and if yes, what directions ought to be issued. The case was in continuation of the challenge to mining and quarrying	Yes. The Court reproduced laws and regulations applicable to mining activities in the areas in question from an expert Committee report. This report was prepared by the Environment Pollution Control	The Court referred to the fact-finding report of the EPCA, which noted that necessary clearances from the Haryana Pollution Control Board were missing in several cases. The Court also reproduced	As an interim order in the case, the Court had ordered a complete ban on mining activities in the Aravalli Hills as well as certain other areas. It had to decide whether to modify this order or not i.e. whether the ban on mining ought to remain absolute or be permitted subject to stringent conditions. The Court clarified the relationship between executive instruments and statutory	The Court appointed another monitoring committee to inspect the mines and determine whether the ban ought to be lifted on a case-to-case basis. In addition to the 9 Government officials appointed as members of the monitoring committee, the Court also appointed three

		<p>operations around the Badkal lake in Haryana [see above Serial Nos. 13 and 14]. In this case, the Court particularly considered whether mine operators had complied with statutory provisions by obtaining necessary clearances from the appropriate authorities and complying with the conditions imposed.</p>	<p>Authority ('EPCA'), a statutory authority set up under section 3(3) of the Environment Protection Act.</p> <p>These included provisions under different regimes like the Environment Protection Act, the Forest Conservation Act, the Punjab Land Preservation Act 1900 and groundwater regulations.</p> <p>The Court independently reproduced provisions of the EIA notification on mining as well as notifications specific to environmental</p>	<p>portions of the report that documented widespread violation of the Court's previous directions.</p> <p>The EPCA in turn obtained the expert opinion of the Central Groundwater Board.</p> <p>In a second report, the EPCA inspected individual mines, submitting a status report on each. The Court reproduced these, demonstrating several instances in which environmental clearance had not been granted.</p> <p>This was similarly documented in a</p>	<p>notifications. It categorically stated that a circular permitting the grant of ex post facto environmental clearance had no basis in statutory provisions and additionally violated the principle of sustainable development. It also observed that notifications under statutes could not be issued through circulars.</p> <p>After documenting non-compliance with statutory norms, the Court went on to cite Constitutional provisions relating to the environment as well as previous cases where it had upheld the precautionary principle and the principle of sustainable development.</p> <p>It stated that in case of doubt about irreparable damage to the environment or the economy, the environment ought to get precedence.</p> <p>While deciding whether to ban or merely restrict mining activities in the areas in question, the Court was also influenced by the objectives of the National Forest</p>	<p>persons as representatives of the public. However, these were also technical experts, not laypersons or local residents.</p> <p>The Court noted that confusion about the applicability of different notifications and provisions across different statutory regimes ought to have been 'first sorted out at appropriate level' rather than filing affidavits in Court. [para 83] However, the Court also clarified that any seeming inconsistency between the Punjab Land Preservation Act and the Forest Conservation Act in particular ought to be resolved in favour of the latter.</p> <p>Similarly, the Court confirmed the applicability of the EIA</p>
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		<p>protection in the Aravalli region.</p> <p>The Court also referred to a circular issued by the MoEFCC seemingly permitting defaulting units to apply for ex post facto environmental clearance.</p> <p>The Court also set out the detailed network of mining laws, rules and regulations, focusing specifically on those provisions that were related to environmental protection. In particular, it pointed out that the approval of mining plans under this framework did</p>	<p>report of the Central Empowered Committee ('CEC'), another statutory committee ordered by the Court to examine EIA plan submitted by mining operators.</p> <p>The Court also reproduced the detailed recommendations of the CEC regarding the conditions under which mining activities ought to be undertaken.</p> <p>Finally, the Court cited the recommendations of the report of the Central Mine Planning and Design Institute Limited ('CMPDI'). The</p>	<p>Policy 1988. Ultimately, the Court concluded that there need not be a complete ban on mining in forested areas so long as it was undertaken in compliance with the principle of sustainable development and in compliance with the statutory provisions of the Forest Conservation Act.</p> <p>The standard that the Court said would trigger a complete ban on mining activities was 'adverse irreversible effect on the ecology.' [para 95]</p>	<p>Notification to the renewal of mining leases.</p> <p>The Court stated that mining activities would be closed if the degradation of the environment continued and reached a 'point of no return.' [para 89]</p> <p>The Court transferred the EIA applications of leaseholders from the CEC to the MoEFCC. The MoEFCC was ordered to consider the adverse effect on health and ecology while considering the impact of the mining activities. The Court also expressed a <i>desire</i> for transparency. [para 91]</p> <p>The MoEFCC was directed to prepare a plan for the restoration of environmental quality.</p>
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			<p>not absolve operators from compliance with other provisions under environmental laws.</p>	<p>report highlighted the need for a district-level plan to holistically assess the impact of mining activities. It also noted that there had been only partial compliance with the guidelines issued by the State Government regarding the operation of mines in an eco-friendly manner.</p> <p>The Court specifically stated that the appointment of experts and monitoring committees was justifiable in light of the Constitutional guarantee to the right to life and environment under Article 21.</p>		<p>The Court stated that violation of any conditions would entail the ‘risk of cancellation of mining lease.’</p>
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18.	<i>MC Mehta v Union of India</i> (2009) (6) SCC 142	In continuation of the previous PIL [S.No. 17], the Court was asked to consider whether mining activities had reached a 'point of no return' so as to warrant a complete ban.	Yes. The Court referred to relevant statutory provisions while reproducing the previous orders passed by the Court in the PIL. In an order dated 29/30 October, 2002 (even before the judgment discussed above), the Court had stated that mining would be permitted in forested areas only after obtaining prior approval under the Forest Conservation Act. However, this would be overridden by the complete ban on mining activities within sanctuaries	Same as above.	The Court noted that it had previously tried to balance mining operations against environmental protection, with a focus on individual mining leases. However, now that the situation had worsened, the Court decided to take a 'macro' or 'holistic' view of the matter. [para 11] Given this holistic view, the Court emphasised that it did not think it relevant to take into account that some individual leaseholders might subsequently have complied with conditions. On the basis of satellite images that demonstrated the environmental devastation that had been wrought, the Court decided to impose an immediate suspension on all mining activities within the area in question. One of the arguments that the Court had to contend with was that the Court did not have the power to impose a complete ban on mining when specific provisions for the cancellation and termination of mining leases were	The Court suspended all mining operations in the Aravalli Hills until a Reclamation Plan certified by the CEC, the MoEFCC and the State of Haryana was framed in accordance with the different statutory provisions, rules and guidelines enumerated by the Court.
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			<p>and national parks under the Wildlife Protection Act. It also stated that no mining was to be permitted in areas where there was a dispute about the applicability of the Forest Conservation Act until such dispute was resolved.</p> <p>The 29/30 October order also stated that mining could continue where relevant clearance had been obtained under the Environment Protection Act and Forest Conservation Act, provided it was not prohibited under other applicable Acts and notifications. However, such</p>		<p>made under the Environment Protection Act and mining laws. The Court rejected this argument by citing Constitutional provisions relating to environmental protection as well as the principles of inter-generational equity and sustainable development. It stated that these two principles formed part of the precautionary principle.</p> <p>In addition to these principles, the Court also listed all the provisions under mining laws and rules that dealt with environmental protection and remarked that the most important of these was the <i>guideline</i> on framing a rehabilitation plan. Since these provisions had not been complied with, the Court held that it was justifiable to impose a complete ban on mining activities.</p>	
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			<p>other Acts and notifications were not enumerated.</p> <p>Like the judgment in the previous case, the Court, in this order also systematically listed all the statutes, rules and regulations applicable to mining activities.</p>			
19.	<p><i>Mohammad Haroon Ansari v District Collector, Ranga Reddy, Andhra Pradesh</i> AIR 2004 SC 823</p>	<p>A letter sent to the Chief Justice of the Andhra Pradesh High Court was treated as a PIL against the illegal crushing of granite around some villages. The crushing was alleged to cause silicosis in the residents of the villages.</p>	<p>No.</p> <p>The Court does not mention any applicable statutory or regulatory provisions.</p>	<p>The High Court asked for a report from the Assistant Director of Mines and Geology.</p> <p>On the basis of this fact-finding report, then ordered the State Government of Andhra Pradesh to appoint a Committee of Experts to assess the dangers of the crushing operations.</p>	<p>The Court asked the Pollution Control Board to respond to the observations in the Expert Committee Report. The Board noted that emissions and decibel levels from the crushing activities were within the permissible limit and stated that it did not anticipate any impact on the lake.</p> <p>The Court held that it was unnecessary for the High Court to have increased the ban on crushing operations to 2 kilometres in light of expert opinion that stated that 1 kilometre would be a safe distance</p>	<p>The Supreme Court reduced the 2 kilometre ban imposed by the High Court on crushing activities to 1 kilometre in keeping with the opinion of the expert committee as well as the guidelines issued by the Andhra Pradesh Pollution Control Board.</p> <p>It also directed all leaseholders to obtain any necessary clearances from the</p>

				<p>The Committee recommended a ban on crushing operations within a 1 kilometre radius of the lake near the villages, but the High Court extended this to 2 kilometres, and on this basis, set aside the leases granted to the operators.</p> <p>When the matter came up before the Supreme Court, it constituted yet another expert committee. This committee found that there were no significant impacts on the lake or the residents of the village from the crushing activities.</p>	<p>between the lake, the residents and the crushing activities.</p> <p>No Constitutional provision or standard or review was mentioned in the Court's order.</p>	<p>Pollution Control Board before commencing mining or crushing operations.</p> <p>It left it open to the Pollution Control Board to take such action as might be necessary to enforce conditions imposed by it under 'relevant statutes.' [para 8] The Court did not specify what these statutes were.</p>

20.	<i>Mukthi Sangarsh Movement v State of Maharashtra</i> 1990 Supp SCC 37	PIL asking for a ban on the commercial quarrying of sand and for the regulation of excavation of the river bed.	No. The Court did not mention any applicable statutory or regulatory provisions.	The State Government of Maharashtra had appointed a Committee of Experts. Sub-committees comprising hydrology and geology experts had also been constituted. The Court reproduced some of the key recommendations of the Committee's report.	<p>The Committee's report contained specific directions regarding the distances from the river bank at which the mining ought to take place.</p> <p>The Court observed that the recommendations had been made by experts who appeared to have considered all the 'relevant angles' of the problem. The need to keep the flow of the river unaffected had been appropriately balanced against the needs of the locals to remove sand. [para 3]</p> <p>Given the care taken by the authorities and the fact that they appeared alive to the situation, the Court held that its intervention was not warranted.</p> <p>The Court was also satisfied that sand mining was being appropriately regulated since the State Government submitted on affidavit that the <i>guidelines</i> framed by the Committee were being followed strictly.</p> <p>No Constitutional provision or standard or review was mentioned in the Court's order.</p>	<p>Although the Court held that its intervention was not warranted, it also directed the local authorities (without naming them) to 'take proper care in dealing with the situation.' [para 4]</p> <p>If, on review, the Committee found that further action was necessary, it was to introduce checks to 'balance the preservation of the natural gift and the social consumption' such that the water source remained unaffected, while the local people were not deprived of their supply [para 4]</p>
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21.	<i>Mullaperiyar Environmental Protection Forum v Union of India</i> AIR 2006 SC 1428	<p>PIL alleging that the safety of a dam would be compromised if the water level was raised. The petitioner also alleged that raising the water level would have an adverse impact on the flora and fauna in the neighbouring forests.</p> <p>The case also involved a long-standing dispute between the two State Governments of Kerala and Tamil Nadu. The Government of Kerala opposed raising the water level of the dam.</p>	<p>Minimal.</p> <p>The Court had to deal with the applicability of the provisions of the Forest Conservation Act, the Wildlife Protection Act as well as notifications issued under the Travancore Forest Act and the Kerala Forest Act, 1961 declaring the area in question as a reserved forest.</p> <p>However, the Court did not set out the relevant provisions of these statutes or consider the validity of notifications issued under them at different points</p>	<p>An Expert Committee was appointed and the Court relied on its report to reach the conclusion that the increase in water level would not have an adverse impact on the flora or fauna.</p>	<p>The Court relied on the Expert Committee's report to reach the conclusion that an increase in the water level would actually be beneficial to wildlife in the area. It was satisfied that the Committee had adequately taken into account the impact on the environment of raising the water level.</p> <p>No Constitutional provision or standard or review was mentioned in the Court's order.</p>	<p>The Court permitted strengthening measures to be carried out by the State of Tamil Nadu and restrained the State of Kerala from offering any obstruction.</p> <p>After strengthening works, independent experts were to examine the safety angle before permitting the water level to be raised.</p>
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			<p>of time and how they co-existed with each other.</p> <p>Instead, it dismissed the applicability of the Forest Conservation Act in a single sentence by stating that the strengthening of a dam could not constitute a 'non-forest purpose' for which prior approval of the Central Government was required.</p> <p>There was no discussion of provisions of the Wildlife Protection Act that related to the kinds of activities permitted and prohibited within sanctuaries.</p>			
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22.	<i>Nature Lovers Movement v State of Kerala</i> 2009 (5) SCC 373	Whether the State Government of Kerala could regularise the unauthorised occupation of forest land without obtaining the prior approval of the Central Government under the Forest Conservation Act.	Yes. The Court systematically set out a chronological history of the laws, rules and regulations governing forest land in Kerala. This included State laws like the Kerala Forest Act, 1961 and the Kerala Government Land Assignment Act, 1960 as well as the Central Forest Conservation Act. The Court applied the <i>non-obstante</i> clause in the Forest Conservation Act, read with the National Forest Policy 1988 and	NA.	The Court did not engage in a balancing exercise, weighing the interest in environmental protection against the need to provide habitation to encroachers over the years. It confined itself to applying the law to the particular facts and circumstances of the case. It held that the Central Government had acted validly in the exercise of its powers under the Forest Conservation Act by granting its approval to the regularisation of encroachment by the State Government. The Government's approval was justified because it was in consonance with its own guidelines on the regularisation of encroachment.	The Court's final order recognised that the decision of the State Government to regularise encroachment was a policy decision in which the High Court had rightly not interfered. It set aside the erroneous finding in the High Court's order that the Forest Conservation Act was only prospective in operation. Instead, it emphatically clarified that the use of forest land for non-forest purposes would require the prior approval of the Central Government under the Forest Conservation Act, even if such non-forest activity had commenced before the entry into force of the Act but was now sought
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			<p>the guidelines issued by the Central Government on the regularisation of encroachment.</p> <p>It also relied on previous cases to conclude that Central Government approval was required under the Forest Conservation Act to regularise encroachment, even if such encroachment had taken place before the Act came into force.</p>			to be extended.
23.	<i>Pradeep Krishna v Union of India</i> AIR 1996 SC 2040	PIL challenging an order of the Madhya Pradesh State Government permitting the collection of <i>tendu</i> leaves by	<p>Yes.</p> <p>First, the Court noted the ‘vagaries’ in Government orders issued from time to time,</p>	The Court referred to evidence submitted by the petitioner regarding the depletion of forest cover in the State of Madhya Pradesh. The	The Court restricted itself to determining whether the order of the State Government was within the limits of the Wildlife Protection Act and if it conformed with the procedure prescribed under the Act. It concluded that the State Government had not	<p>The Court upheld the validity of the order of the State Government permitting the collection of <i>tendu</i> leaves.</p> <p>It also directed the State</p>

		<p>tribals within the boundaries of sanctuaries and national parks.</p>	<p>repeatedly altering the Government's stand on the collection of <i>tendu</i> leaves. [para 9]</p> <p>Next, the Court set out in detail all the relevant provisions of the Wildlife Protection Act. It interpreted the provisions that govern activities permitted or prohibited within the boundaries of sanctuaries and national parks in the background of Articles 48A and 51(g) of the Constitution.</p>	<p>petitioner had relied on the State Forest Report, 193 and the Forest Survey of India from 1987 to 1993.</p> <p>It did not categorically accept the contention of the petitioners that one of the reasons for the shrinkage in forest cover was the entry of tribals into sanctuaries and national parks. However, if this were true, the Court declared that urgent steps were needed to prevent the destruction of the environment in those areas.</p>	<p>violated any legal provision in permitting the collection of <i>tendu</i> leaves.</p> <p>However, it also noted that the State Government was in a position to issue such a notification only because it had not acquired the rights of the tribals or finally declared the areas in question as sanctuaries or national parks according to the procedure prescribed in the Act.</p>	<p>Government to begin the procedure under the Act to acquire the rights of tribals and to issue final notifications declaring such areas as sanctuaries or national parks. It expressed confidence that the Government would act expeditiously in light of its Constitutional duties.</p>

24.	<i>Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh</i> AIR 1988 SC 2187	PIL challenging illegal and unauthorised limestone mining in the forested areas of Mussoorie-Dehradun. [Multiple orders were passed in this case, and I have amalgamated these orders for the purposes of this table].	<p>Yes.</p> <p>In one of its later orders, the Court noted that a previous bench of judges had, in the same case, omitted to take into consideration the provisions of the Forest Conservation Act.</p> <p>The Court also noted that the provisions of the Environment Protection Act had come into force after the writ petition in this case was filed. Without offering any reasons, the Court held that the provisions of this Act did not oust the Court's jurisdiction, although it</p>	<p>Several different expert committees were appointed by the Court as well as by the Central Government.</p> <p>The Court ordered the closure of mines or permitted their operations on the basis of the recommendations of these committees. It even directed the leaseholders to submit their schemes directly to one of the committees for approval.</p>	<p>In one of its orders [dated 12 March 1985], the Court acknowledged that the closure of the mine would cause hardship to business owners, but that this was a price to be paid in order to safeguard the right of the people to live in a healthy environment.</p> <p>In a later order [dated 16 December 1986], the Court stated that it was for the Government to decide whether limestone deposits ought to be exploited at the cost of the environment. In the same breath, it stated that this was a matter for an expert body, on the basis of which the Government ought to take and firmly implement a policy decision.</p> <p>The Court was also asked to determine whether mining ought to be permitted in a controlled manner or whether a total ban ought to be imposed. The Central Government had filed two affidavits, with the first in favour of controlled mining, while the latter supported a total ban on mining in the area. The Uttar Pradesh State Government and</p>	<p>The Court appointed two committees as part of its final directions—a Rehabilitation Committee to oversee the rehabilitation of displaced mine owners, and a Monitoring Committee to oversee reforestation in the area where the mines had been operating.</p> <p>The Court appointed two public-spirited citizens as part of the Monitoring Committee.</p>
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		<p>admitted that ordinarily, it would not adjudicate a dispute when a special provision had been made in the law.</p> <p>The Court set out a comprehensive history of forest legislation in India culminating with the Forest Conservation Act and reiterated the position set out in previous cases that that the renewal of mining leases required the prior approval of the Central Government.</p> <p>Later in its judgment, the Court extended this position to hold that permitting mining</p>		<p>individual mine owners opposed this latter stand.</p> <p>However, the Court deferred to the Central Government and termed its change of stance an improvement in light of the harm caused to forest growth by mining operations. It did not consider that the Central Government had taken any illegitimate considerations into account.</p> <p>In the interests of certain forms of economic activity, such as the manufacture of drugs and sugar (which required limestone), the Court held that the total ban would not be imposed immediately, but in a phased manner.</p> <p>While considering the pleas of individual mine owners, the Court also held that in the ‘interests of general benefit to the community, interests of individual citizens may be overlooked.’ [para 55]</p> <p>The Court made an exception for three mines and allowed them to operate until the expiry of their original period, citing</p>	
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			<p>even under the strictest conditions would violate the provisions of the Forest Conservation Act. In order to arrive at this interpretation, the Court relied on the national policy and the interests of the community in preserving forests. It could not permit anything that detracted from this goal.</p>		<p>unemployment from closure as a concern.</p>	
25.	<p><i>Samatha v State of Andhra Pradesh</i> AIR 1997 SC 3297</p>	<p>The case primarily dealt with the Constitutional validity of the transfer of mining leases in tribal lands to private mining companies. The</p>	<p>Yes.</p> <p>The Court had to consider the applicability of the Forest Conservation Act, especially the contention that the Act was not</p>	<p>NA.</p>	<p>The Court applied Article 21 and the principles of sustainable development and the polluter pays principle, as articulated in earlier cases to inform its interpretation of forest.</p> <p>The Court also made some observations on balancing the need for mining operations</p>	<p>The Court felt it necessary that the Chief Secretary of the State of Andhra Pradesh constitute a Committee comprising the Secretary of Industry and the Secretary of Tribal/Social Welfare to collect factual</p>

		<p>majority of the case is concerned with an interpretation of Schedule V of the Indian Constitution, which deals with the administration of Scheduled Areas. However, the Court was also required to consider whether the transfer of the leases violated provisions of the Forest Conservation Act and the Environment Protection Act.</p>	<p>applicable since the land in question had not been declared a forest under the State law, the Andhra Pradesh Forest Act, 1967.</p> <p>This case was decided before the Court laid down the expanded meaning of 'forest' in the landmark <i>Forest Conservation</i> case. Therefore, the Court relied on dictionary meanings of forest, the object and purpose of the Forest Conservation Act and the Environment Protection Act, as well as previous decisions by the Court on the</p>		<p>against environmental protection, although it was not entirely clear with what effect.</p> <p>It stated that mining operations, while detrimental to forest growth, were part of the 'layout of the industry' and that the MoEFCC had a duty to prevent mining operations that were affecting the forest. [para 125] However, the Court did not itself strike a balance.</p>	<p>information on the feasibility of permitting mining.</p> <p>It also stated that it would be obligatory for the State Government to obtain Central Government approval before granting a lease. It directed the Central Government to constitute a Sub-Committee comprising the Prime Minister, the Minister for Welfare and the Minister for Environment while granting this approval so that the State's policy could be consistent with the nation's.</p> <p>The Court also left it open to State Legislatures to determine the basis on which a statute ought to be enacted keeping in mind the guidelines laid down by the Court.</p>
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			<p>impact of mining activities to hold that forest deserved an extended meaning.</p> <p>Accordingly, the Forest Conservation Act applied and the leases granted by the State Government without Central Government approval were void.</p>			This would ensure a consistent scheme throughout the country.
26.	<i>State of Andhra Pradesh v M/s Anupama Minerals</i> 1995 (81) SCC 117	The State Government had refused to grant the renewal of a mining lease in a forest area. The Andhra Pradesh High Court directed the State Government to	<p>Yes.</p> <p>The Court interpreted section 2 of the Forest Conservation Act in light of its object and purpose and held that the power of</p>	NA.	<p>The Court had to consider whether the State Government had acted within the limits of its authority under the Forest Conservation Act by refusing to renew the lease.</p> <p>Rather than restricting itself to upholding the refusal by the State Government in light of the object and purpose of the Act, the Court</p>	The Court held that the directions issued by the High Court were in violation of the Forest Conservation Act and set them aside.

		consider renewal and to seek prior approval of the Central Government under Section 2 of the Forest Conservation Act. The Court was asked to consider the legality of the High Court's directions.	the State Government to renewal was coupled with a duty to prevent depletion of the forest. The refusal of the State Government to grant renewal could not therefore be termed illegal.		went a step further and held that a grant of renewal of the lease within the forest area would have been in <i>violation</i> of the law.	
27.	<i>State of Himachal Pradesh v Ganesh Wood Products</i> AIR 1996 SC 149	PIL to restrain the State Government from setting up manufacturing units in a particular sector that were likely to encourage the indiscriminate felling of <i>khair</i> trees and have an adverse impact on the ecology of the region.	Yes. IPARA, industrial policy, forest policy, court reiterated that it was not created under a statutory provision, therefore does not detract from other statutory provisions In order to determine	The Court relied on an affidavit filed by Secretary (Forests), Government of Himachal Pradesh as evidence of the availability of the <i>khair</i> trees that would make up the raw material for the manufacturing units.	The Court noted that the order of the State Government rescinding approval for three of the units could not be traced to a specific statutory authority. Therefore, it was the Court's function to review the exercise of the Government's executive power. The Court relied on the National Forest Policy, the State Forest Policy, various Central and State laws related to the environment as well as Article 51-A of the Constitution to reach the conclusion that the Government	The case was remanded to the High Court, which was directed to take into account public interest as well as the interests of the owners of the manufacturing units. This balancing was to be undertaken on a survey of the availability of raw material conducted by an expert body. The Government was

		<p>The Industrial Projects and Approval Review Authority ('IPARA') had granted approval to six manufacturing units. The State Government then rescinded the approval for three of these units. The Himachal Pradesh High Court set aside this decision of the State Government, and the matter was then appealed to the Supreme Court.</p>	<p>whether the State Government had properly exercised its power while rescinding approval, the Court established a hierarchical relationship among the different applicable policies and statutes. It noted that the IPARA was only set up under executive authority, while there was a more extensive list of Central and State environmental statutes that were applicable to the setting up of industries.</p> <p>It listed these various enactments, including the</p>		<p>had exercised its power validly and that there was no absolute or unrestricted right to establish industries.</p> <p>The Court also applied the principles of sustainable development and inter-generational equity to inform its review of the Government's decision. It held that these principles as well as the policies and statutes mentioned above ought to inform the implementation of industrial and liberalisation policies. IPARA (the body that had initially granted approval) had not undertaken a systematic survey of the availability of <i>khair</i> trees and its decision violated Central and State forest policy.</p> <p>The Court held that the owners of the manufacturing units whose approval had been rescinded could not rely on the doctrine of promissory estoppel. (The owners argued that they had made considerable investment in light of the approval granted by IPARA). The reasonable</p>	<p>directed to constitute this expert body and to base its submissions before the High Court on the Government's assessment of the report of the expert body.</p> <p>The Court prohibited the grant of approval to new manufacturing units until the Government had appropriately surveyed the availability of raw material.</p>
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		<p>Himachal Pradesh Land Preservation Act 1978 and the Himachal Pradesh Forest Produce (Regulation of Trade) Act 1982. In particular, it noted the provisions of the Environment protection Act that empowered Government to impose restrictions on the locations of industries.</p> <p>Accordingly, it upheld the State Government's decision to rescind approval, even going a step further to hold that the State Government had an obligation to exercise its powers so as to give effect to the</p>		<p>expectation of the owners could be outweighed by the public interest in preserving forest wealth.</p> <p>However, the Court did not itself undertake this balancing exercise. Instead, it remanded the case to the High Court so that the latter could factually examine the extent to which the owners of the manufacturing units had incurred losses by relying on the approval granted by IPARA.</p> <p>Told the High Courts to take into consideration public interest as well as the interests of the owners of the manufacturing units. Also ordered it to take into account estimates and availability of raw material with the aid of an expert committee. This estimate should cover Government and Forest lands and must be arrived at keeping in mind National and State Forest policies and relevant statutory provisions.</p> <p>The Court also stated that the principle of sustainable</p>	
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			underlying objectives of all the statutes that it had enumerated.		development required not only that industries be restricted on the basis of an assessment of forest wealth, but that their working also ought to be monitored closely in order to maintain the necessary balance.	
28.	<i>State of Uttar Pradesh v Deputy Director of Consolidation</i> AIR 1996 SC 2432	Dispute over the status of certain lands as forest areas.	Yes. The State Government laid claims to the land under the Indian Forest Act, 1927 while the respondents disputed the applicability of this Act and instead claimed landholding rights under the Uttar Pradesh Consolidation of Holdings Act, 1953. The High Court and the Supreme Court reached contradictory	NA.	Both the High Court and the Supreme Court applied their minds to the question of the legal validity of the notifications issued under the two statutes. Neither of the Courts engaged with the balancing of competing considerations i.e. individual property rights against environmental preservation.	The Court confirmed the applicability of the Indian Forest Act to the land in question and set aside the order of the High Court.

			<p>conclusions on the applicability of these two statutory regimes.</p> <p>Both Courts confined their reasoning to the provisions of the statutes in question. The Supreme Court ultimately confirmed the precedence of the Indian Forest Act on the grounds that the Act constituted a complete code in itself, thus precluding the applicability of other legislation. The object and purpose of the Indian Forest Act or environmental considerations did not play any role in the Court's ultimate decision.</p>			
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29.	<i>Tarun Bharat Sangh, Alwar v Union of India</i> AIR 1992 SC 514	PIL brought by a social action group demanding the enforcement of statutory notifications promulgated under the Wildlife Protection Act, the Forest Conservation Act and the Environmental Protection Act.	Minimal. The State Government was alleged to have illegally and arbitrarily granted licences for mining dolomite and limestone inside protected forest areas. These activities had an adverse impact on the wildlife. The Court noted that statutory notifications under three different regimes had been issued in respect of the lands in question—the Rajasthan Wild Animals and Birds Protection Act 1951, the Rajasthan Forest	The Court appointed a Committee to enforce statutory measures and prevent environmental degradation and preserve wildlife within the protected areas.	The Court did not cite any Constitutional provisions or environmental principles in support of its directions. The Court, did not itself balance environmental and economic interests, but issued directions to the Committee to recommend alternate mining sites for <i>bona fide</i> grantees of leases. This was intended to compensate for the hardship that would be caused by the termination of mining operations in the protected area. The Court observed that ‘it was odd’ that the State Government should declare certain areas as protected forests under different statutory regimes, and simultaneously permit mining operations in such areas. [para 7] However, it did not explicitly hold that the State Government had acted in excess of its statutory authority.	The Court made an interlocutory direction prohibiting mining in the protected area. The Court appointed a Committee under the Chairmanship of a Judge and comprising Government officials and one representative of the independent organisation, Centre for Science and Environment. It also permitted the petitioners and the mine leaseholders to assist the Committee in its deliberations. It ordered the Committee to ensure the enforcement and implementation of its order by the concerned authorities, without naming such authorities. The Committee was
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			<p>Act, 1953 and the Wildlife Protection Act.</p> <p>The petitioners alleged that the effect of these notifications was to prohibit mining within the protected areas covered by these notifications. The applicability of these notifications was disputed by the leaseholders of mines operating in the area.</p> <p>The Court did not engage in a discussion of the provisions of the notifications or the statutes under which they were promulgated to ascertain the scope of activities permitted within protected areas.</p>			<p>also ordered to ascertain which mine operators fell within the protected area so that the Court could effectively implement its ban.</p> <p>Finally, the Committee was asked to assess the damage to the environment, to recommend remedial measures for its restoration as well as to identify the agencies through which such restorative schemes would be implemented.</p>
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			Without offering any reasons or setting out the provisions of relevant mining laws, the Court also stated that mining privileges had nothing to do with the declaration of the area as a protected forest.			
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