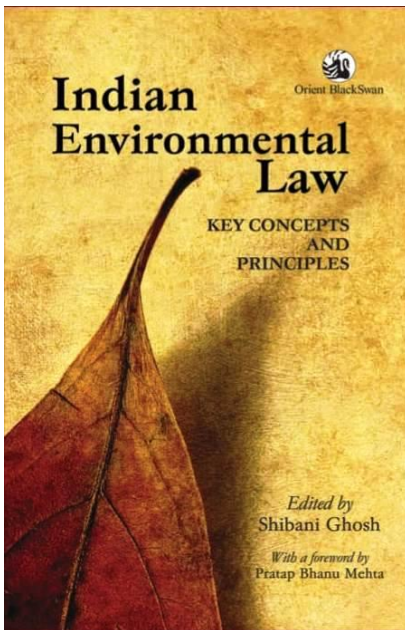


BOOK REVIEW

Can the Twain Ever Meet? Environmental Jurisprudence and Justice in India

Manshi Asher*

Shibani Ghosh, ed. 2019. *Indian Environmental Law: Key Concepts and Principles*. New Delhi: Orient Blackswan. ISBN: 978-9-352-87579-5, pp. 360, ₹925 (HB).



Indian Environmental Law Key Concepts and Principles (2019), a collection of essays edited by Shibani Ghosh, discusses the evolution and application of various conceptual frameworks for understanding environmental jurisprudence in India. In the first two chapters, Lovleen Bhullar and Shibani Ghosh, respectively, draw out the constitutional basis and procedural rights that govern people’s “right to environment” in India today. In the subsequent chapters (3 to 6), the evolution and current usage of key legal principles that are considered critical to the making of environmental rules are subject to searching scrutiny. Notably, these

* Himdhara Environment Research and Action Collective, Village Kandwari, Palampur, Kangra 176061, Himachal Pradesh, India; manshi.asher@gmail.com.

Copyright © Asher 2020. Released under Creative Commons Attribution-NonCommercial 4.0 International licence (CC BY-NC 4.0) by the author.

Published by Indian Society for Ecological Economics (INSEE), c/o Institute of Economic Growth, University Enclave, North Campus, Delhi 110007.

ISSN: 2581-6152 (print); 2581-6101 (web).

DOI: <https://doi.org/10.37773/ees.v3i2.216>

chapters bring into focus the debates and implications in the legal rendering of principles such as sustainable development (Saptarishi Bandhopadhyay), the polluter pays principle (Lovleen Bhullar), the precautionary principle (Lavanya Rajamani), and the public trust doctrine (Shibani Ghosh). These four essays help trace the origins of these legal doctrines in the Indian courts and focus, in particular, on how environmental decision-making gets inserted into case law. In Chapter 7, which is the final one, Dhvani Mehta carries out a detailed review of how compliance with judicial orders and their enforcement and effectiveness in terms of implementation play out on the ground.

In essence, this book debates and discusses the interpretation, reinterpretation, distortion, and dilution of these various legal principles when applied in court cases. It questions the robustness of the concepts that currently inform existing environmental laws in India and debates whether they rest on sound legal premises, claims, and practices. Given that the themes covered by the collection are vast in scope, this brief review will comment on what the reader could take away from this book with regard to environmental jurisprudence and its implications for environmental justice in contemporary India.

Since the 1980s, judicial activism in India has, in fact, often been lauded for contributing to environmental policy and governance. As Bhullar shows in the first chapter, domestic jurisprudence has clearly linked the “right to environment” with Article 21 (Right to Life) of the Indian Constitution, among other articles (47, 48A, and 51A(g)), and Indian courts have played a critical role in this process. However, as this and the following essays in the book suggest, this right becomes difficult to realize due to the “varied” and “flexible” application of concepts by the judiciary in environmental decision-making.

Shibani Ghosh, in the following chapter, while laying out the various laws and rules that guarantee procedural rights—the right to information, the right to public participation, and the right to access to justice—argues that these procedural environmental rights are on “firmer legal foundations” (103) than substantive environmental rights in India. However, given the systematic onslaught on procedural rights (especially in the last few years) with the dilution of the Right to Information Act (RTI) and the Environmental Impact Assessment (EIA) Notification 1994 (Ghosal 2018), a careful reassessment of the stability of procedural rights is called for.

Delving into the Narmada case, Bandhopadhyay comments on the instrumental use of “sustainable development” as a principle by Indian courts. He critiques the “pick and choose” approach of the judiciary,

particularly how the latter treats the notion of sustainability as a handmaiden of the interests of urban citizens, with their modernist vision of the future (150). Bhullar's essay highlights how the term "polluter pays" has not been interpreted as a preventive measure. Instead, domestic courts have focussed on its curative rather than justice dimension. While reviewing its evolution, one misses the critical assessment that at their very core, concepts like "polluter pays" were intended to only "manage" the environmental impact of neo-liberal economic development directed at higher growth (and thus more corporate profit), without ever having to compromise on or question the idea of "growth" and its inherent ecologically destructive or socially exploitative character (Lohman 2019).

Interestingly, Lavanya Rajamani's essay observes how the "precautionary principle" has not come of age in environmental law in India, due to the courts' balancing of environmental concerns with those of "sustainable development". Her commentary also speaks about the overreach of the judiciary and courts. The starkest evidence of this elite bias is in judicial decisions in the domain of forest conservation that is particularly made evident in the Godavarman case (Mate 2015).

While discussing the public trust doctrine, Ghosh walks us through how Indian courts have relied on this principle in cases involving various natural resources, since its use in the Kamal Nath judgment of 1996. She argues that for the doctrine to be effective, it must be interpreted or defined more sharply and put in application by the executive rather than the judiciary alone. Given the changing nature of the state and the increasing privatization of public resources, there is a need to review how this doctrine is being rendered irrelevant.

Dhvani Mehta in the final chapter critically analyses the issues around mechanisms set up by the court (like the Central Empowered Committee) and existing executive regulatory bodies (like the State Pollution Control Boards) in ensuring compliance with law and court orders. Acknowledging that a variety of social, political, and economic factors influence the functioning of these agencies, she cautions against the creation of newer authorities in the name of "institutional reforms".

We cannot ignore that India has suffered a 36-point drop in its global Environment Performance Index (EPI) as of 2018. India is now in the bottom 5 of 180 countries (PTI 2019). India was cited as the fourth-most dangerous country in the world for environmental activists in 2016 by a UK-based watchdog group, Global Witness. This book cites several instances of environmental crises in which Indian courts have intervened, but fails to meaningfully explain why project-affected communities

continue to lose their access to natural ecosystems. The Indian judiciary is arguably undergoing a severe internal crisis and its credibility is questionable as constitutional democracy weakens and incidents of political interference in judicial decision-making are repeatedly flagged (Bhatia 2014). Specifically, the highly acclaimed instrument of access to environmental justice—India’s decade-old National Green Tribunal—is now being increasingly divested of its powers to enforce and prevent environmental destruction (Dutta 2019).

Environmental governance in India, inside and outside of judicial territory, is increasingly revolving around techno-managerial solutions that further push for monetary valuation and commoditization of nature. It is apparent that collective access to and ownership of natural habitats/territories by marginal communities (like Adivasi people) and their right to conserve ecological spaces remains at the periphery of the environmental discourse, even today. The challenge lies before the active community of researchers, lawyers, practitioners, and activists to adopt a more multidisciplinary, holistic, and radical critique of the existing enviro-legal order in India and to work together towards realizing environmental justice.

REFERENCE

- Ahmed Omair. 2018. “Rights without Institutions are No Rights at All.” *The Third Pole*, July 26. <https://www.thethirdpole.net/en/2018/07/26/rights-without-institutions-are-no-rights-at-all/>.
- Benjamin, Vipin Mathew. 2010. *Has the Judiciary Abandoned the Environment?* New Delhi: Human Rights Law Network.
- Bhatia, Gautam. 2014. “Book Review: ‘The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India.’” *Indian Constitutional Law and Philosophy*, February 23. <https://indconlawphil.wordpress.com/2014/02/23/book-review-the-shifting-scales-of-justice-the-supreme-court-in-neo-liberal-india/>.
- Dutta, Ritwick. 2019. “Woes of the National Green Tribunal: Are the Recent Appointments Unconstitutional?” *Bar and Bench*, October 9. https://barandbench.com/new-appointments-national-green-tribunal-unconstitutional-judicial-independence/?branch_match_id=709144027720293519.
- Ghosh, Shibani, ed. 2019. *Indian Environmental Law Key Concepts and Principles*. Hyderabad: Orient Black Swan.
- Ghosal Aniruddha. 2018. “Four Environmental Rules Diluted in 2018 That Will Have an Impact Next Year and Beyond.” *News 18*, December 26. <https://www.news18.com/news/india/four-environmental-rules-diluted-in-2018-that-will-have-an-impact-next-year-and-beyond-1984047.html>.
- PTI. 2019. “India Ranks 177 out of 180 in Environmental Performance Index.” *The Hindu*, January 24. <https://www.thehindu.com/sci-tech/energy-and->

[environment/india-ranks-177-out-of-180-in-environmental-performance-index/article22513016.ece](https://www.environment/india-ranks-177-out-of-180-in-environmental-performance-index/article22513016.ece).

Lohman, Larry. 2019. "Neoliberalism, Law and Nature." In *Research Handbook on Law, Environment*, edited by Philippe Cullet and Sujith Koonan, 32–63. United Kingdom: Edward Elgar Publications.

Mate, Manoj. 2015. "The Rise of Judicial Governance in the Supreme Court of India." *Boston University International Law Journal* 33: 169.

Pal, Sumedha. 2019. "Niyamgiri Anti-mining Struggle: Brutal Repression by Odisha Govt Continues." *Newsclick*, August 21. <https://www.newsclick.in/Niyamgiri-Anti-Mining-Struggle-Activists-Arrest-Vedanta-Odisha-Government>.

Roy Brototi. 2019. "Environmental Rights have Been Denuded." *The Hindu Businessline*, November 6. <https://www.thehindubusinessline.com/opinion/columns/environmental-rights-have-been-denuded/article29890867.ece>.

Thayyil, Naveen. 2009. "Judicial Fiats and Contemporary Enclosures." *Conservation and Society* 7 (4): 268–282.