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Environment, Law, and Democracy in India

K. SIVARAMAKRISHNAN

Some years ago, in his contribution to a collection of essays on the Supreme Court and the Indian Constitution, Pratap Bhanu Mehta emphasized the political significance of the Court, saying, "there is not a single important issue of political life in India that has not been, by accident or design, profoundly shaped by its interventions … the courts participate and collaborate in governing India" (Mehta 2006, 162). How exactly might this happen? In beginning to explore answers to this question, I want to focus on the formation of a distinct environmental jurisprudence and its relationship to the changing and dynamic qualities of a democratic polity in India. And in formulating my analysis I draw here on my current work on courts and the environment in India or how the environment came to be a legal object in India over the last century.

Such a study must look at the making of laws, the process of litigation, the formation of jurisprudence, and the relation of the legal public sphere to other political institutions and social conflicts. To that end this project involves research in courts, in archives, among litigators and litigants, and with civil society organizations that are active in the legal public sphere. I cannot delve into all these aspects in a short essay, so I will limit myself to some selected comments on Indian democracy followed by a brief account of the making of an environmental jurisprudence in the Supreme Court of India. In constructing a synoptic account of aspects of an Indian environmental jurisprudence, emerging in the last two decades of the twentieth century, I am deploying the methods Kim Lane Scheppele has described as constitutional ethnography (Scheppele 2004).[1]

Colonial legal institutions for what are now considered as natural resources, or nature, or the environment, in India developed in two realms through the last decades of the nineteenth and early decades of the twentieth century. One, which I would refer to as rural government, was where such laws and their

K. Sivaramakrishnan (k.sivaramakrishnan@yale.edu) is Professor of Anthropology and Forestry & Environmental Studies at Yale University

[1]According to Scheppele, "constitutional ethnography … looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the mechanisms through which governance is accomplished and the strategies through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context" (Scheppele 2004, 390–91).

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administration came most directly into contact with livelihoods and rights in land, water, forests, animals, and other aspects of the terrestrial environment in India (see Pathak 2002; Sundar 2010a). The other, which might be contrastingly named urban government, was the realm where law and its implementation more often expressed ideas about public nuisances, health, and sanitation. Law pertaining to the environment in cities seemed to be less about individual or collective rights, and more about civic sense and security. It was also, especially after the plague in Bombay and the movement of the imperial capital to Delhi, about pleasing vistas and planned living in cities (Pathak 1994; Anderson 1995; Sharan 2006). For instance, City Improvements Trusts created in Delhi, Bombay, and Calcutta as the nineteenth turned into the twentieth century, focused on hygiene and uncluttered urbanism and attempted to clean cities by segregation (Hazareesingh 2000; Mann 2007). In both these realms environmental questions remain wrapped, or were anticipated, in legal debates and issues of government that provide a genealogy of ideas about the environment as both an essential resource for individual living and societal heritage for public good.[2]

The *Government of India Act* (1935), and the Constituent Assembly Debates, of 1947–1950, added a key dimension to the development of ideas about the environment and its government in India by inserting them into other debates about the shape of Indian federalism (Kohli 2001).[3] The constituent assembly debates are interesting in this context. When it came to natural resources and rural development, or, for that matter, health and sanitation, these debates were mostly about which level of government would administer what sectors of the economy and society as the prime mover in those sectors. Arguably, the vision of federal government that animated deliberations leading to the framing of the constitution favored states' empowerment in the management of land and other aspects of human development. Only the sharing of interstate rivers invited some consideration of central administration (Rao 2004). The effects can be seen till this day in the legislative history of forests since independence. It took the *Forest Conservation Act* (1980), and the *Forest Rights Act* (2006), to abrogate the powers vested in states, each in very different ways, and with contrasting intent. The former operated in the name of central supervision of the process and purpose of forestland conversion for other public goods, and the latter worked in the name of ensuring local rights to forestland were effectively identified and protected, especially for Scheduled Tribes.[4]

[2]These ideas, that take clear shape in the 1970s in India, somewhat parallel similar developments in the USA, Europe, and other places in the developing world across Asia, Africa, and Latin America.

[3]The working of Indian democracy, some have argued, can be more usefully assessed in terms of the working of federalism, for a key aspect of the distribution of power in society that has allowed democracy to deepen is the way "a delicate balance has been struck and restruck between forces of centralization and decentralization" (Kohli 2001, 2).

[4]Pathak 1994, 3139, discusses how Center-State relations were strained in the enactment and application of the *Forest Conservation Act* (1980). The Writ Petition filed by Sidhartha Nayak, a social

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The fortunes of federalism in the first four decades of Indian Independence merit a more detailed consideration than I can offer here. (For an interesting assessment of federalism in design and practice, see Dasgupta 2001; Manor 2001). But if Austin is correct in his assessment that the Nehru-Gandhi years saw an erosion of states' powers into the late 1980s, with some mild correctives applied by the Janata Party regime in the late 1970s via the 43rd and 44th amendments, then forest and environment law and its consequences simply grew from and exacerbated existing patterns (I am referring to the concise assessment of the Indian federal experience during the period 1950 – 85, in Austin 1999, 555–574). Apart from these intercalative aspects, the Constitution and its founding moments is also important for its distillation of aspiration. As Rajeev Bhargava notes, the Constitution is a touchstone, "a moral document … embodying an ethical vision" (Bhargava 2008, 4). It envisaged nothing less than a revolution in several registers – the establishment of democracy and individual liberties, the creation of conditions for emancipation of all subordinated groups, and the achievement of equality by all (Guha 2007, 119). These revolutions also contained inherent contradictions, and they generated a simmering conflict between democracy and social revolution that often spilled into tensions between the legislative-executive branches of the state and its judicial arm, which exercised the power of judicial review and thus enjoyed the role of guarding the core principles enshrined in the Constitution (For a vivid account of these tensions, as he discusses the events leading to the First Amendment, see Austin 1999, 71–98).

The adoption of the Indian Constitution, in 1950, created a country of putatively equal citizens of everyone who remained within the national borders of independent India.[5] Citizenship required an elaboration of rights and, in this case, also of governmental duties to bring about the social revolution necessary for the effective exercise of a wide range of rights, especially for those historically placed at the margins of social opportunity. And it is useful to distinguish political rights from socioeconomic rights, as the former are more readily part of the web of democracy, while the latter are the elements of the desired social revolution. Political rights might range from adult franchise to freedom of speech and

activist and advocate from Bhawanipatna, Kalahandi in Orissa, and the advocate, Anitha Shenoy against mining in Niyamgiri Hills by Vedanta Industries, discusses at length the violation of local forest rights conferred under *Forest Rights Act* (2006). See *Forest Case Update* 2007, 2–5. On the recommendation of a committee appointed by the Ministry of Environment and Forests, Government of India, to evaluate the implementation of the *Forest Rights Act* (2006), mining licenses granted to Vedanta Industries were suspended in November 2010.

[5]State formation in India after independence was carried out in a framework of liberal civil rights, democracy grounded in universal suffrage, affirmative actions for balancing freedom and equality with justice for disadvantaged groups in society, federalism, and secularism. This was a distinctive Indian formulation of the balance of concerns that was to shape state-society relations for the rest of the twentieth century (see Sarkar 2001, 25).

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require governments to act as custodians, but socioeconomic rights usually allude to capacities and conditions in which citizens can flourish and often require government provisioning.[6] As Shankar and Mehta remind us, "the Indian constitution distinguished between enforceable fundamental rights, which were to be protected from incursions by the state, and non-enforceable directive principles, which were goals and duties of the state and included social and cultural rights … the framers made the fulfillment of the rights to food, health, and basic education contingent on the state's economic capacity" (Shankar and Mehta 2008, 148). And from the outset the higher courts were situated at the center of the aspirations released and conflicts generated by these distinctions, for they saw themselves as primary actors in the facilitation of the rights-based revolutions imagined in the constitution.

I know I am being very quick and overly schematic, but I will risk saying, nevertheless, that in the 1950s and 1960s, the question of rights, especially in rural government, was subordinated to the priorities of national development, putting meaningful multi-level democracy somewhat at odds with macroeconomic development. Forests, rivers, and common lands were all legislated and administered on the principle that the first charge upon them would be for national service. Equally, in the 1970s and 1980s, many of these areas, and especially those where wild animals roamed, particularly charismatic megafauna, were claimed for nature conservation. Again, the question of rights was subordinated to other priorities, this time the preservation of national heritage. In some ways the opposition between local rights and national heritage was even more marked, as is expressed vividly in his dissent to the final Tiger Task Force report by Valmik Thapar, who wrote against the expansion of village rights in tiger habitats, saying, "the premise of continued co-existence over vast landscapes where tigers thrive ecologically, as well people thrive economically, is an impractical dream" (Thapar 2005, 4).[7]

Post-Independence India also experienced a rapid expansion of planned development through the five-year plans and significant central revenue outlays for local development through planned schemes that were sponsored by the central government. Democratic government in India was inevitably filtered through the institutions designed for planning with consequences for the environment (On the idea of planning and its defining role in state formation in independent India, see Chatterjee 1993, 205–219). And so, both questions of rights and processes of planning became integral to the unfolding of Indian democracy. Actually, since Rousseau wrote *Social Contract* it is hard to build a

[6]I am following here well-argued distinctions between classes of rights that are available in the literature (see Janoski 1998, 28–33; and for the original ideas he builds on, see Marshall 1950).
[7]A contrasting view can be found in the more recent study of elephant conservation, which notes, securing elephant habitat has to be done in ways that makes wildlife and people compatible in their proximate existences (see Rangarajan et al. 2010).

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theory of democracy that does not deal with some form of the idea of a general will and a representative government, which interprets the will through law, planning and policy (Rousseau 1968 [1762]). Many have suggested such framing is not particularly useful in the contemporary world. I will simply follow Ian Shapiro to say, perhaps we can rethink Rousseau through a distinction between ideal and non-ideal manifestations to retain a purchase on the world around us. In this view, what passes for representative government in countries that actually aspire to it is admittedly an approximation, and to recognize it as such is not always a criticism if we note that a more inclusive or representative system of government has yet to endure for as long in this world (Shapiro 2003).

Associated with this backhanded compliment for democracy is the notion that really existing democracy is compatible with, and maybe even requires, social inequality (Shapiro and Hacker-Cordon 1999, 4). This may be because of its reliance on capitalism as the associated set of economic arrangements, but that may not be the only reason. This means, of course, that redistribution, and redistributive justice (an even more lofty expectation, especially in Indian planning) is hardly to be found in working democracies. Redistribution offers the possibility of peacefully managing conflict, but not much more than that (The idea of minimalist democracy is further developed by Przeworski 1999). And even there, the evidence seems to be discouraging. India, of course, was fashioned as a socialist democracy, and in that self-definition we can see the recognition of the potential contradictions between deliberative and distributive functions of democratic institutions. If capabilities and opportunities are the necessary ground on which citizenship is realized, to what extent does a democratic polity facilitate or impede the provision of these opportunities to all its potential citizens? And, for that matter, does the deepening of democracy—one measure of which may be the multiplication of tiers of government which are elected (viz. the addition of constitutionally mandated Panchayat elections since the mid-1990s)—enable or inhibit distributive abilities of government and social institutions?

The working of democracy has certain entailments, not least the call to action at several levels of engagement in politics. At a descriptive level it is easy to observe that Indian democracy has led to a series of proliferations – of parties, identities, and conflicts.[8] It has also led to the proliferation of regulatory regimes, and lastly the proliferation of normative understandings of what may be democracy's value. One of the cherished values is, of course, civic virtue, and one of the measures of this virtue is the accounting of civil association.

[8]This observation conforms to the more general idea that a recognition of the basic connection between democracy and constitutional states finds "the system of rights is blind neither to unequal social conditions nor to cultural differences … [and] … the consistent actualization of the system of rights … [cannot happen] … without social movements and political struggles" (see Habermas 1998, 208).

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There is, I believe, a fascinating discord between the ability of democracy as a condition to provide the space for making claims and expressing perspectives, and the stimulus democracy provides to associational behavior. Patron-client networks and civil society organizations cannot be neatly opposed to each other in India, and civic virtue may find its most ardent expression in faith based service organizations. These forms of civic action may deliver some of the most dramatic distributive successes, even as they seem least civil and resemble the work of antisocial elements.[9]

Association is kin to mobilization and associations can strengthen and multiply each other as social phenomena. Such indeed was the case in India as the 1960s shaded into the 1970s. At one level political parties proliferated, and at another level so did NGOs. Along with these trends varied social movements captured the imagination and energy of urban middle classes and varied groups across the countryside. Courts entered this ferment through their own brand of activism, with the initiation of public interest litigation soon after the political Emergency of 1975–77, and they used their activist persona to focus on socioeconomic rights and the quality of life. "The judges began incorporating rights to health, food, education, shelter, and so forth, into the fundamental rights to equality (Article 14) and life and liberty (Article 21)" (Shankar and Mehta 2008, 149). In their growing body of rulings, many originating in Public Interest Litigations (referred to hereafter as PILs), potable water, a clean environment, and sanitation became a part of the right to life while getting industries like stone crushing units, rice mills, and brick kilns to move out of urban and residential areas was deemed crucial to its quality (Shankar and Mehta 2008, 159).

If the first cases (from the early and mid-1980s) focused more on pollution; by the 1990s the implementation of the *Forest Conservation Act* (1980) became the vehicle for a series of sustained interventions and the creation of a governance apparatus that is of particular interest (*MC Mehta v. Union of India* 1987b; *Indian Council for Environmental Legal Action v. Union of India* 1996; *Environmental Awareness Forum and TN Godavarman Thirumalpad v. Union of India* 1997). Through two cases, now popularly known as the Godavarman case (1996) and the Center for Environmental Law case (1995), both concerned with the implementation of the *Forest Conservation Act* (1980), the Supreme Court created a forum for continuing intervention and governmental innovation that is becoming an evermore tangled web of federal relations on the one hand and citizen rights and aspirations on the other (For a useful initial discussion of the work of the courts as judicial over-reach and tilting federal relations in a centralizing direction, see Rosencranz and Lele 2008). Key orders passed on December 12, 1996 and November 13, 2000 prevented states and even

[9]In various studies we can see these processes and their analysis in discussions of political society, social capital in the countryside, rise of lower castes, urban gangs, and neighborhood political operatives (see Kakar 1996; Hansen 2001; Krishna 2002; Jaffrelot 2003; Chatterjee 2006).

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statutorily authorized federal agencies from denotifying (i.e. opening up to private exploitation) forests and parks without due review by the Courts (see Datta and Yadav 2007, 3–4). The Godavarman case, in particular, made use of the public law instrument of continuous mandamus,[10] a fairly uncommon constitutional jurisdiction available to it in the Constitution of India (For a fuller treatment of the implications of this case for the extension of Supreme Court jurisdiction to forest conservation and thereby to a judicial view of the environment, see Thayyil 2009).

As an outgrowth of these rulings, and drawing on powers vested in the *Environment Protection Act* (1986), the Court also moved to constitute a series of high-powered committees, authorities, and, in May 2002, the Central Empowered Committee, to oversee the implementation of court orders and interim rulings emanating from the suite of litigation folded into the growing and segmented portfolio constituted by the two originating cases. This CEC, consisting of three federal government officers, and two NGO representatives, was also authorized to dispose of petitions that would implement court orders and send reports to the bench on larger issues as needed (Datta and Yadav 2007, 11–12). This is just one of several hybrid regulatory bodies created by higher court edict that I see as examples of the institutional forms that have emerged from civil society and higher court interactions involving environmental and related social justice questions in recent times.[11] Arguably such outgrowths of judicial activism, and government responses, including special judicial mechanisms like the National Environmental Appellate Authority, are an expression of how "quality of life" questions have shaped the formation of new state spaces – institutional hybrids combining judicial oversight and executive accountability – and new notions of citizenship.[12]

All this follows a spate of environmental legislation from the 1970s and 1980s and a parallel increase in public interest litigation over the 1980s and 1990s; which prompts the following interrelated questions: How does the working of judicial review and activism in environmental disputes and regulation articulate new meanings for citizenship in India's democracy? Why are higher courts more active in this process, and what new political formations, including

[10]A mandate requiring tasks in general public interest be performed expeditiously without miscarriage of justice.

[11]Another would be the system of public hearings that has been instituted as a way to involve public participation in the decisions and assessments to be made by Pollution Control Boards or during Environmental Impact Assessments, processes generated by the *Environment Protection Act* (1986). For a thoughtful examination of these hearings, see Chaturvedi 2004.

[12]Procedural elaboration may appear bureaucratic at one level, but is also necessary for increasing transparency, consultation, and creating new opportunities for procedural scrutiny and thereby the administration of justice. A positive example would be the Delhi High Court ruling that held undue haste in the conduct of environmental public hearings and proceedings before expert committees would amount to procedural impropriety vitiating the process and hence rendering it unjust (see Kohli 2009).

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state-civil society hybrids, are produced as a result? What theoretical and practical implications does this have for environmental governance in India?

I believe these questions are highly salient to any contemporary yet historically grounded understanding of Indian democracy as it enters a seventh decade. Directing these questions through the prism of environmental concerns is particularly useful not merely for the wide and complex moral compass of such concerns, or the fascinating opportunity they provide for examining the relationship between environment and democracy. There is also a sound empirical justification arising from the fact that the majority of public interest litigation or judicial activism has involved cases arising from environmental problems like forest and wildlife conservation, water and air pollution, relocation of hazardous industries, protection of marine habitats along India's long peninsular coastline, and the livelihoods of millions of scheduled tribes and rural poor for whom sustainable livelihoods seem increasingly threatened by both industrialization and nature conservation activities that have gained momentum in the last two decades.

In speaking of judicial activism I should clarify that this term commonly applies to the power of higher courts to take *suo moto* notice of issues of public interest or initiate cases (invoking jurisdiction from the Constitution) based on third-party complaints or notifications.[13] But, as Nandini Sundar has argued, such activism is also more a characteristic of civil society in the last few decades than ever before. In the interests of brevity I will simply summarize here by saying that "legal mobilization" is an important part of social mobilization to an unprecedented degree (Sundar 2010b). This activism is also waged across a broader terrain to include public demonstrations, political parties and their need for votes, parliamentary committees, and the media, signaling both a more rights-based refashioning of the public sphere from below, as well as the way in which public participation is increasingly circumscribed by legal expertise.

In a study of family law and minority cultural rights, Narendra Subramanian also notes that legal mobilization has increased among women's organizations, rights organizations, and community organizations since the 1970s. Women's organizations focused more on the legal empowerment of women as they gained considerable influence over the legal elite and in the bureaucracies engaged in gender-relevant policy-making. Intellectuals associated with women's organizations became members of the Law Commission and the newly formed Women's Commission, and thereby pressed their demands. These organizations attended more to litigation to urge the judiciary to grant women more rights, and many of them established legal aid cells to help women facing matrimonial problems. This led to the resolution of some disputes

[13]Juristic activism has worked to develop modes of thought, and fashions rights and remedies to bring law in consonance with justice but has been uneven in the attention it has paid to different issues (see Ramanathan 1996).

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through informal arbitration and in community courts, and gave more women good legal representation if they approached the state courts (Subramanian 2010).

A similar commentary can be provided in the case of environmental NGOs and land rights advocacy groups, with the difference that they initially were slower to litigate, but have become more wide-ranging and enmeshed in popular–often violent–political conflict as the construction of a legal and juridical public sphere around quality of life issues has proceeded rapidly in India since the 1980s.[14] Some environmental NGOs have been adept in recent decades when it comes to turning an issue with specific group and class interests into one of more universal environmental entitlements, usually expressed as rights to ecosystem services or amenities in the public domain.[15] It is to the judicial history of this process that I would like to turn now for a brief delineation of how constitutional law was re-shaped to produce what I will term an environmental jurisprudence.[16]

Post-emergency Supreme and High Courts went to work with vigor utilizing expanded powers available from constitutional amendments and the climate created for expansive interpretations of article 253 and article 21 – the right to life and liberty. Judges in many states were inspired by the landmark Dehradun mining case and made this connection explicit by holding that the constitution includes the protection and preservation of nature's gifts without which life cannot be enjoyed (*T. Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad* 1987). In subsequent rulings the right to life and the right to livelihood were linked up as well. As the Supreme Court noted, in a 1985 ruling, any person deprived of the right to livelihood, except according to just and fair procedure established by law, could challenge the deprivation as offending the right to life conferred by Article 21 (*Olga Tellis v. Bombay Municipal*

[14]As a study of urban environmental politics in Howrah documents, the filing of more petitions before the green bench of the Calcutta High Court "tell(s) of the rising interest in using public interest litigation to establish a sense of public sphere in West Bengal" (see Dembowski 1999, 52).

[15]Equally, it may be true, as a study of the dispute over contaminants in aerated drinks marketed by some multinational corporations has noted, "Middle-class environmental organizations, unable to mobilize and sustain broad coalitions, have thus increasingly resorted to the use of courts in coaxing an apathetic state to action, a strategy that has been well documented to lead to outcomes congruent with middle-class interests" (see Vedvan 2007, 664; for a more general assessment of middle classes and the environment in India, see Mawdsley 2004).

[16]I use this term with several caveats to describe the accumulation of judicial practice and wisdom that shapes self-perception of responsibility and role in courts, but also ripples through other parts of government and society to generate ideas, institutions, and conflict. That jurisprudential accretion may benefit particular social classes or economic processes more than others is no less possible in the environmental sphere, or in public interest litigation, though arguably in such contexts social revolutionary possibilities are always bubbling at the surface. I am also agnostic as to whether environmental jurisprudence learns from or helps create a broader environmental value system that is capable of generating broad social benefit. For some comments on this last point, see Balasubramaniam 1994.

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Corporation 1985). In Uttar Pradesh, a north Indian state, the National Thermal Power Corporation (NTPC) was constructing the Rihand Super Thermal Power project. Land acquisition was made conditional on NTPC providing court-approved facilities to the ousted forest dwellers, mostly tribal groups (*Banwasi Sewa Ashram v. State of Uttar Pradesh* 1987).

Many legal experts, judges and commentators have suggested that this activism on the part of the Supreme Court of India arose both from responses to specific Indian constitutional crises, most notably the Emergency of 1975–77, and the climate of enabling norms and principles created by international treaties and exhortations (A view ably reproduced and discussed in Dias 1994; for a more recent examination of the emergence of environmental PIL from the ferment of the 1980s, see Rajamani 2007). A new batch of visionary judges began accepting letters from NGOs as petitions on behalf of poor litigants. In another 1985 case, the Supreme Court observed that it was moved to accept letters as writ petitions where a person or a class of persons by reason of disability, poverty, or social disadvantage could not approach the court (*State of Himachal Pradesh v. Parent of Student in Medical College* 1985). The previous year, Justice Bhagwati had already cleared the ground for such proactive court involvement by ruling the right to life was also inseparably the right to live with dignity (*Bandhua Mukti Morcha v. Union of India* 1984). One commentator declared post-Emergency judicial activism revealed a philosophy of constitutional interpretation that viewed the Constitution as more than rules, and in fact a statement of principles of constitutional governance (Sathe 2001).

Justices Bhagwati and Krishna Iyer initiated court activism right after the Emergency years. Early in their judicial careers, both Bhagwati and Krishna Iyer were involved in the legal aid movement. Each of them had written reports for the government on fostering legal services for the poor (Government of Gujarat 1971; Government of India, Ministry of Law, Justice and Company Affairs 1973; Government of India, Ministry of Law, Justice and Company Affairs 1977). These venues were where they first explored the ideas of expanded standing that they implemented in subsequent rulings. The puzzle that they tried to resolve was fundamental to the working of democracy – how do all citizens exercise constitutionally conferred rights? They began, in seeking an answer to this puzzle, the process of creating new state spaces of executive accountability to judicial review. Between 1978 and 1984 the early experiments by Justice Bhagwati were based on the constitutional guarantees to the right to life.[17] We can think of the 1970s and early 1980s as a period when the PIL was used as a

[17]Commenting favorably on a major early PIL ruling, an eminent jurist noted that in this case Justice Bhagwati had "emphasized the wide scope of the orders which the Court can make to enforce fundamental rights" (see Noorani 1984). In the same case the Supreme Court endorsed the use of commissions appointed by the Court for field inquiries into facts in cases where the fundamental rights of the underprivileged are violated and where investigation is necessary.

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tool of social justice – addressing mostly cases about abolishing bonded labor, establishing worker rights, enforcing the rights of prisoners to legal representation, and consolidating women's rights.

Litigation benefited from the expansion of the *locus standi* doctrine to include public-spirited citizens among those having standing to invoke the court on behalf of socially disadvantaged individuals and groups (see *SP Gupta and others v. Union of India* (1982) *Forward Construction Company v. Prabhat Mandal* (1986). The Court established a direct connection with citizens via the channel of fundamental rights and directive principles.[18] The evolution of public interest litigation into a broad swathe of social concerns was facilitated by the growing availability of the environment as a foundry where the steel of progressive judicial review could be smelted. One keen observer traces the ascendancy of environmental subjects in PIL as follows: "In its nascence, PIL's constituency was bonded labor, prisoners, child labor, the mentally ill, women in custodial institutions. In the later half of the 1980s, environment began to occupy a place of prominence. And, in the 1990s, environment dominated judicial discourse as matters of public interest" (Ramanathan 2004, 4524).

The judicial review of administrative and legislative action or inaction was enabled in terms of "irrationality", "illegality", and "impropriety" but national security remained a term that could create impermeable boundaries around state actions threatened by judicial review. As Upendra Baxi points out, this limitation was not necessarily conceived in constitutional terms as a limitation of justice, due to the "belief that almost all practices of power directed to maintaining the unity and integrity of the nation are inherently justice enhancing" (Baxi 2002, 37). That said, as Charles Epp notes, "in India, leading justices on the Supreme Court created a revolution in constitutional law in the late seventies and early eighties, greatly expanding the constitution's formal protection for equality rights and for the less fortunate classes in society" (Epp 1998, 24).

However, despite considerable activism on the part of the Indian Supreme Court from late 1970s for the next decade, the Indian rights revolution remained stunted as landmark cases did not have their judgments consolidated by other cases, and implementation of rulings was poor. The new approach taken by the Supreme Court, since 1977, clearly connected values of due process and equality. Leading justices also developed extended and detailed policy prescriptions for government officials. Mining and water pollution cases were examples. "A number of conditions in India seem to have been ideal for the emergence of a rights revolution. The Indian Constitution guarantees a broad list of rights; the Indian state increasingly has come to violate many of those rights; Indians have used the language of rights in response; and the Supreme Court after 1978 has

[18]For a balanced account of PIL's first two decades in India, see Desai and Muralidhar 2000; for an earlier, influential assessment of public interest litigation as a response to state failure, and lack of accountability, see Baxi 1996.

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handed down a series of landmark judgments that dramatically expanded the scope of promised protection for constitutional rights" (Epp 1998, 89).

The emergence of this connective tissue of varied rights is the more general context for the more particular examination I will now take up of environmental rights and how they came to be defined by emerging higher court environmental jurisprudence in the 1980s and 1990s. As Michael Anderson notes, mobilizing existing rights to address environmental rights, interpreting existing rights to include environmental concerns, and creating new explicitly environmental rights are all part of the same spectrum (Anderson 1998).[19] There is also a vital distinction to be made between rights and standards, the one may be allocated in principle, but the other has to be realized in practice and lead to the enjoyment of the rights. Standards are harder to universalize and must respond to local perceptions and conditions, including their possible implications for social conflict or exclusion. Despite the minefield of norms and practical legalities created by the judicial endeavor to adumbrate standards that respect the regime of rights being created, the movement towards Indian environmental jurisprudence has, for some scholars, been inexorable. It has relied on a constitutional law rationale that places public over private interest and procedural activism on the part of higher courts, especially the Supreme Court of India (see Abraham 1999; Desai 2002).

By the mid 1980s protection of the environment and maintaining an ecological balance, however defined, were being described as duties shared by citizens and the state (*RLEK v. State of Uttar Pradesh* 1986). A series of cases took up issues relating to the displacement of poor people from forest reserves on account of large dam construction (*Banwasi Sewa Ashram v. State of Uttar Pradesh* 1986; *Gramin Sewa Sanstha v. State of Madhya Pradesh* 1986; *Bandhua Mukti Morcha v. State of Tamil Nadu* 1986). And in a famous case of tanneries in Kanpur discharging effluents into the river Ganges, the Court awarded itself the prerogative to issue directions to statutory authorities charged with preventing such degradation of the river. The argument offered was that while closure of tanneries may cause unemployment and loss of revenues, life, health and ecological security have greater importance for the people at large and in the vicinity of the polluted areas of the river (*MC Mehta v. Union of India* 1987a). In the protection of the river, which is associated closely with national heritage, the Court argued not from a logic of preventing or removing a public nuisance, a common law reasoning present in the colonial precedents, but from a specific reading of Article 21, noting that tradition, culture, and heritage, and the protection of such heritage, would all come within the compass of an expanded concept of life (*Vikram Dev Singh Tomar v. the State of Bihar* 1988;

[19]In India some environmental organizations (Foundation for Ecological Security and Legal Action for Wildlife and Environment, Delhi) have demanded a constitutional amendment to provide an explicit fundamental right to clean water and pollution free environment.

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and *Ramsharan Antyanaprasi v. Union of India* 1989). A few years later the Supreme Court amplified that the right to life would include the right to food, clothing, and a clean environment (*Shanti Star Builders v. Narayan Khimalal Totama* 1990; *Chetriya Pradushan Mukti Sangharsh Samiti v. State of Uttar Pradesh* (1990).

The Supreme Court spent much of the 1980s expanding standing, and enlarging its definitions of the fundamental right to life to include natural heritage or pollution free environments (Sub-committee on Judicial Accountability 1991; *Subhash Kumar v. State of Bihar* 1991). This work reinterpreting the normative infrastructure of constitutional rights was accompanied by parallel procedural innovation to give practical substance to the adumbrated principles. The new jurisdiction created to enforce fundamental rights enabled the evolution of procedure appropriate to the jurisdiction. The court found itself to be more than an umpire, and cast itself in the role of an organizer of proceedings, a provider of relief, and supervisor of the implementation of its own orders. To this end it has become necessary to seek the assistance of expert panels, commissioners, advisory committees, and amicus curiae (*Sheela Barsa v. Union of India* 1988). In 1991 a spate of cases brought the environment to the forefront of constitutional jurisprudence and highlighted the procedural assertiveness of this jurisprudence. In one case pertaining to vehicular pollution in Delhi, a high-powered committee was appointed with a retired Supreme Court justice as the Chairperson. And in others, drastic consequences were threatened for local authorities not implementing earlier orders to stop limestone quarrying in Doon Valley and the discharge industrial effluents into the Ganges River (*MC Mehta v. Union of India* 1991a; *RLEK v. State of Uttar Pradesh* 1991).

By 1996 events had taken a different and confrontational turn. The Supreme Court had taken interest in creating institutional hybrids combining judicial oversight and executive accountability – what I have called new state spaces. A bench consisting of Justice Kuldip Singh and Saghir Ahmed acted on public interest litigation filed by S Jagannathan against Union of India, directing the Central government to constitute an authority under the *Environment Protection Act* (1986) and confer on that authority powers to protect ecologically fragile areas. During this year fourteen separate rulings closed factories producing hazardous chemicals, relocated 168 industries from Delhi, banned mining in Haryana, introduced coastal zone protection in many states, fined tanneries in Tamil Nadu, banned felling of forests in many states, and took *suo moto* notice of the problem of air pollution in Delhi.[20] It is clear from these cases that the link between

[20]It is important to note that in each kind of environmental arena, the elevation of the problem to a level of general welfare of the citizenry, spurring higher court activity, follows a particular trajectory. One such, in the case of industrial risk and hazard is traced to the Bhopal gas disaster of 1984, the amendments to the *Factories Act* (1987), and the growth of a jurisprudence favoring relocation of hazardous industries in the subsequent decade (see Ramanathan 2004, 4522–23).

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human rights and environmental rights made by the courts was charted on two axes. One is individual rights, like the right to life, and the other is group rights like those of indigenous peoples to resources and self-determination in their native territories (for the larger argument on this point, see Picolotti and Tallant 2003).

The emergence of public interest law took both indigenous conceptions of justice and cosmopolitan standards into the common law system received from the British. Both the responsibility of the state to protect public interest and the allowing of third party litigation to identify such interest were clearly enunciated and allowed in the emerging category of public interest law. Nature conservation gained popularity in legal terms through eminent domain and public trust (elaborations of this point can be found in Weiss 1984; Coyle and Morrow 2004). But environmental law often derived from property and tort law, in order to limit the exercise of private entitlements, which could result in environmental degradation. The human right to conservation requires the protection of the environment for a life of dignity and wellbeing. And various rights – to life, health, livelihood and cultural or economic rights – are seen as contingent on the right to natural resources or nature in a more holistic sense. This shift has its own curious history in Indian constitutional jurisprudence. The Supreme Court started as a defender of property rights, inviting criticism for being a partisan of landed elites. And in traversing through its strong orientation in crafting a public interest jurisdiction towards social justice, the Court has fashioned an environmental jurisprudence that to some appears increasingly as a vehicle of middle class environmental values and politics (for a discussion of the ways in which urban middle classes have asserted claims to the city in the language of environmental protection and natural amenities, see Mawdsley 2004; Baviskar 2005).

However, to the extent the construction of environmental jurisprudence rests on the constant negotiation of the tensions between conservation and democracy, resources and amenities, livelihoods and public health, ultimately envisioning inter-generational equity and the inhabitation of a planetary consciousness, the Supreme Court is called upon to struggle out of class affinities and contemporary pressures. In a 1995 ruling the Court was quite expansive noting that the word "environment" encompassed both a hygienic atmosphere and ecological balance. Enjoyment of life, the Court held, is not possible without protection and preservation of the environment, and therefore, air or water pollution and ecological degradation should be regarded as violation of the right to life (*Virender Gaur v. State of Haryana* 1995). Realizing the obstacles to a timely realization of these values, the Supreme Court was constantly looking for mechanisms and strategies to translate its judicial mandates into political and administrative action. It opined on the constitution of agencies for coastal zone regulation in both Central and State governments, assessed the environmental impacts of slaughter-house mechanization, and, in a case for banning the import, production

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and distribution of forty insecticides and additives already banned in the USA, directed the creation of a committee of senior officials from four concerned ministries of the Government of India to carry out the necessary investigations (*Akhil Bharat Goseva Sangh v. State of Andhra Pradesh* 1995; *Indian Council for Enviro-Legal Action v. Union of India* 1997; *Ashok v. Union of India* 1997).

The development of environmental jurisprudence is marked in the latter part of the 1990s by the adoption of various principles that further elaborated legal norms beyond the expansion of standing or fundamental rights, and procedural flexibility or administrative engagement of the Court. Responding to a news item in a leading English language daily published from New Delhi, the *Indian Express*, the Supreme Court took note of a matter concerning a private company called Span Motels that had built a club on the banks of the river Beas, encroaching reserved forestlands. This case led to the extension of the public trust doctrine for environmental protection purposes. The Court observed that the public trust doctrine under English Common Law had only applied to traditional uses like navigation, commerce, and fisheries. However, American courts had used the doctrine to protect ecological values – fresh water, wetlands, and riparian forests.[21] Based on its English common law heritage, and adopting an American innovation, the Indian Supreme Court ruled that the environment and ecosystem cannot be eroded for private commercial use unless courts find it is necessary–in good faith–for public good. The National Environmental Engineering Research Institute, a public sector academic institution, was asked to evaluate the damage and Span Motels was required to pay restitution, while the state government was held to have breached public trust (*MC Mehta v. Kamal Nath* 1997; *Vellore Citizens Welfare Forum v. Union of India* 1996, followed; *Indian Council for Enviro-Legal Action v. Union of India* 1996, relied on).

In another case, when the Lucknow Mahapalika allowed a builder to construct an underground shopping complex in Aminabad, the municipality was found to deprive residents of the area access to an historic park, thereby violating public trust (*MI Builders Private Limited v. Radhey Shyam Sahu and Others* 1999). Along with public trust, the Court also began to rule based on the precautionary principle (meaning harm is produced in the absence of proof to the contrary) as a way to clarify the relationship between fundamental rights, fundamental duties or directives of state policy, and environmental protection (*MC Mehta v. Union of India* 1997; *MC Mehta v. Union of India* 1996). So the precautionary principle could be invoked when 246 brick kilns in the Union Territory of Delhi were ordered closed while the local administration

[21]The public trust doctrine at work here is described as follows: "Deriving from the common law of property, the public trust doctrine is the original legal mechanism to ensure that government safeguards natural resources necessary for public welfare and survival. At the core of the doctrine is the antecedent principle that every sovereign government holds vital natural resources in "trust" for the public-present and future generations of citizen-beneficiaries." See Wood 2009, 45.

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was asked to assist these kilns in either adopting pollution mitigation technologies or relocating to other industrial areas (*MC Mehta v. Union of India* 1998). In some ways this principle is seen as enabling a proactive policy to prevent the violation of public trust. So, for instance, in a case pertaining to sanitation in Agra city, the Supreme Court not only held the government responsible for supplying safe drinking water and sewage systems, but also constituted a monitoring committee involving social workers and civil society organizations working with the Divisional Commissioner of Agra to estimate the effectiveness of the municipality in delivering these services (*DK Joshi v. Chief Secretary Government of Uttar Pradesh and Others* 1999).

The precautionary principle, the Court noted, and the corresponding burden of proof on the person who wishes to change the status quo, applied in cases of polluting industries where the extent of damage may be hard to assess. But where environmental effects can be estimated, through impact assessments and other prescribed mechanisms under rules framed within the *Environment Protection Act* (1986), the principle of sustainable development could come into play (*Narmada Bachao Andolan v. Union of India* 2000; *Andhra Pradesh Pollution Control Board v. Professor MV Nayudu* 1999, distinguished). By 2000, the number of cases listed as environmental had grown dramatically. The Supreme Court was reserving Fridays for environmental public interest litigation, to deal with the torrent of cases filed in that decade. And ten years later, in 2010, green benches were sitting on both Mondays and Fridays, recognizing the growing volume and justice-confounding delays of the environmental cases.[22] If the sustainable development principle was articulated as a way to find a reasonable and middling path between the demands of conservation and development, the court was also emphatic in noting that awareness of the fullest implications of environmental destruction needed to be raised, and one way to do this was through yet another legal principle, known as polluter pays, that held polluters not only paid damages for restoration of ecologies destroyed but also compensation to the citizenry who suffered personal loss through ecological disturbance in their lives (*MC Mehta v. Kamal Nath* 2000; *Uttar Pradesh Pollution Control Board v. Mohan Meakin Limited* 2000. *Kanti Bhadra Shah v. State of West Bengal*, 1 SC 722 (2000) followed. *Municipal Corporation of Delhi v. Ram Krishna Rohtagi*, 1 SC 1; 1983 SCC (Cri) 115 (1983); and *Muncipal Corporation of Delhi v. Purshottam Das Jhunjhunwala*, 1 SCC 9; 1983 SCC (Cri) 123 (1983), distinguished).

As I conclude this necessarily short and selective discussion of cases illuminating several principles through which the Supreme Court articulated an

[22]My attendance of the proceedings of the Green Benches and time spent in the precincts of the Supreme Court, in conversation with lawyers and visitors to the Indian Law Institute Library across the street, allowed me to attend to the performative and quotidian procedural aspects of these public interest litigations and Green Benches. These aspects are to be the subject of other writing.

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environmental jurisprudence, relying both on common law tradition and rights-based innovation from the United States and other experiences, I would like to point to the Court as being alert to what the available statute already enabled in these new jurisdictions, and the extent to which it saw its role in a classical guardianship function for core constitutional values. So, for instance, in a case relating to noise pollution caused by use of amplifiers in religious services, the court held that the rules under the *Environment Protection Act* (1986), specified such pollution as a health hazard to humans and animals, and further specified what levels of noise caused pollution. And, interestingly, the new law was creatively linked to colonial nuisance and police laws in the ruling.[23] Similarly, in matters pertaining to pollution in Delhi, noting inaction of municipal authorities in relation to earlier directions issued, the Court reiterated compliance with existing provisions of municipal and cantonment laws would serve the articulated environmental protections.[24]

In 2000 an important order further clarified the role of the Supreme Court in environmental protection and elaborated the jurisprudence on sustainable development. It ruled that where an attempt has been made by state legislature and state government to balance the need for environmental protection and economic development, and impoverished areas are likely to benefit, it would not be proper to apply a principle of prohibition. Rather principles of protection, polluter pays, sustainable development, and inter-generational equity must be applied (*Consumer Education and Research Society v. Union of India* 2000). For legal scholars this hesitant evolution of an environmental jurisprudence is noteworthy, but can also be troubling in that it may lead the courts down the path of policy-making, something clearly in the legislative and executive domain of Indian government and a function beyond the constitutional mandate to higher courts or their institutional competence (Rajamani 2007 is an effective exponent of these concerns through her careful analysis of a variety of salient issues raised by the work of the Indian Supreme Court in its newly found PIL jurisdiction). But, as a comparative study of public interest litigation and its role in environmental jurisprudence notes, expansion of considerations of standing and investigations of the practical implications of legal and constitutional provisions are a necessary part of the development of such jurisprudence which has yet to be refined in most parts of the world, or, indeed, in international courts (Schall 2008). In the Indian case, considering the question of rights in the natural environment, engagement in the law and policy spheres remains crucial for all social groups (Menon 2007). The spheres are not neatly

[23]I refer here to the *Tamil Nadu Towns Nuisances Act* (1889); *Madras City Police Act* (1888) and *Church of God (Full Gospel) in India v. KKR Majaz Colony Welfare Association* 2000.

[24]The earlier directions alluded to here came from *Dr. BL Wadehra v. Union of India* (1996). And the new orders were passed in *Almitra Patel v. Union of India* (2000). The municipal laws evoked were the *Delhi Municipal Corporation Act* (1957), the *New Delhi Municipal Committee Act* (1994), and the *Cantonments Act*, (1924).

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separated and, if social action litigation is to further the relentless pursuit of constitutional assurances of the good life to all citizens, courts have to illuminate the persistent gaps between lofty intent and the limitations of practice (for an early adumbration of this position, see Leelakrishnan 1991). Courts can trigger administrative and legislative responses that complete tasks identified by judicial activism (Faure and Raja 2010). These are, of course, the contours of the debate in legal studies.

I would like to bring this question into the light of at least two other perspectives. One taken from political theory considers the relationship between constitutional law and democratic politics. As Sunil Khilnani notes, meditating on the multiple meanings of political representation in India since 1950: in the early 1950s and again in the 1970s, the issue of equality in India was focused around the right to private property. But since the brief episodes of radicalism in those two periods, the issue of equality has been moved to a different arena – addressed through reservations and other kinds of group identity-based rights including women, tribes, dalits, religious minorities, etc. In fact, as Ramaswamy Sudarshan reminds us, in 1979 the 44th amendment abolished the right to property from the fundamental rights (Khilnani 2002, 74; Sudarshan 2002, 161). Arguably a certain impatient identity politics present in many new social movements gained acknowledgement, and in the view of some jurists did so at the expense of the structural integrity of the constitution. It is interesting to note here, though, that PIL pioneer Justice Bhagwati did not share these anxieties.[25]

The other perspective is of Indian feminist scholarship. There is now a very interesting debate on the place of judicial activism, and concomitant casting of all issues in a rights framework, when it comes to securing the well-being of women in all situations. Litigation to develop more specific legal instruments, or to make bureaucratic delivery of services more accountable, is not seen by some feminists as a panacea. There is an interesting debate among feminists about the efficacy or even desirability of judicial activism in securing the rights of women (Rajan 2003, 34–35). Feminist theorists and activists have questioned the wisdom of allowing liberal state ideologies to express themselves in the language carefully crafted and made legitimate by years of struggle in women's movements. Should Indian environmentalists have the same worries? Does judicial activism, relying on the enterprise and commitments of environmental justice movements, reformulate the environment question in terms enabling cooptation by the liberal state? What role can metropolitan civil society organizations play in the struggle

[25]The ruling in the Kesavananda Bharati case that affirmed the idea that constitutional amendments could not alter the basic structure of the constitution gave precedence to form over substance and underlined stateness a valued characteristic of good government. But Justice Bhagwati, as indicated in his dissenting opinion in the Minerva Mills case, was of the view that fundamental rights could be meaningful to the masses only if some socio-economic goals were realized, and this could license amendments that altered "basic structure" of the constitution. Sudarshan, op. cit., p. 171.

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between quality of life issues forcefully articulated by a newly assertive and growing middle class, and rights to livelihood for most poor people driven to the wall by private-public partnerships in industrial and social infrastructure?

I believe these and other questions about the nature of environmental governance in India are opened up in interesting ways by the study of courts, civil society, and state formation. I have used this opportunity here to begin my examination through the perspective of the development of jurisprudence in Indian higher courts, especially the Supreme Court, in environmental matters. Even as the Courts evolve and, in the eyes of some, expand their role in ways that are fraught with the possibility of overreach, it is clear that they are at the forefront of institutional and legal innovation, within a larger set of processes that make Indian democracy work. The creation of legal public spheres and environmental jurisprudence clearly remain works in progress in India.

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