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Original Article

Privatisation of Natural Resource-Based Sectors, Ease of Doing Business, and the Law

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ABSTRACT

In 1991, several sectors of the Indian economy which hitherto were more or less the exclusive domain of the public sector were opened up to private players, including global corporates. This was accompanied by a series of changes to the related policy, legal and regulatory regimes. This process has continued in the decades that followed. These policy, legal and regulatory changes, though mainly in the sectoral and financial domain have had significant implications for environmental, social and livelihoods impacts of activities in these sectors.

This article proposes to trace some major changes in the legal, regulatory and governance frameworks which have had significant environmental, social and livelihood implications in three key sectors – water, electricity generation and coal mining. It shows how this shift in the legal regime has been driven mainly by the objective to promote "ease of doing business", leading to neglect of social and environmental concerns. The article also documents how this thrust to prioritise business leads to more tolerance of non-compliance of environmental laws and creates pressure for their dilution. Last but not the least, the article highlights how compliance with environmental laws and regulations often needs actions that are under the purview of the financial and economic regulations and institutions. It argues for a proper understanding of this link and for designing sectoral, economic and environmental laws in a manner that they strengthen each other.

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Introduction

In 1991, the Government of India under Prime Minister Shri P. V. Narasimha Rao, who had just assumed office, introduced sweeping reforms in many sectors of the economy. Broadly, these were presented as a liberalisation of the economy, but the main thrust was on opening for private sector participation many sectors of the economy hitherto reserved for the public sector; and allowing global (private) players to invest in areas where till then, only domestic investments were allowed. This is the reason these reforms were labelled as LPG (Liberalisation, Privatisation, Globalisation). While 1991 saw the first set of changes in the policy, laws, and regulations to push for LPG, these reforms continued to be rolled out progressively over the years, a process that in many ways continues even now.

Among the sectors opened for private sector participation were several sectors that are directly dependent on natural resources. These included electricity generation, transmission and distribution, and water supply for domestic and industrial users and irrigation.

Thermal power generation needs coal or gas. Hydropower generation depends directly on water. Land is needed not only for power plants based on any of these energy sources but also for the transmission and distribution networks. Water supply sector by its very definition needs access to water resources. On one hand, while these sectors are dependent on natural resources for their working, on the other hand, they also have profound impacts on the environment. Land needed for coal mines, power plants and hydropower reservoirs often requires large areas of forests to be cut down or submerged. Transmission lines and water canals can sever and thus disrupt wildlife corridors. Effluents, emissions, and solid waste from coal-fired power plants can cause significant pollution of land, air, and water resources. Given all this, it is obvious that any changes in the policy-legal-regulatory regime that affect or facilitate these sectors will have profound implications for the environment. Yet, when discussing "environmental laws", little attention is paid to those laws that are primarily thought of as economic, financial, and technological or sectoral laws and regulations.[1] It is often thought that these laws and regulations are independent of the environmental laws and regulations, and both can be developed (and implemented) independently, on parallel tracks. In reality, laws and regulations brought in to facilitate liberalisation, privatisation and globalisation have significant impacts on the environment, and they also shape the evolution of environmental policy and legal regimes.

This can happen in several ways. First, the basic rationale or justification presented for introducing these reforms is to facilitate economic growth. Encouraging the "ease of doing business" is often a more popular articulation of this justification. Making it easy for "business" to operate is considered critical to push higher economic growth and hence the push for higher GDP often translates into facilitating "ease of doing business". It is likely that this phrase also comes from the World Bank, which brings out the "Ease of Doing Business" rankings where "Economies are ranked on their ease of doing business, from 1–190".[2] The Government of India has also formally adopted this as one of its stated policy objectives that shapes its various programs.[3]

Given this, the need to make doing business "easier" often ends up becoming not just the main but the only objective, with adverse implications for other objectives like equity, employment, access to resources for the poor and

[1] For the purposes of this article, regulations form a part of the legal framework, but they are not directly part of Acts/Rules framed under Acts. Such regulations may be made by Regulatory Authorities such as the Central Electricity Regulatory Authority (CERC), which is required to bring out 'Tariff Regulations' every five years that determine how the tariff will be set for electricity generated from Central Government owned projects and multi-state projects. These regulations will influence matters beyond tariff. Another set of regulations introduced by the CERC pertain to allowing (and the procedure for) passing through of costs of the 2015 environmental norms for thermal power plants. Water Regulatory Authorities could bring in regulations for allocation of water to different users etc. Similarly, many requirements brought in by the Ministry of Environment, Forest and Climate Change via Office Memorandum (OM) are equivalent to regulations such as an OM that required thermal power plants to seek revision in environmental clearance if their coal source changed.

[2] The World Bank Doing Business Archive, 'Ease of Doing Business Rankings' <https://archive.doingbusiness.org/en/rankings>.

[3] See, for example, Press Information Bureau, Ministry of Commerce & Industry, 'Ease of Doing Business' (23 March 2022) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1808810>.

deprived, and of course, the need to preserve and enrich the environment. Laws and regulations get designed without any consideration for what they would mean for the environment. Second, the need for environmental protection is often seen as an obstacle to ease of doing business, rather than being one of the desired goals of the process of economic development. This makes environment the lesser priority. In turn, this can have two consequences. One, there is non-compliance with existing environmental laws and regulations, a non-compliance which is tolerated and accepted, with regulatory institutions also often turning a blind eye to such violations or taking only soft action. Two, there is pressure to dilute and weaken the existing environmental protection regime.

There is a third way in which the financial and economic laws can impact the environment. Often, proper compliance with environmental laws and regulations needs actions that are under the purview of the financial and economic regulations and institutions. Unless this link is understood and both the sets of laws designed so that one can trigger the operation of the other, it is possible that compliance with environmental laws will suffer.

This article first briefly discusses what "privatisation" has meant in the power and water sectors, the development of its policy, legal and regulatory regime, and its implications for the environment. It then discusses some key aspects of privatisation in the water sector. It then explores how laws, regulations and policies meant to facilitate liberalisation and privatisation sideline environmental concerns to facilitate commercial and economic objectives. This is discussed first in the context of privatisation and reforms in the water sector. The article then takes up the experience of the electricity sector (though this can also be partly called the water sector where hydropower is discussed) and presents examples of the various ways in which laws and regulations meant to facilitate liberalisation and privatisation impact the environment and put constraints on the design and implementation of environmental laws. It then discusses whether it is possible for economic and sector laws to integrate environmental concerns. The article then looks at several examples and discusses how the pressure of ease of doing business leads to dilutions in the environmental protection regime. Lastly, it highlights how the two sets of laws and regulations – sectoral laws and environmental laws - are inextricably linked, how inaction in other sectors can affect implementation and effectiveness of environmental laws, and why it is necessary to also understand these set of linkages as we discuss environmental legal and regulatory regime and its implementation.

While a comprehensive tracing out of the development of the two sets of laws in their entirety over the last several decades would be very interesting, it is beyond the scope of this article, and not necessary for the objective of this article, which is essentially to highlight how these processes of privatisation and liberalisation (and the legal and regulatory regime created to facilitate it) impact the design and implementation of environmental laws and regulations. For this purpose, some important examples will suffice.

Privatisation, Changing Legal Regimes and Environment

The meaning of the word "privatisation" has become highly contested especially when used in the context of natural resources like water, and natural resource dependent products or services like electricity, and infrastructure related to these. Agencies like the World Bank, the International Finance Corporation (IFC) and others promoting private sector participation in these sectors have been at pains to emphasise there is no privatisation of the resource (e.g., water) in the process; and ownership of the resources remains in public hands. It is only the provision of service or management of the asset or resource that is given in private hands or "privatised". An asset here would refer to any intervention, construction, or infrastructure created to make use of the natural resource – for example, a dam and a reservoir. On the other hand, communities directly impacted by such privatisation processes have been saying that this distinction is academic; on ground, de facto, the private entity in such a process often acquires control on the re-

source in a manner that is indistinguishable from ownership.

What is equally important is that "privatisation", in whichever of the above two senses of the word one takes, brings about a shift in the purpose for which the resource or the asset is managed. Public management of a resource is mainly geared towards meeting social objectives – for example, meeting the water needs of communities for domestic and municipal use, for economic purposes, for sustenance etc. Equally important, such social objectives implicitly or explicitly encompass other objectives like conservation of natural resources and protection of the environment. Commercial viability is often the last priority or even disregarded if found hindering the social objectives. Privatisation, on the other hand, explicitly brings in the objective of profits for private entities. The assumption is that there is convergence between allowing the private entity to make a profit from the enterprise and meeting the social objectives. Unfortunately, experience on the ground has shown that this convergence is just an assumption. Often, it is not possible to meet the two objectives at the same time; this has been a fundamental reason for the failure of many of the privatisation projects – as exemplified by the privatisation of water supply in Cochabamba or in Guinea.[4] Privatisation often leads to the central objective of the project shifting to profits for the private entity.[5]

These two factors – profits being the main objective and effective control being in the hands of private entities – result in significant (adverse) implications for the environment, creating greater risks of environmental destruction and degradation. The next section looks at a couple of examples.

Globally, and in India, the rollout of privatisation has taken several forms: long term concessions to supply water to urban or industrial areas; handing over such water supply infrastructure to private entities through arrangements like full or partial sale or lease arrangements and formats like Build Own, Operate, Transfer (BOOT); service contracts where the private entity only provides some specific service like billing and collections; full private ownership of assets like thermal power generation and so on.

Since the central element of privatisation has necessarily been the profits of private entities, the process of privatisation requires that entire broader sectors, beyond just individual projects, must be structured to allow these profits to be made. Given that sectors like water and electricity were largely built on the model of public sector ownership and control with social objectives at the heart, privatisation has also been accompanied by the so-called "sector reforms" in India, and elsewhere.

Several aspects needed to be reformed towards this end. For example, water and electricity were priced very low (to provide access to all), but profits were not possible at these levels of tariff. Disconnection due to the non-payment of bills was not enforced so seriously. The government provided significant subsidies to the producers and consumers in these sectors, which private players would not be able to match. Cross subsidies made the richer consumers support consumption by the poorer consumers. Thus, the process of privatisation was accompanied by reforms with key elements being increasing tariffs (of water and electricity), enforcing the principle of full cost recovery from consumers, removal of cross-subsidies, elimination of public facilities like public stand posts for water supply, bringing in and enforcing a disconnection policy and several others. In effect, the aim of the reform was to transform the sectors into commercial and market operations and make it conducive for private companies to make profits.

Given this, privatisation in water and electricity sectors has also seen commodification and marketisation going hand in hand. This is why we (this author and Manthan Adhyayan Kendra, the organisation that he belongs to) have proposed understanding privatisation and com-

[4] Gaurav Dwivedi, Shripad Dharmadhikary and Rehmat, WATER: PRIVATE, LIMITED - Issues in Privatisation, Corporatisation and Commercialisation of Water Sector in India (2nd edn, Manthan Adhyayan Kendra 2007) <>; World Bank, India – 'Water Resources Management Sector Review - Urban Water Supply and Sanitation Report' Volume I - Main Report No. 18321 (The World Bank 1998) 31 <https://www.manthan-india.org/wp-content/uploads/2015/04/Water-Pvt-Ltd-New.pdfhttps://documents1.worldbank.org/curated/en/197361468752712366/pdf/multi-page.pdf>.

[5] For a detailed analysis of this with case studies, see Dwivedi and others (n 4).

modification in the water sector as "any mechanism that gives a private player control of any part of the water system, or an arrangement where water is a commodity that is bought and sold, and profits can dominate other concerns". A similar understanding would apply to other natural resource-based sectors also.

While these aspects were fundamental to both the water and electricity sectors, the roll out of privatisation and reforms has been different in both the sectors. It began much earlier in the power sector (as detailed in the next section) and was implemented more extensively. In the water sector roll out started late and has been uneven, probably because of the highly complex and multifaceted nature of water, the fact that water is far more critical to survival and sustenance, the internal contradictions of privatisation with respect to social obligations and the strong resistance which emerged all over the country to privatisation in the water sector.

Privatisation and Environment in Water Sector

Several policy changes as well as new laws and regulations have been brought in to facilitate privatisation and reforms in the water sector. The most important of these have been the laws brought in to create Independent Water Regulatory Authorities (IWRA).

As profits, and therefore tariffs at which water can be sold is of critical concern to private entities entering the sector, the World Bank and other international financial institutions argued for a model where tariffs would be set by an Independent (Tariff) Regulatory Authority (IRA) rather than the government. This model was already being rolled out in the power sector. Thus, there was a push to create these IWRA in several states. The M.P. Water Sector Restructuring Project[6] of the World Bank which was approved in 2004 required the setting up of the State Water Tariff Regulatory Commission (SWaTReC) as an autonomous institution "to review and monitor water sector costs and revenues, and for rationalised setting of bulk water user fees to enable the sector institutions to move towards financial self-sustainability".[7] Maharashtra was the first state to set up an IWRA called the Maharashtra Water Resources Regulatory Authority (MWRRA) by enacting a legislation of the same name in 2005.

In Madhya Pradesh, the proposed IWRA was specifically focussed on tariff setting, as is clear from the name itself. In this way, concerns other than financial concerns, but equally pressing, were left out of the ambit of such an authority. In the MP Water Sector Restructuring Project the functions related to sustainable basin development were left to other proposed agencies like the Sindh and Tons Basin Development and Management Boards. In terms of implications for the environment, this did mean that financial and commercial issues would be dealt with in isolation from environmental implications. How it would have played out is difficult to say, as the Authority has not yet been formed in Madhya Pradesh even after so many years.

But the experience of the way private projects were being structured then clearly indicated that protecting the profits of private entities was going to be the overriding priority, even at the cost of social and environmental objectives. The Sheonath Industrial Water Supply project in Chhattisgarh, often called the first privatised water supply project in the country, is a case in point. The project was a concession given to Radius Water Limited, a private company, to build an anicut on the Sheonath river and supply water from this to the Borai Industrial Estate near Durg. The company promptly asserted control on the 23.6 km long reservoir that was created, stopping local people from using the reservoir for fishing, bathing, and minor irrigation, claiming that it had the right to all this water as it was to be used to supply the industries. The state also supported the company in this. Further, the project agreement and various incentives given to the company included an assurance that in

[6] World Bank, 'IN Madhya Pradesh Water Sector Restructuring Project' <https://projects.worldbank.org/en/projects-operations/project-detail/P073370>.

[7] World Bank, Project Appraisal Document – Madhya Pradesh Water Sector Restructuring Project: Report No: 28560-IN (World Bank 2004) 3.

case of a lean season, the state government would release water from the upstream dams to ensure that the company had enough water to supply to the industries. In this way, the releases of water from upstream projects and hence the flow of the river became earmarked or reserved for the profits of the company, which would get priority over any social or environmental objectives that may require such releases.

A similar case can be seen in the response of private hydropower projects to a notification issued in 2018 by the (then) Ministry of Water Resources, River Development and Ganga Rejuvenation which mandated the release of environmental flows from hydropower projects in the rivers in the upper Ganga basin.[8] As release of flows for environmental purposes implies less flow available for power generation and hence represents a loss of revenue and profit for the companies, several companies have not followed the order,[9] and at least one company had moved the court challenging it.[10]

Privatisation and associated legal and regulatory structures and institutions have been rolled out much faster and at a much larger scale in the electricity sector as compared to the water sector. Hence the implications for the environment of privatisation and legal regimes built to facilitate it are seen more clearly in the power sector. The following sections discuss these.

When Ease of Doing Business is the Focus, Whither Environment

Among the first sectors in which reforms were launched in 1991 was the electricity sector, in particular electricity generation, thermal as well as hydropower. The reforms were not shy in declaring that their main aim was to attract the private sector to invest in power generation and that the reforms were being designed to facilitate this (and private profits) in every way. One interesting visual clue to this was the cover of a booklet brought out by the Government of India in 1992 summarising the main objectives of the reforms and the legal and regulatory changes brought in for the same. The entire cover pictured piles of currency notes including dollars, pounds and other international currencies indicating that money was at the centre of the effort.[11]

The publication stated:

> *The need of all-round development is putting a heavy burden on our limited resources. Mobilisation of resources for achieving self-sufficiency in electricity sector assumes high priority... In this background, the Government has resolved to mobilise additional resources to help bridge the gap in supply by encouraging greater private investment in the electricity sector.*[12]

It further states that the Government had lined up "a package of incentives ... investors... will find really attractive", "opening up profitable investment opportunities".[13] The publication also listed these incentives.

There was a tremendous response to this initiative and MoUs totalling to about 90,000 MW of

[8] Order No 5195 (B) published in Gazette of India, Extraordinary Part II-Section 3 – Sub-section (ii) October 10, 2018, No. 4009.

[9] See Central Water Commission, 'Implementation of Minimum Environmental Flows in River Ganga (Up to Unnao) – Status Report' (Central Water Commission 2020).

[10] See, for example, The Wire Staff, 'Ganga Water Flow Norms: Hydropower Company Takes Water Ministry to Court' The Wire (23 October 2019) <https://thewire.in/law/alaknanda-hydrpower-compnay-ganga-water-flow-notification-cas>.

[11] Department of Power, Ministry of Power and Non Conventional Energy Sources, Government of India, India's Electricity Sector – Widening Scope for Private Participation (2nd edn, Government of India 1992).

[12] ibid 1.

[13] ibid.

capacity were signed – more than the total installed capacity in the country at that time. Moreover, eight large projects were declared as "Fast Track" projects and provided with a counter-guarantee to ensure full payments in case of defaults by the State Electricity Boards (SEBs).

The signing of MoUs, declaring certain projects on the fast track etc. indicated quite clearly that the decisions to go ahead with the projects were already taken, and the issue of environmental impacts of these projects was hardly likely to matter. If at all, it would be addressed as an afterthought through "mitigation measures". This approach to environmental impact assessment (EIA) and environmental clearance (EC) is a key characteristic of the environmental regulatory regime in India. In this approach, environmental impacts are not a factor in deciding whether to take up a project or not. The EIA and EC processes are initiated towards the end of the project planning cycle, well after the fundamental structure and elements of the project are in place, and a decision to go ahead has already been taken. This makes the project effectively fait accompli and environmental concerns can at most lead to some mitigation measures. This situation is partly because of the prevalent practice and partly because of the way the law is structured. Indeed, it is possible that the formulation of the law itself mirrored and enshrined further the practice, without questioning it, or without any application of mind. Given that the basic structure of environmental regulations relating to EIA and EC were under development precisely during this period (with the EIA Notification issued in 1994), it is likely that this hype around the opening of the power sector and the huge response could have been a factor in making sure that the EIA Notification 1994 did not move the EIA process well upstream in the project planning process. This could have put the brakes on the massive response and big plans under the reforms process. It is another matter that many of these projects never saw the light of the day as they ran into a host of problems including mobilisation of finances, sectoral issues and in several cases, strong opposition based on social and environmental impacts.

In particular, the hydropower projects did not fare well. Out of the large number of hydropower projects for which MoUs had been signed (the exact number is not available) just 13 schemes with total capacity of 4,318 MW had obtained the first stage in-principle clearance from the Central Electricity Authority (CEA) by 1996.[14]

To identify the reasons for this lukewarm response of the private sector to hydropower projects, the Government of India set up a committee head by former Chairperson of the Central Electricity Authority (CEA) Shri M.K. Sambamurti in 1996. The committee identified three main reasons for this. The first one was financial constraints. The second was that most hydropower projects now being proposed were in the Himalayan region, a region that presented many difficulties for constructing hydropower projects. Lastly, the committee noted that environmental activists were making sustained attacks and criticism of the environmental impacts of the hydropower projects.[15] To address this last issue, the Sambamurti Committee suggested that:

> *it is necessary to undertake a preliminary environmental impact study of the schemes identified… and select schemes which will involve least environmental impact. Then these can be pursued vigorously while the others are subjected to more detailed environmental assessment.*[16]

This was an important recommendation as it meant precisely that the decision to take up a project was to be made after and based on its environment impact assessment. However, the committee recommended that this impact assessment be carried out by CEA and the Central Water Commission (CWC), 'who have been actively involved in promoting hydro development for past several decades'.[17] The irony of this statement and the clear conflict of interest was

[14] CVJ Varma and BL Jatana (eds), A Century of Hydropower Development in India (Central Board of Irrigation and Power 1997) 305-307.

[15] Ministry of Power, Government of India, Report of Committee on Hydro Power (Government of India 1997) 8-9, 15.

[16] ibid 15.

[17] ibid 15.

conveniently missed or ignored by the committee. Also, these agencies suggested by it did not have any specialisation or expertise in the environment and impact assessments. Both these indicate the failure to recognise the environment as a significant factor, and the belief that it was a subject just about anyone could handle, which did not need expertise and domain specialists in its own right. It was a typical trivialisation and marginalisation of environmental concerns which the infrastructure sector indulges in.

The fact that a committee which recognised environmental criticism (if not environmental impacts!) as a key factor in the unenthusiastic interest of the private sector in hydropower, still refused to suggest a proper assessment framework as well as implementation by appropriate institutions shows how strongly the agenda of "ease of doing business" shaped the environmental protection regime. For example, in this case, the committee could easily have recommended that the agency to carry out the EIA of the various proposed hydropower projects should be identified by the Ministry of Environment and Forests (then MoEF, now Ministry of Environment and Forest and Climate Change (MoEFCC), and that the MoEF should recommend which projects should be taken up based on the EIA. But it did not do that. This showed to what extent the agenda and functioning of the MoEF was pushed and controlled by other ministries like those of Power and Water.[18]

In 2003, Parliament enacted the Electricity Act, 2003 consolidating all earlier laws related to electricity generation, transmission, distribution etc. and bringing in certain important provisions to further streamline the power sector. One of the key provisions was the complete delicencing of thermal generation.

This meant that anyone was free to put up a thermal power plant, without any consideration for whether so much power would be needed in the country. The idea was that power generation capacity addition would now be guided by the dictates of the market and not through planning. To aid the ease of business, and to ensure that there were less entry barriers in the market, thermal power generation was delicenced. If the plant could not find buyers for the power, it would shut down, and the loss borne by the promoter / entrepreneur. This is how the market would ensure optimal capacity of power generation. But what is good for the market is not necessarily good for the environment.

Under a regime of planned capacity installation (as it was as a part of the Five-Year Plans)[19], the environmental costs necessary to install thermal power plants would be commensurate with the estimated power needs of the country. Under a "free for all policy" if more power plants were taken up for construction, then environmental costs would have to be paid for all of these, regardless of whether they continued to function or had to shut down because there was no demand for the power.

Thermal power plants need land, huge quantity of water and coal and they also discharge massive quantities of waste. All these impact the environment. If anyone put up a power plant and then that was shut down due to lack of a market, it still meant that land was locked up, systems to supply water like dams would have been built, and mines may have been opened or earmarked. But was this likely, or would the market be the efficient arbitrator that it is claimed to be? In fact, this is precisely what happened.

In 2011, the Prayas (Energy Group), Pune carried out an analysis of the number of thermal power plants in the environmental clearance pipeline.[20] The "pipeline" refers to plants who had applied for the environmental clearance to the MoEFCC, and were at various stages of the clearance including TPPs who had secured EC. This meant that these were plants for which locations had been identified, Detailed Project Reports (DPRs) had been prepared, land acquisition begun in many cases, and in general the promotors were

[18] For a more elaborate discussion on the developments with respect to hydropower projects and the power sector reforms, see Prayas (Energy Group), Many Sparks but Little Light: The Rhetoric and Practice of Electricity Sector Reforms in India (2017) <https://energy.prayaspune.org/images/pdf/many_sparks_but_little_light._809533331.epub>.

[19] From India's independence in 1947 till 2017, the Indian economy was essentially visualised and structured as a planned economy. The main instruments of this planning were the Five Year Plans developed by the (now abolished) Planning Commission of the Government of India.

[20] Shripad Dharmadhikary and Shantanu Dixit, Thermal Power Plants on the Anvil - Implications and Need for Rationalisation (Prayas (Energy Group) 2011).

serious about going ahead with these projects. The Prayas study did not include "announced" power plants. The study found that in 2011:

> *Data from the Ministry of Environment and Forest (MoEF) analysed by the Prayas Energy Group shows that the ministry has accorded environmental clearances to a large number of coal and gas-based power plants whose capacity totals 192,913 MW. Another 508,907 MW are at various stages in the environmental clearance cycle, that is, they are either Awaiting Environmental Clearance, or have Terms of Reference (TOR) Granted, or are Awaiting TOR. It is extremely rare for a thermal power plant (TPP) to be denied environmental clearance. This means that there are around 701,820 MW of coal and gas plants waiting to be built in the coming years. Coal based plants account for an overwhelming 84 percent of these in-pipeline projects.*
>
> *These additions are more than six times the currently installed thermal capacity of 113,000 MW. They are also three times the capacity addition that would be required to meet the needs of the high renewables-high efficiency scenario for year 2032 projected by the Planning Commission's Integrated Energy Policy report.*[21]

It is not surprising that many of these projects failed to take off, and many became stranded assets. As per a report by the Ministry of Power, Government of India:

> *Power sector has seen tremendous growth in terms of capacity addition during the last few years. The growth in capacity addition outpaced the growth in demand. This mismatch in demand and supply has primarily led to stress in the power sector. ...Department of Financial Services provided a list of 34 coal based Thermal Power Projects, mostly private, totalling 40,130 MW which were considered "Stressed" by Ministry of Power on 22 March 2017.*[22]

It is important to note that even for those that failed to ultimately take off or are stranded, severe environmental costs have been paid. Thus, whatever delicensing may have meant for ease of doing business for the power sector, it had serious implications for the environment.

Moreover, such a delicenced regime has serious implications for environmental impact assessment. While EIAs of individual projects may be possible, it is virtually impossible to carry out Sectoral or Strategic Environmental Impact Assessments (SEA) in such a regime as there is no clarity on how many plants are being proposed, where, and at what time.

The importance of a SEA is clear from this description of SEA by a UNEP Report:

> *Put simply, SEA refers to a formal, systematic process to analyse and address the environmental effects of policies, plans and programmes and other strategic initiatives(...). SEA extends the aims and principles of EIA to the higher levels of decision-making when major alternatives are still open and there is far greater scope than at the project level... It allows problems of environmental deterioration to be addressed at their "upstream source" in policy and plan-making processes, rather than mitigating their "downstream symptoms" or project-level impacts.*[23]

It is another matter that sectoral or strategic impact assessments have not been incorporated in the legal and regulatory regime in India. However, it is an important desirable improvement of the EIA/EC regime, and the delicenced regime makes it that much more difficult.

[21] ibid.

[22] Ministry of Power, Government of India, 'Report of the High Level Empowered Committee to Address the issues of Stressed Thermal Power Projects' (Government of India 2018) 5.

[23] Abaza Hussein, Ron Bisset and Barry Sadler, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (1st edn, UNEP 2004) 86.

Can Economic and Sectoral Laws Integrate Environmental Protection

An important question is whether economic, financial, and technical/sectoral laws can incorporate environmental aspects at all. The answer is of course, yes; and interestingly, a good example is the very Electricity Act, 2003 which delicensed thermal generation capacity addition. The Act mandates, in section 8(1), that, unlike thermal power plants, hydropower projects will need "concurrence" from the CEA.

Section 8(2) (a) of the Act, quoted below, lays down what factors CEA should consider while giving this concurrence.

> *(2) The Authority shall, before concurring in any scheme submitted to it under sub-section (1) have particular regard to, whether or not in its opinion, (a) the proposed river-works will prejudice the prospects for the best ultimate development of the river or its tributaries for power generation, consistent with the requirements of drinking water, irrigation, navigation, flood-control, or other public purposes, and for this purpose the Authority shall satisfy itself, after consultation with the State Government, the Central Government, or such other agencies as it may deem appropriate, that an adequate study has been made of the optimum location of dams and other river-works;*

Thus, in a way the concurrence for a single hydropower project requires an examination of the entire basin in an integrated manner; and while the environment is not directly mentioned, one can justifiably argue that "other public purposes" would necessarily include maintaining the integrity of the ecology of the basin and protecting its biodiversity.

Whether this enabling of environment protection as an integral part of the economic law was legislative intent or not is not clear. However, this provision shows that it is eminently possible to integrate protection of the environment within economic and technical laws instead of having parallel, separate legislations to govern the sector and its environment impact.[24] At the least, it should be possible to design sectoral legislation in a manner that it does not obstruct proper environmental impact assessments and environmental protection. Again, it is another matter that this provision (section 8(2)) is not followed in a manner as to realise this benefit, but it does highlight the possibilities.

It should be emphasised that arguing for integration of environmental concerns into sectoral laws does not mean there should not be separate laws for environmental protection. Indeed, specialised laws and regulations focussing on the environment remain necessary. But proper implementation of these laws would be helped greatly if sectoral laws are shaped keeping in mind that they also will impact the environment, and if their design therefore ensures complementarity and synergy with environmental protection objectives, rather than a hindrance as is often the case today.

Ease of Business Driving Environmental Laws

So far, we have seen how ease of doing business marginalises environmental considerations, but in theory at least, if most certainly not in practice, environmental laws still remain equal to sectoral and economic laws in their authority. However, the influence – or pressure – of "ease of doing business" is increasingly seen more directly on the design and structuring of environmental law and regulation itself. We look at the example of some recent changes in regulations relating to the management of pollution,

[24] Of course, separate and specialised laws for the sector and for environmental protection will still be needed, but the point is that sectoral laws can and should also include provisions enabling and facilitating the integration of environmental protection.

particularly fly ash in thermal power plants (TPPs).[25]

On 11 November 2020, the MoEFCC brought out an Office Memorandum (OM)[26] that allows thermal power plants to change the source of their coal without having to get their Environment Clearance (EC) amended. The logic hitherto was that the composition of coal used in a power plant has a direct bearing on the nature and levels of pollution. For example, domestic coal has very high ash content, whereas imported coal normally has much lesser levels of ash. Coal from different sources can have different levels of sulphur, mercury, and other elements. Hence, a condition of the EC given to thermal power plants has been that when a TPP changed its coal source, it needed to get approval from the MoEFCC in the form of an amendment of the EC (and the relevant conditions for environment protection measures).

The OM is quite upfront about the fact that this change has been brought to avoid inconvenience to TPPs. One of the reasons given by the OM for making this change is that "the linkage period granted through short-term linkage and e-auctions vary from 3 months to 1 years, making Project Proponents to approach the Ministry for granting amendment in EC each time…".[27] Of course, this is mainly due to the problem with coal supply from Coal India Limited and other mines, and it is quite worrying that this problem of coal supply is being addressed by diluting environmental requirements. This is a clear case of the pressure of ease of doing business pushing a dilution of environmental regulations.

Further, the OM also says that the Ministry of Power has also issued an advisory to TPPs using imported coal to shift to domestic coal under the Atmanirbhar Bharat (Self Reliant India) initiative. This is a specious excuse, because such a shift is likely to be a one-time shift and considering that domestic coal has much higher ash content and hence likely to be more polluting, a one-time amendment in the EC is certainly justified. The OM itself mentions that process of getting an EC amended for change of coal source would take 2-3 months, which is hardly a long period, given that a change of coal from imported to domestic coal would itself be under negotiation for several months.

The OM thus says:

> *In order to simplify the procedure for change in coal source and encourage thermal power plants to use domestic coal, the Ministry has decided the following procedure(…). All thermal power plants (…) can change the coal source (…) without seeking amendment in the EC.*[28]

In other words, the aim is to "simplify" the procedure – euphemism for dilution of environmental safeguards – to ensure convenience to big business.

Moreover, there is another element here that raises some questions. Just before the time this OM was brought out (November 2020), the Government of India completed the first (ever) round of auctions of coal mines for commercial purposes.[29] Until now, coal mines were either owned by public sector enterprises or if allotted to private sector, they were allotted as "captive mines" – where the coal produced was to be used only by the allottee, only for the allotted purpose (say thermal power generation) and for the allotted specific unit only (say a specific TPP).[30] But this policy was changed and coal mines are now auctioned to any entity, public or

[25] For a more detailed discussion of this issue, see Shripad Dharmadhikary, 'Ministry Removes Environmental Safeguards for Change in Coal Source for Power Plants: Move Aimed at Helping Private Coal Miners' (22 November 2020) <https://shripadmanthan.blogspot.com/2020/11/ministry-removes-environmental.html>.

[26] Ministry of Environment, Forest and Climate Change, Government of India, Office Memorandum – Amendment in Environmental Clearance for change in coal source by Thermal Power Plants – reg, Dated 11 November 2020 <http://moef.gov.in/wp-content/uploads/2019/01/OM-Amendment-in-Environmental-Clearance-for-change-in-coal-source-by-Thermal-Power-Plants.pdf>.

[27] ibid 1.

[28] ibid 2.

[29] See Press Information Bureau, Government of India, Ministry of Coal, 'States to Garner Rs. 6,656 Crores of Annual Revenue from the Historic Success of Nation's First Commercial Coal Mining Auction: Shri Pralhad Joshi' (9 November 2020) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1671487>.

[30] See for details, Ministry of Information and Broadcasting, Commercial Mining of Coal - Big Boost to Aatmanirbhar Bharat (Government of India 2021) <https://coal.nic.in/sites/default/files/2021-09/22-09-2021.pdf>.

private, who can sell the coal in the market on a commercial basis to anyone. Even export is allowed.

Several private players successfully bid for these mines, and these players would certainly benefit from any easing of market conditions. Doing away with the need to seek EC amendment for a change in coal source would make it easier for TPPs to shift their coal source to some of the new private owners of the mines won under commercial coal mine auctions. Similarly, a change in the coal source away from imported coal to domestic coal is also likely to benefit these new miners. In an earlier notification of 21 May 2020, the MoEFCC withdrew the requirement that TPPs located at more than a certain distance from coal mines had to mandatorily use coal with less than 34 percent ash. Now there is no restriction on the percentage of ash or distance.

This is just one of the several examples in which environmental regulations are being relaxed in an open and upfront justification of ensuring ease of doing business, or, as the Government puts it, "ease of doing responsible business".[31]

Inaction by Actors from Other Sectors Impacts Environmental Compliance

Apart from the fact that the push for ease of doing business directly shapes environmental laws and their implementation, there are several instances where laws, institutions and actors of other sectors need to play a proper role to ensure compliance with environmental laws. Inaction – or abdication of responsibility - by these actors and institutions can lead to lax or failure of environmental compliance and is also an indication of weakness in the legal regime for ensuring environmental protection. One of the most important examples of this is the case of gross non-compliance with the emission and water norms for thermal power plants notified by the MoEFCC in 2015.

In December 2015, the MoEFCC notified norms which introduced, for the first time, limits to the emissions of SO2, NOx and Mercury from thermal power plants, and made the limits for emissions of particulate matter (PM) more stringent.[32] The notification also introduced for the first time a limit to the specific water consumption (water used per unit of electricity generated) of thermal power plants. All the TPPs were given two years, that is, till December 2017 to comply.

The saga of how the industry, supported by the Ministry of Power has tried hard to push for the dilution of the norms and postponement of its deadlines (successfully, for both), has been extensively written about,[33] and as that is not the main thrust of this article, it is not being discussed here. The point relevant here is that while these norms are essentially a part of the environmental regulatory regime, their smooth implementation depends significantly on the actions by power sector institutions and actors.

Compliance with these norms was likely to result in extra expenditure for the TPPs – in terms of capital costs for installation of pollution control equipment, and in terms of operational costs for running this equipment. Power sector regulations that govern the tariff of power generated by the TPPs allow that when such changes take place – called a "Change in Law" event (for obvious reasons), then the TPPs are allowed to pass on these costs to the consumers. But this process is not automatic. It needs appropriate action from the Electricity Regulatory Commissions (ERCs, at Central and

[31] See for example the release on 'New Initiatives' of the MoEFCC brought out on completion of two years of the NDA government in May 2016 <https://archive.pib.gov.in/documents/rlink/2016/may/p201652301.pdf> and <https://pib.gov.in/newsite/PrintRelease.aspx?relid=145571>.

[32] The Environment (Protection) Amendment Rules, 2015, Gazette of India, Extraordinary, Part II-Section-3 Sub Section (ii) No. 2620, New Delhi, 8 Dec 2015. S.O. 3305(E)

[33] See, for example, Juhi Chaudhary, 'India's Coal Sector Seeks to Avoid Emissions Norms' India Climate Dialogue (17 November 2017) <https://indiaclimatedialogue.net/2017/11/17/india-coal-sector-avoid-emissions-norms/>; Anubha Aggrawal, 'Environment Ministry Finalises Coal Thermal Power Plant Categories: What does it Say about Emission Norms Compliance' Down To Earth (22 December 2021) <https://www.downtoearth.org.in/news/pollution/environment-ministry-finalises-coal-thermal-power-plant-categories-what-does-it-say-about-emission-norms-compliance-80795>.

State levels) to allow this pass through of costs, and action from the relevant government to declare that the event is indeed a "change in law". In the absence of a pre-emptive action by the ERCs, the TPP can spend the money to install the equipment to meet the norms, and then approach the ERC to allow these costs. This has an inherent risk and uncertainty, and most TPPs refrained from going ahead with such a spending. TPPs were apprehensive that without such an assurance, they would not be able to obtain financing to install the equipment. It was only in May 2018 - six months after the deadline to meet the norms was over - that the Government of India, through the Ministry of Power, issued a Directive to the Central ERC to treat this notification as "change in law". The CERC itself only came out with the relevant changes to the Tariff Regulations and other provisions in August 2020 and August 2021. This has been used by the TPPs as a reason to justify non-compliance,[34] although the deadline to meet these norms has been extended several times, from 2017 to 2022/2025 (depending on categorisation of the TPP). There were also several other actions which were the responsibility of power sector institutions, which were delayed or inadequately undertaken.[35]

There can be several reasons for this lack of proper action by the power sector institutions. First and foremost, the MoEFCC itself – which is mandated to ensure implementation of these regulations – has been completely inactive in terms of any monitoring and action to ensure that these norms were implemented and implemented in time. This lack of action by the MoEFCC would have made the power sector institutions also lax. If the MoEFCC had taken strong penal action against the non-compliant TPPs, it is possible that they would have pressurised the Ministry of Power and other agencies to take faster and more adequate action. The abdication of responsibility by the MoEFCC is a more generic issue which impacts the implementation of other environmental laws too. But in the specific case of these emission and water norms, power sector regulatory agencies may have had other reasons also for inadequate action. One, they may not see the need to take any action with respect to implementation of environmental norms as their obligation, and hence take the approach that "we will address the issue when it comes to us". Second, like most power sector agencies, these institutions may also feel that power sector concerns are more important than environmental concerns.

Given this, it is important that in cases where action is needed from other sectoral agencies, environmental and sectoral laws need to recognise this and make appropriate provisions that would require all agencies to act pre-emptively and effectively. This means that when environmental laws are being drafted, attention should also be paid to amend other (sectoral) laws to remove any ambiguity in terms of other sector agencies to also take timely and adequate action, and indeed obligate them towards this.

May be the MoEFCC has learned something from this whole saga. When it brought in the new Fly Ash Notification in December 2021 regulating the use and disposal of fly ash by TPPs, the MoEFCC made it a point to add a provision, section A(10) that "[s]tatutory obligation of 100 percent utilisation of ash shall be treated as a change in law, wherever applicable".[36] However, clearly this is not enough, because whether the change in law is "applicable" in any given specific situation or not would still need to be decided by some agency. Given that, this provision is redundant and makes little difference. Also, it is a moot point whether the power to declare an event as a "change in law event" can be taken on for itself by such a notification. It would need an amendment of the relevant power sector law/regulation to ensure that implementation of this (Fly Ash) notification would automatically trigger the relevant provision of change in law or require the relevant agency to take up the issue and make such a declaration pre-emptively.

In other words, it is important when designing and structuring environmental laws and regulations to ensure that other relevant laws and reg-

[34] See for example 'Emission Control Solutions -Deployment by TPPs and industry concerns' PowerLine (July 2020) <https://powerline.net.in/2020/07/10/emission-control-solutions/>.

[35] For a detailed discussion of this issue, see Maria Chirayil, Ashok Sreenivas and Shripad Dharmadhikary, 'Lost in the Haze - Pollution Norms in India's Coal Power Plants' The India Forum (20 December 2021) <https://www.theindiaforum.in/article/lost-haze>.

[36] Gazette of India, Extraordinary, Part II-Section-3 Sub Section (ii) No. 5075, New Delhi, 31 Dec 2021. S.O. 5481(E), 15.

ulations are also modified as necessary to ensure proper implementation. This is necessary to ensure that environmental compliance does not remain at the mercy of other sectoral institutions who in the first place do not consider environmental laws and regulations as falling within their ambit, or as their obligation, and who may not even consider environmental concerns on par with their sectoral concerns.

Conclusion

In tracing the course of some of the key economic reforms since 1991, especially in the power sector, this article shows that economic growth is the major justification for such economic, financial, or technical/sectoral laws. This stress on "ease of doing business" often means that other equally important objectives like the environment get side-lined. Such laws often get designed without any consideration for what they imply for the environment. Further, since environmental protection (and the requirements of regulations to achieve it) is often seen as an obstacle, not only is non-compliance tolerated, but there is pressure to dilute and weaken the existing environmental protection regime. Such weakening of environmental norms for ease of doing business is becoming increasingly upfront. Last but not the least, there are cases where smooth implementation of environmental regulations depends on actions of agencies from other sectors and implementation of laws pertaining to other sectors. In such cases, this cross sectoral implementation cannot be left to the discretion of other sectoral agencies but needs to be built into the laws themselves so that pre-emptive or timely action by all agencies becomes a legal obligation. A proper understanding of these factors and taking steps to address these will be necessary to strengthen environmental laws and their implementation, and ultimately, to achieve the desired goal of environmental protection.

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