

Greening the Indian federal system¹

Introduction

Over the last six decades, relations between the Centre and the states in India have manifested in different forms for different issues, including internal security, agriculture, revenue, land, and natural resources. This has been a reflection of the concerns and developments of the nation as a whole as well as states from time to time. Some of the environmental issues, such as those relating to forests, wildlife and water, have been a cause of contention between the centre and state, sometimes influenced or aggravated by factors such as coalition politics, asymmetric federalism, a green judiciary, globalisation and the aspirations of states.

Environmental federalism

Environmental federalism is ‘*the study of the normative and positive consequences of the shared role of national and subnational units of government in controlling environmental problems.*’ (Shobe & Burtraw, 2012) Most scholars, like Wallace Oates, approach the issue of environmental federalism from within the purview of fiscal federalism. Fiscal federalism refers to the general normative framework for assignment of functions to the different levels of government and appropriate fiscal instruments for carrying out these functions (Oates, 2001). It is concerned with ‘understanding which functions and instruments are best centralized and which are best placed in the sphere of decentralized levels of government’. In other words, it is the study of how competencies and fiscal instruments including transfer payments or grants are allocated across different (vertical) layers of the administration.

Environmental federalism relates to the ‘proper assignment of various roles’ to the different tiers of government. (Oates, 1997) However, such a proposition is not free from challenges and criticism. The ‘race to the bottom’ thesis is an oft cited criticism of environmental decentralisation or principle of subsidiarity. However, there is very little empirical evidence to prove race to the bottom as a fall out of environmental federalism. Moreover, differences in state policies may not necessarily lead to race to the bottom or exacerbate rivalry. It may even result in positive spill over effects such as drawing lessons from each other. (Jørgensen, 2011)

The principle of subsidiarity is seen as one of the bases for federalism and sharing of powers amongst Centre and states. (See (Esty, 1996)) The principle, from a common sense perspective, lays down that ‘*decisions should be taken at the level closest to the ordinary citizen and that action taken by the upper echelons of the body politic should be limited.*’ (European Commission, 1992) This principle

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per se does not distribute powers amongst different levels of government, but simply aims at governing the use of such powers and 'justify their use in a particular case'. (Lenaerts, 1993) However, it lays the basis for distribution of powers and functions. It justifies environmental decentralization as the sub-national and local levels are directly impacted by environmental actions and externalities.

However, several issues concerning the environment cannot remain local because the effects of environmental mismanagement cross state and national boundaries. Environmental degradation originating at one place goes on to affect a much bigger geographical area and involves not just the local governments but requires intervention from state and central governments too. Thus, the concept of environmental federalism requires an examination of the appropriate jurisdiction for the management and provision of environmental goods and services. Here it will be crucial for the central government to play a role with regard to the environmental regulation that requires assuming responsibility for those activities that have important environmental 'spillover effects' across jurisdictional boundaries. State and local governments can engage in regulation of environmental quality and services (subject to the minimum levels set by the central government), and should design and implement programmes. Therefore, there is a need for a distributed governance of the environment across multiple levels of the government, and federal systems are uniquely placed for this challenge.

For the purposes of this paper, we adopt a broad and holistic approach towards environmental federalism, which includes matters related to forests, biodiversity, rivers, other water bodies, pollution control and abatement, climate change etc.

Environmental federalism in the Indian Context

India's National Environment Policy, 2006, sets forth the Principle of Decentralization, that is, '...ceding or transfer of power from a Central authority to state or local authorities, in order to empower public authorities having jurisdiction at the spatial level at which particular environmental issues are salient, to address these issues'. Need for a decentralized approach has been recognized and developed since the time the Indian Constitution came into being. This was given a further thrust with the 73rd and 74th amendments. Over the years, the centralization and decentralization has been a dynamic feature of Indian federalism. This section describes the manner in which this has been dealt with by the Indian Constitution and federalism.

Introduction and main features of the Indian federalism

While there are certain inherent common features of federalism, different countries show variations in adapting the federal idea. (Blindenbacher & Koller, 2003) India opted for a federal polity with a strong Centre, with the Constitution of India stipulating a 'union of States' in 1950. One of the distinct features was that the constitutional drafting committee made it clear that the Indian model was not a result of an agreement of states to join in a federation and therefore, no state had a right to secede from it. (Constituent Assembly Debates, 1948) It was deliberately kept flexible and envisaged that '*the Constitution can be both unitary as well as federal according to the requirements of time and*

*circumstances*². (Constituent Assembly Debates, 1948) Therefore, it is also referred as quasi federal, (Wheare, 1963)² accused of being a federation but not committed to federalism. (Verney, 1995)

Separation and sharing of powers

Biased towards the Centre, the Indian federal system divides matters into Union, State and concurrent lists³. Learning from Canada's experience with short lists, India made a more detailed list adding specifically to the concurrent lists to make sure that the competence of states emanates from a written Constitution subject to a final interpretation by the federal judiciary. (Singh, 2001) However, both the wording and interpretation of these constitutional provisions have weakened the legislative and fiscal competence of states.⁴ Besides the Union list, the Central government enjoys supremacy on matters in concurrent list as well.⁵ Parliament as well as a State Legislature can make laws on concurrent subjects but in case of a conflict and no scope for harmonious reading of the provisions, law made by the parliament prevails. Only the parliament has the residuary power to make laws on matters, which are not included in any of the three lists and environment is one such matter. States' ownership of public land and natural resources coupled with legislative powers conferred by Article 246, read with List I and II of Schedule VII, of the Constitution defines the sharing of powers and responsibilities between centre and states with respect to environmental and natural resources.

Powers of states are derived from the Constitution, and interpreted by judiciary. However, separation of powers is not as simple as it appears in the text of the Constitutions. This is because overlapping jurisdictions is an inherent problem of federalism and it is impossible to define and divide matters in water-tight compartments. A clear allocation of powers in some countries has done little to remove the problem. (Hollander, 2010) Some scholars suggest two means of addressing this problem – through subnational constitutions or through detailing the form of government for subnational units in a federal constitution in such a manner that there is little subnational constitutional space. (Williams & Tarr, 2004) India falls under the latter category.

Overlaps or duplication or conflicts in a federal sharing of powers and responsibilities is not problematic per se (See Hollander, 2010) but depends on the context. In the Indian scenario, where vast asymmetries exist in the conditions, challenges and capacities of states and institutions, the need for a diverse and flexible approach is even greater. This is further aggravated by the differences in nature, scale and impact of environmental issues.

Federalism is not a static concept, but a process that undergoes a perpetual process of evolution and adaptation. (Brouillet, 2011) The Indian model is no different and is described as a work in progress even after sixty years. (Arora, 2007) The model has been a witness to and responded to various factors such as increasing conflicts over jurisdiction, strengthening of regional parties with the rise of coalition politics, and emergence of newer smaller, often natural resource rich, states.

² Wheare, K C. 1963. 'Federal Government'. Cited in Baogang He, Brian Galligan and T Inoguchi, eds. *Federalism in Asia*. Cheltenham: Edward Elgar Publishing Limited: 2007

³ Schedule VII read with Article 246 of Constitution of India

⁴ *M. Karunanidhi v. Union of India*, [(1979) 3 SCC 431]; As per Art 254 (1) in case of any inconsistency between laws made by Parliament and laws made by the legislatures of States on a concurrent matter, the law made by parliament shall prevail.

Read more: <http://interpretationofstatutes.blogspot.com/2010/08/repugnancy-federal-and-state-statutes.html#ixzz1JfmbdyKP>

⁵ Article 246, Constitution of India

Environment and its domains in the federal structure⁶

Environment does not feature in the Indian Constitution as a separate entry under the schedule demarcating legislative rights. However, environment protection is clearly provided for in the Indian Constitution as a directive principle of state policy and judicial interpretation over the years has further strengthened this mandate. In 1977, the National State was enjoined with the duty to protect and improve environment and safeguard the forests and wildlife of the country as a part of the directive principle of the state policy and citizens enjoined with the duty to protect and improve the natural environment. Thus, Constitutional sanction was given to environmental concerns through the 42nd Amendment, which incorporated them into the Directive Principles of State Policy and Fundamental Rights and Duties. The same amendment also changed the centre-state jurisdiction on a few environmental subjects.

Since environment is not a distinct item for legislative and administrative purposes, legal protection of the environment has taken three main routes – *first*, through judicial decisions adopting a broad approach in interpreting the fundamental right to life as guaranteed in Article 21 by including within its ambit the right to a wholesome environment; *second*, legislation in response to international developments⁷, and *third*, laws on subjects that form a component of the environment or are bound to have direct or indirect implications for the natural environment, such as forest, wildlife, water, fisheries and land. It must be noted here that since residuary power vests with the centre, any environmental subject not listed in schedule VII, is centre's prerogative. Therefore, land and water are state subjects, forests and wildlife are concurrent and environment in general is a residuary subject.

Box 1: Distribution of powers on some environment related domains

Union/Centre

- Residuary powers (those not mentioned in either of the lists)
- Atomic energy, mineral resources necessary for its production
- Inter-State rivers and river valleys
- Ports
- Regulation & development of oilfields, mineral oil resources; petroleum, petroleum products; other inflammable liquids
- Regulation of mines and mineral development

State

- Public health and sanitation; hospitals; dispensaries
- Communication (roads, bridges etc incl. inland waterways)
- Land
- Water
- Agriculture
- Fisheries
- Tax on sale and consumption of electricity

Concurrent

- Vagrancy; nomadic and migratory tribes
- Prevention of cruelty to animals
- Forests
- Protection of wild animals and birds
- Electricity

⁶ This section builds upon an earlier research for the Thirteenth Finance Commission in 2009. TERI, 2009

⁷ National legislation in response to international agreements is not always necessary. Once an agreement is ratified by the executive, it comes into force, irrespective of the corresponding domestic legislation.

Box 2: Special provisions in India's federalism		
V Schedule	VI Schedule	Special
Scheduled Areas and Scheduled Tribes in	Tribal Areas in	Other special provisions with respect to some states
<ul style="list-style-type: none"> • A.P. • Chhattisgarh • Gujarat • H.P. • Jharkhand • M.P. • Maharashtra • Orissa • Rajasthan 	<ul style="list-style-type: none"> • Assam • Meghalaya • Mizoram • Tripura 	<ul style="list-style-type: none"> • Nagaland • Andhra Pradesh • Mizoram • Manipur (hilly areas) • J&K

Forests

The role of forests in a sustainable development framework is crucial not only for the role it plays in maintaining the ecological balance but also the fact that it is a rich reservoir of resources that can sustain communities and generate revenue for the state. Forests have always been at the centre of debates but the literature has often focussed on private vs public control, and not so much on inter-governmental aspect of natural resource policy. (Koontz, 2002) In India, forests are governed by laws of both states as well as centre since forest is a concurrent subject. While the 1927 Indian Forest Act and some state government laws were more with respect to commercial exploitation of forests⁸, the Forest Conservation Act of 1980 had a clear focus on conservation in the form of

Box 3: Compensatory afforestation

Compensatory afforestation is one of the most important conditions stipulated by the Central Government at the behest of the Supreme Court for diversion of forestland for non-forest activities. A 2004 GoI notification provided for creation of a Compensatory Afforestation Fund and that the monies received in CAMPA (Compensatory Afforestation management and Planning Authority) from a State or the Union Territory shall be used only in that particular State or the Union Territory. The Supreme Court in its judgement dated September 2005, it directed 'that ordinarily expenditure shall be incurred in the particular State or Union Territory but leaving it to the discretion of the CAMPA to also incur expenditure in other State or Union Territory. For seven years, the fund amounting to Rs 11,000 crore was lying idle with the ad-hoc CAMPA while centre and states struggled for greater control over the funds.

In 2009, the Supreme Court ordered release of CAMPA funds to the states while accepting the recommendations made by the Centrally Empowered Committee for utilising the funds. Thereafter, MoEF set up a national CAMPA and laid down guidelines for establishment and functioning of State CAMPAs.

⁸ However, several state laws emphasize on conservation, *for example*, Andhra Pradesh alone has acts and rules on Protected Forest, transit of forest produce, trade in forest produce etc., Kerala has a Forest Act, Forest Settlement Rules, Forest Produce Transit Rules. It also has some recent acts like Forests (Vesting and Management of Ecologically Fragile Lands) Act, 2003 and the Restriction on Cutting and Destruction of Valuable Trees Rules. Karnataka has a Forest Act, Tree Preservation Act and Wildlife Protection (Karnataka) Rules

restrictions on non-forest activities in forest areas. In the process of laying restrictions on non-forest activities, this Act, and its interpretation, has resulted in restrictions on some powers of the states as well.

Land

Land is a State subject and rights in and over land and land tenures, land improvement are within the State's jurisdiction⁹ and for acquisition and requisitioning of property, both the parliament and legislature of states have the power to legislate. Since alienation of agricultural land and land improvement are state subjects, land use and state level laws and rules govern conversion of agricultural land to other uses. The eleventh schedule of the constitution provides for devolution of powers with respect to land improvement, implementation of land reforms and land consolidation and soil conservation to the panchayats at appropriate level.

Water

Water under the Indian Constitution features both in the State as well as Union lists. Entry 17 of List II puts water at the disposal of the states. However, the legislative competence of the states is not general and is specifically with respect to water supplies, irrigation and canals, drainage and embankments, water storage and waterpower. It is also subject to the powers of the Centre where interstate river and river valleys are involved, pursuant to List I. Other than the direct entry on water, there are other key subjects relating to water, such as fisheries, which is a state subject and waterways etc., which are concurrent. Power and responsibility to implement schemes with respect to water supply can be devolved to local bodies, and for fisheries, minor irrigation, water management and devolution can be devolved to the panchayats at appropriate level.

A subgroup was set up under the Working Group on Water Governance for the Twelfth Five Year Plan, which came up with a draft National Water Framework Law, in the nature of 'an umbrella statement of general principles governing the exercise of legislative and/or executive (or devolved) powers by the Centre, the States and the local governance institutions'. (Planning Commission, 2012) This has been taken note of and a draft of the Act to be legislated by the government is under way. (The Hindu, 2012) Prevention and control of pollution

Prevention and control of water pollution and the maintaining or restoring of the wholesomeness of water is provided for in the Water (Prevention and Control of Pollution) Act, 1974. It vests the authority in Central and State Pollution Control Boards to establish and enforce effluent standards in mines and processing plants. Similar to the Water Act, the Air Act, 1981 provides for the prevention, control and abatement of air pollution. The Central Board created under these Acts¹⁰ has been assigned functions that are mostly supervisory as well as for co-ordination of activities of State Boards. The Central Board may also provide technical assistance and guidance to state boards, conduct training for persons engaged in programs for prevention, control and abatement of water pollution.¹¹ The State boards are assigned functions of conducting comprehensive programs of pollution control in the state. The State boards not only lay down effluent discharge standards but are

⁹ Entry 18, List II, Schedule VII, Constitution of India

¹⁰ The Water (Prevention and Control of Pollution) Act, 1974 (Water Act) and The Air (Prevention and Control of Pollution) Act, 1981 (Air Act).

¹¹ Section. 16 of Water Act.

also responsible for complete monitoring of compliance of such standards. They may also evolve economical and reliable methods of treatment of sewage and trade effluents.¹² The State boards are subject to directions from the Central or the State government. On the other hand, in conducting programs on prevention and abatement of pollution the State governments have flexibility in design and implementation of the programs.

Biodiversity

India is a signatory to the Convention on Biological Diversity. In 2002, a Biological Diversity Act was enacted to further the objectives of the convention and in recognition of the sovereign rights of the country. The Act creates a three tier system comprising a National Biodiversity Authority, State Biodiversity Boards and Biodiversity Management Committees for protection of biological diversity and the intellectual property associated therewith.

The National Biodiversity Authority grants approval to use genetic resources and the associated knowledge for commercial utilization by foreign nationals and entities. The State Biodiversity boards grant similar approvals to domestic entities. Applications for IPRS are received and approved by the NBA only. The Act does not mandate a role for the states in granting the approval for applying a patent, or even imposing a benefit sharing fee or royalty for commercial utilisation.

Climate Change

Climate change is one of the most cross cutting issues of the above mentioned domains of environment. Before we look at the climate specific instruments, it must be noted that there are regulatory instruments and policies that support or promote actions for mitigation of climate change in India through the institutional framework for energy efficiency, and promoting renewables, both grid connected and off grid. These include the Energy Conservation Act, the Energy Conservation Building code, and the Integrated Energy Policy.

The National Action Plan on Climate Change was finalised in 2008 to identify measures that promote India's development objectives, 'while also yielding co-benefits for addressing climate change effectively'. The National Action plan has to be implemented at a subnational and local level. Therefore, besides references to implementation to state responsibilities, it was also announced that states should prepare action plans for mitigation and adaptation strategies for their respective jurisdictions. To this effect a set of guidelines in the form of a framework were issued under the aegis of MoEF. Started by Delhi and Orissa, about 16 states have

Box 4: Coastal regulation and management

Coastal environment in India has been regulated as per the Central Government notification (the Coastal regulation Zone Notification) under the umbrella legislation of Environment Protection Act. A focus on coasts has not been a focus of national policies, and the regulation has been primarily in terms of zoning of coastal regions and prohibition of activities therein.

The original notification, which was subject to a lot of criticism, especially from the coastal states and communities, has been amended after two decades in 2011. Inter alia, the 2011 notification introduces Coastal Zone Management Plans, which are to be formulated by the coastal states. These plans are envisaged as a step towards an integrated approach, as against the sectoral approach.

¹² Section. 17 of Water Act.

prepared their state level climate action plans till date.

Key issues in environmental federalism

Effective devolution of any governance effort involves mutual dependency between the central government and the State or local governments. (Honadle, 2001) (Hedge, et al., 1989) At one level, the federal government depends on the state or local government to take up the responsibility of carrying out required activities whereas the state government depends on the federal government for institutional and often financial support to perform the activities. At another level, the responsibilities, including decision making, are nested across different levels of government. These shared responsibilities across different government levels are based on the understanding that some levels are better positioned to respond to the governance challenges. This assumes greater importance in the context of environment and natural resources, owing to different conditions, capacities and priorities as well as localised impacts of many environmental challenges and challenges posed by climate change, which cuts across boundaries. Federalism can provide a valuable dimension in policy innovation by offering the opportunity for experimentation with differing approaches to environmental management (Oates 1999, 2009)

Decision making

For a long time, most of the discourse on federalism focused on the need and role for transfers and grants in aid for an enhanced sharing of powers and functions between the centre and states. However, there is more to federalism than transfer and devolution from higher levels of government. In a federal system, states are ‘not agents of some national government hierarchy’ but have a role of their own in the government system. (Agranoff, 2001) It is a network of larger and smaller arenas as against higher and lower. (Elazar, 1998) In the Indian context, owing to its peculiar model of federalism, it may not be so simple to locate these multiple non-hierarchical arenas. While the Indian model may be called quasi federal (Wheare, 1963), or a work in progress (Arora, 2007), or a centralised polity creating an indestructible union (Constituent Assembly Debates, 1948), the fact remains that much of the powers that the Indian states possess are not passed on by the centre but derived from the Constitution itself. (Majeed, 2004) Therefore, there is more to Indian federalism than state level implementation of rules, policies and schemes designed at the level of the Centre. Decision making powers are an important feature of the federalism discussion.

In environmental decision making, the two dominant models of federalism are that of collaboration and competition. While cooperative decision making may avoid duplication and conflict, it may lead to race to the bottom. However, conflicts per se are not bad as it may foster competition (MacKay, 2004) and enhance efficiency (Farber, 1997). Besides, cooperative federalism may itself not be sufficient to secure a voice for states in the decision making. As Arora points out, the political process dominated by federal coalitions and state-based parties has been more successful in making the national policy-making more participatory than cooperative federalism. (2007)

As mentioned in the previous section, many of the decision making powers relating to environment are inclined towards Centre. Besides the exclusively mentioned domains for the Centre, residuary powers and acting upon international commitments, there are instances which show that environmental decision making in India is skewed towards the Centre and the experience with sharing of powers has been more contentious than cooperative. Following the actions taken by the Central

government in response to international commitments in the 1970s and 80s, the role of state governments has been more in terms of implementing policies designed at the Central level, suggesting a tendency of over-centralisation within the federal structure.

Forests and wildlife have been one of the most contentious domains in environmental federalism in India. Management of forests is distributed between the centre, state and to some extent local bodies depending upon the nature of forests and subject area. The combined effect of the forest laws is that state governments are empowered to notify reserve forests and protected areas. However, states have to take prior permission from the centre before diversion of forest land.

The development of Centre-state relations with respect to forests in India has had two major influences, viz., transfer of forests from state list to concurrent, and the jurisprudence developed around forests by the Supreme Court. Forests and wildlife were recognised as state subjects at the time of framing of the Constitution. At the time of Emergency, 'forests' was transferred from the state list to the concurrent list¹³ through the 42nd Amendment to the Constitution. Concern for conservation of forests has been cited as the obvious reason for making forests 'a subject of parallel jurisdiction of central and state governments'¹⁴. However, the amendment and the subsequent enactment of the Forest Conservation Act have also been viewed as curtailing states' control over their forests.¹⁵ Certain rulings of the Supreme Court have exacerbated this. For example, in *T.N Godavarman vs Union of India*¹⁶, it was ruled that states have to take prior permission from the centre before diversion of any forest land for non-forest activity. Similarly, in *Centre for Environmental Law, WWF vs Union of India*¹⁷, approval from Indian Board of Wildlife was mandated before de-notification of any protected area by the states.¹⁸ The role of institutions set up at the behest of Supreme Court, such as the Central Empowered Committee and CAMPA in environmental federalism needs to be studied.

Most of the newer environmental laws have been initiated by the Centre, with certain powers and functions delegated to the states. The Biological Diversity Act (BDA) is one such example, where states enjoy certain powers with respect to granting approvals for use of its genetic resources. However, even the scheme of BDA is skewed in favour of the centre. Courts can take cognizance of only a complaint made by the Central government or an authorised authority, such as the NBA.¹⁹ Prima facie, the state governments or the state biodiversity boards do not have the locus to move the court directly for an action under the BDA. This was highlighted in the recent case of Karnataka, where one of the reasons for the State biodiversity board's decision to not prosecute Mahyco company was due to this jurisdictional aspect.

Most of the major and contentious uses of water in terms of centre-state and state-state relations, such as irrigation, water storage and waterpower are all state subjects. However, states must exercise their powers without prejudicing the rights of other states in which the river flows.²⁰ Considering that most of the major rivers in the country flow through more than one state, the Centre has an equally extensive jurisdiction vis-à-vis regulation of water. Besides, emotional attachment to water adds

¹³ Item 17 A was added to List III

¹⁴ Ministry of Environment and Forest (2002) 'Empowering People for Sustainable Development' pp 31 – 41. Available at URL http://envfor.nic.in/divisions/ic/wssd/doc1/chap6/da_page_6_1.htm

¹⁵ For a discussion on forests, see Kulkarni Sharad (2000) *The plight of the tribal at "Protecting Nature"* a symposium on some legal issues concerning the environment. New Delhi August 2000

¹⁶ Writ Petition no. 202 of 1995

¹⁷ Writ Petition no. 337 of 1995

¹⁸ This provision has now been amended in the Act itself now

¹⁹ Section 61, Biological Diversity Act

²⁰ According to item 56 of list I the Union is responsible for regulation and development of inter-state rivers and river valleys to the extent that it is declared by Parliament by law to be expedient in the public interest

another level of complexity to the interstate water disputes by making it a political issue. A holistic and ecologically sound approach is missing from the management of interstate river water management because a common feature of agreements amongst states is segmentation of integrated systems. (Iyer, 2012)

The role of decision making at state levels or with ample involvement of states is vital in areas where the direct and immediate impact looms greater in some states. Coastal management is one such issue. The vulnerability of coasts on account of climate change is not unknown. However, the National Action Plan on Climate Change approaches the issue of coastal adaptation at a very preliminary level, mostly from the perspective of disaster management. Unlike issues like energy, habitat, agriculture and Himalayan ecosystem missions, coastal issues gets no special focus in the National Plan. In such a scenario, the importance of state level plans and development of better infrastructure, including early warning systems and management of coastal activities needs greater attention. (See (Noronha, 2007)

The constitutional allocation power shows that space available for states does exist. Whether these decision making powers are adequate or not can be debated at length. However, the issue with respect to exercise of these powers is as central as existence of powers to the discourse on federalism. Inadequate and inefficient use of powers can be seen in the actions taken by states on issues such as notification of protected areas, settlement of rights, Panchayat Extension of Schedules Areas Act (PESA) etc.

There are both internal constraints, such as lack of capacity and political will, as well as external constraints, such as those in the form of centralisation through institutions or courts approach towards states. An important question in this regard is to what extent has the judiciary facilitated or restricted environmental federalism in India through its rulings and the institutions set at its behest.

On one hand judiciary has delivered some landmark judgments on protection of environment and conservation of natural resources, and on the other hand some of the same judgments or orders have added another level of stress in Centre-state relations. Therefore, judiciary in the case of federalism has had its advantages as well as disadvantages. ‘A balance between the strong arm of law and a reasonable arm of law must be struck to keep the green agenda in safe hands.’ (Sinha, 2012)

A number of institutions, many of them at the level of Centre, have been established that govern various environmental matters and natural resources. Some of these institutions have been established under environmental legislation, thus enlarging Centre’s domain on natural resources which otherwise would be state subjects, for example river water and ground water. (Iyer, 2012)

With several institutions related to environment, the need for inter departmental and inter-ministerial coordination at the levels of Centre and state to coordinate actions planned, designed and implemented at various levels is imperative.

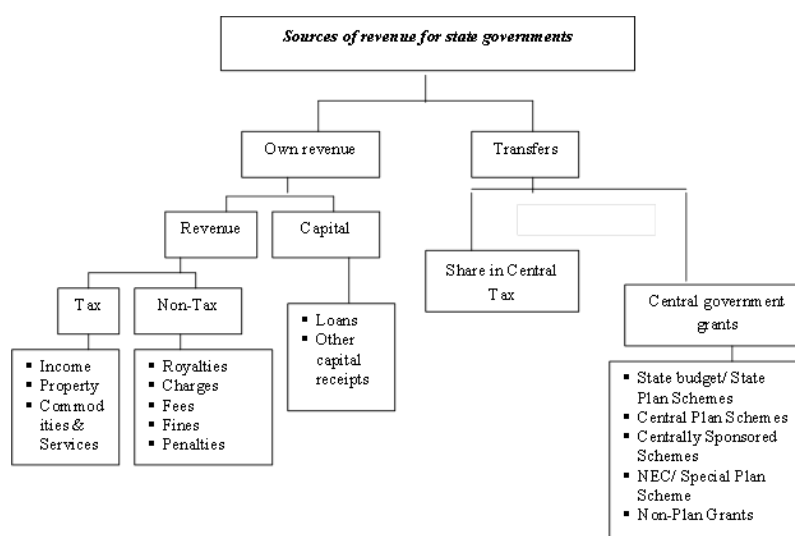
Fiscal matters and use of economic principles

Fiscal matters, including tax and transfers, are an important element of any discussion or debate on federalism, including environment and natural resources.

With respect to tax revenue, states show discontent with the level of their involvement in the decisions taken by the Centre. Further, the ability of the states to generate enough revenue on their own to meet

their expenditure needs is under attack mainly as a result of expansionary use and interpretation of the Concurrent List and political dynamics.

There are large amounts of central funds that are disbursed to the state governments as Non-Plan expenditures by the Planning Commission, more often to run the centrally-sponsored schemes. Central sector schemes and centrally sponsored schemes are important features of decentralization in India. Under central sector scheme, there is 100 percent assistance from the central government while in the centrally sponsored schemes the expenditure is shared by the centre as well as the state and implementation monitored by the state government. Such grants are not only often motivated by political reasons determining Centre-state relations but even their disbursements is politicised. Furthermore, in the name of a plethora of centrally sponsored schemes, the Centre has systematically eroded fiscal autonomy of states. Consequently, many states are forced by the centre to undertake a large number of new expenditures as their contributions to so-called centrally-sponsored schemes and some of them may create significant tradeoffs.



In order to fulfill its responsibilities, financial capacity needs to exist or be supported through transfer of funds or power to use fiscal instruments to raise revenue and meet environmental goals. At present, under the Ministry of Environment and Forests plan, there are thirteen central sector schemes and six centrally sponsored schemes. Matching grants in the case of centrally sponsored schemes often results in an additional financial burden for states, rather than giving them an incentive to take actions for better environmental management. In India, the Finance Commission forms an important part of the fiscal/financial relations in the federal structure of India. The main considerations before the finance commission are: (i) how is the proportion of central tax revenue to be shared be determined; (ii) specify criteria for deciding shares of individual states; and (iii) determining the weights attached to different allocation criteria (Government of India, 2004) (Hazra, et al., 2008). Three sets of

Box 5: Thirteenth Finance Commission and the environment

Unlike the previous Finance Commissions, the mandate of the 13th Finance Commission was enlarged to look at “the need to manage ecology, environment and climate change consistent with sustainable development” while making its recommendations.

The 13th Finance Commission has provided grants for the environment - forests, water sector management and incentives for grid connected renewable energy.

The Commission has earmarked 5,000 crore as green bonus, which are special grants for areas with more forest cover. This money will be given to all state governments over a period of five years. An amount of Rs 5000 crore is recommended as water sector management grant for four years. The purpose of this grant is to incentivise the states to establish an independent regulatory mechanism for the water sector and improved maintenance of irrigation networks. The grant for renewable energy is structured to reward states for renewable generating capacity that comes on stream into the grid during the first four years of the projection horizon. The reward falls due in fiscal year 2014-12 after having allowed enough time to states to respond to the incentive hereby recommended. Though the grant is targeted at state-level on-grid capacity, local bodies have a variety of small-scale technological options for off-grid generation of renewable energy which could even feed into the grid. It is important to note that the release of certain grants is subject to various prescribed conditionalities to ensure that the States comply with the overall agenda in these sectors.

The Commission has recommended a substantial increase in the grants to local bodies to provide for a broad level of unconditional support for both urban and rural local bodies for the entire five-year period governed by its recommendations. This funding is expected to enable the local bodies to meet the challenges of environmental degradation, population pressure, exhaustion of resources and revenue constraints. There are no usage conditionalities attached to local grants since certification of usage has been found to act as an obstruction to the regular flow to local bodies of funding provisions made by previous Commissions. Although there are no strictures imposed on usage, it is hoped that the considerably enhanced funding for local bodies will address the woefully inadequate sanitary conditions that prevail over the majority of human habitations in the country.

considerations define the tax devolution criterion. These are- (i) population, tax efforts and fiscal discipline to correct vertical imbalance; (ii) income distance method²¹ to correct horizontal imbalance; and (iii) area to account for cost disabilities (Rangarajan & Srivastava, 2008).

²¹ “Distance Formula = $(Y_h - Y_i)P_i / \sum (Y_h - Y_i)P_i$, where, Y_i and Y_h represent per capita state domestic product (SDP) of the i th and the richest state, P_i is the population of the i th state, $(Y_h - Y_i)$ for the ‘h’ state is to be equivalent to that of the second highest per capita SDP state” (Rao, 2000).

The state governments and local bodies are also provided with earmarked grants that include environmental functions. For example, the antipoverty programs such as Bharat Nirman in which the local bodies can take up projects that have bearings on environmental conservation. Similarly, under the Jawaharlal Nehru Urban Renewal Mission (JNNURM), grants are provided to support projects related to provision of water services, solid waste management etc. However, the benefits of all the centrally sponsored schemes do not always reach the local levels, and local bodies are not adequately involved in the design and implementation of these schemes.

In case of fiscal transfers for provision of public services, one of the criteria used by the federal finance commissions for devolution to state government and that by State Finance Commissions to rural and urban local bodies is the 'area' of the state. This criterion accounts for cost disabilities (circumstances like excess rainfall, hilly terrain, and large remote areas with low density of population) in providing public goods. The use of 'area' of a state as a criterion for determining its share stems from the additional administrative and other costs that a state with a larger area has to incur in order to deliver a comparable standard of service to its citizens (Government of India, 2004) and also will encourage internalizing of environmental externalities. Moreover, inter-governmental fiscal transfers must also strive towards incentivizing cooperation for addressing trans-boundary challenges.

In certain environmental spheres, the power and control of the Centre is high even though the states are responsible for taking action for protecting the environment at the state level, and therefore more accountable. There is an imbalance in terms of contribution and receipts of the states. This can be illustrated in the case of compensatory afforestation, where contributions by states go to a CAMPA Fund and cannot be released for utilization only on the basis of an approved Annual Plan of Operations. Thus, while the states are under immense pressure to act towards enhancing forest and tree cover and conservation and management of wildlife, monies collected for this purpose are locked in funds. Illustrating the case of CAMPA in Andhra Pradesh, concerns were raised with regard to less payouts from the fund than the interest earned on the funds at the Workshop on Greening the Indian Federal system held in July. (The Energy and Resources Institute, 2012)

Use of economic principles

In a study by World Bank (Boadway, et al., 1994), four economic principles for use in deciding the taxing responsibilities for various levels of government have been highlighted. The principles are- efficiency of the internal common market, national equity, administrative costs and fiscal needs of the level of government. This implies that progressive redistributive taxes, stabilization instruments and resource rent taxes should be assigned to national governments, while tolls on inter-municipal roads should be assigned to state governments, and resource taxes such as royalties and fees and severance taxes on production and/or output should be designed to cover the costs of local service provision and be assigned to sub-national governments. In the context of environment, sub-national governments could also impose taxes to discourage local environmental degradation.

Alm and Banzhaf draw a set of principles that should drive the choice and level at which the instrument must be introduced. These are, geographic scope of the externality, consistency with fiscal needs of the level of the government, take into account mobility of the polluting actor, assuming that mobility across local borders is easier than mobility across national borders. (2011)

Given the preponderance of resource-related subsidies as well as the lack of effective disincentives for polluters, the issues of rational pricing of natural resources and pollution charges need immediate

attention. Wrong pricing signals and inadequate use of economic principles in environmental decision-making are also responsible for poor environmental outcomes. Application of economic principles to complex problems around environmental management can be useful in considering the suitable model of federalism. (Ben-David, 2009)

In the absence of a well enforced or effective command and control regime, economic instruments can play a useful role in environmental management. Based on the cost, effectiveness, efficiency etc. a balance of command and control with market instruments should be struck. Introducing new instruments that take into account environmental challenges are necessary, but what is equally essential is a mechanism to evaluate the performance of such policies and gather evidence that the policies and instruments have actually worked and been effective. It is not possible to have clear evidence of efficacy in case of environmental policy and measures. However, some cases demonstrate a growing interaction between researchers and regulators to acquire credible evidence to test regulations. (Pande, 2012)

Rewarding environmental performance is seen as a useful way to incentivize improved outcomes. One example of this is the Planning Commission Environmental Performance Index to be operationalized during the Twelfth Five year plan, which takes into account the efforts made towards environmental management, especially pollution abatement, conservation of natural resources, GHG emissions reductions and rank the states to incentivise environmental performance. However, such environmental performance indices have certain inherent limitations, such as difficulties in assigning weights and lack of complete and reliable data.

Capacity and accountability

Two integral aspects of devolution of environmental governance to state and local governments are the capacity of 'these governments within the government' to perform and the accountability in the system to achieve the intended goal. While capacity is a critical factor for operationalization of decentralized governance, accountability brings in greater efficiency in the system.

Capacity can be broadly defined as '*the ability to perform appropriate tasks effectively, efficiently, and sustainably*'. (Hilderbrand & Grindle, 1994) The concern for capacities of the state and local government can be cited as a reason for limited devolution despite the poor performance of centralized governance in many spheres. The counterview suggests that capacity is not an absolutist concept but a dynamic process. (Honadle, 2001) The capacity to perform may increase with assignment of new responsibilities and by initiating adequate institutional and capacity development measures. One of the major objectives of any decentralized governance system is to make the government more accountable to citizens or focus on service delivery consistent with citizen's preferences (Shah & Shah, n.d.). Environmental governance in a federal structure is often characterized with institutional density involving multiple agencies across the levels of the governments, often with divergent objectives. Federal governance systems often focus more on 'structures and processes with little regard to outputs and outcomes' (Shah & Shah, n.d.). Forest governance in India is an example of this. States seem keen on exploiting the carbon credit potential of forests in their climate action plans. However, they seem unaware of the and concerns and implications of schemes like these and also fail to take into account the experience and lessons learnt from previous experiments like the JFM. (Jha, 2011) Other similar challenges can be seen in the domains of biodiversity, pollution control, etc. Although nearly all states have established their respective state biodiversity boards by now, it took almost a decade for several states, including those

rich in biodiversity, to set them up. Most state biodiversity boards suffer from problems of understaffing, lack of resources, vision and expertise.

Several socio-economic and institutional factors influence (supplement or hinder) the capacity of governments at state and local levels. Even though several environmentally sensitive and resource rich areas have decentralised forms of governance in principle, the institutional mechanism for strengthening this decentralization is missing. Lack of willingness to strengthen decentralisation in practice can also be attributed to absence of a perceived direct or long term political benefits for the political institutions and parties. (The Energy and Resources Institute, 2012) Perception plays an important role in building capacity at local levels as there is often a fear that too much power, and associated capacity, at lower levels of government may restrict attainment of national goals, whether with respect to development or environmental conservation. There is a perceived lack of faith in the ability of state or local governments and agencies to deliver results with respect to environmental governance.

The State pollution control boards have largely remained agencies for control of industrial pollution. Most of the potential powers of state boards remain un-utilized. The provisions of the pollution control Acts do not envisage participation of local authorities in pollution control activities. Consequently the monitoring activities are mostly centralized. The SPCBs do have a network of regional offices. But besides financial constraints of expanding and strengthening such networks, technical capacity remains one of the central concerns for improved service delivery. (TERI, 2009) Under the National Action Plan on Climate Change, the state pollution control boards are required to verify the compliance of the Environmental Management Plan. However, the issue of capacity of state boards remain unaddressed.

States, in their action plans on climate change, have highlighted the need for technical capabilities and human resource. Some states, like Karnataka, have linked their capacity building needs with their proposed actions for addressing climate change. (Mishra, et al., 2011)

Accountability of the governance systems to its stakeholders is considered as the hallmark of good governance. However, accountability is defined/ perceived differently across the disciplines (Adeyemi, et al., 2012). In common parlance, accountability means greater responsibility to the system objectives, greater responsiveness to the citizen's preferences and greater commitment to the values and higher standards of morality. Accountability also can be in the form of social, financial, political, administrative, ethical and legal (Adeyemi, et al., 2012). In a more practical context, accountability of any governance system is reflected in outcomes in terms of its convergence with the desired objectives and preferences or expectations of the citizens. The decentralized governments are expected to be more accountable for their proximity to the citizens and for better understanding of the local challenges. It also emerged at the workshop in New Delhi that corruption at the level of local governments is more visible and resented and hence, in principle, should be less than at other levels of government. However, there is an increase in the perverse incentives that exist for corruption at local levels. Therefore, there is a need for effective design of accountability mechanism within the governance structures. The issue concerning accountability varies across the environmental resources characteristics and ecosystem regions. It must be ensured that any mechanism to strengthen capacity and accountability is applicable to both mainstream and parallel institutions. Several parallel structures have come up in the realm of environmental management, and these are not immune from challenges such as inadequate capacity and corruption.

The federal governance structure has resulted in multiple institutions in the environmental governance arenas. These institutions are initiated by different agencies of the government with divergent interests. Cooperation among the agencies often poses as challenges even among the institutions with similar interests. Consider the case of forest resources. There are three distinct formal community level institutions i.e., Joint Forest Management committees, Biodiversity Management Committees, and Empowered village committees under FRA. The recent move to integrate JFM with local communities and the PRI institutions (Gram Sabha) will also have consequences on the capacity and accountability concerns. This underlines the importance of institutional coordination in a federal context. There are multiple stakeholders whose capacity needs to be built to respond to the various environmental challenges. This also entails a multi-tier approach that targets different agencies, levels and facets through different instruments. There is a need to study further the reasons behind some governments performing better in addressing these challenges than other governments, irrespective of similar capacity level. The critical variables within the government structure that explains this difference need to be appreciated. This may also involve a complex process of identifying a set of capacity indicators and measuring them. It is equally important to recognize the challenges state and local governments and agencies face in managing the environment and the factors that hinders their existing capacities based on the general understanding of the notion of ‘capacity’. It is also important to explore all these issues in the context of future challenges given the dynamic nature of environmental challenges. Dynamism in the concept of capacity must also be recognized in light of

Box 6: Key points of the Workshop on Greening the Indian Federal System

- Need to enhance political and policy ownership across different levels of governance.
- Examine ways to remove the trust deficit that exists amongst levels of government.
- With respect to the role of judiciary and its impact on federal relations, the view is that there is a space for the reasonable arm of law, but not for the strong arm of the law which encroaches upon the state domain.
- People vs state and environment vs development and local democracy are extremely pertinent to the discussion on federalism and green issues. There is a need for a strong buy in from the people for measures for environmental management.
- Local government is supposed to be less corrupt due to its proximity to people but there is a need to watch out for emerging perverse incentives that are resulting in greater corruption.
- Importance of looking at expenditure responsibilities as well as taxing abilities of state and local governments. A hard budget constraint could actually motivate improved efficiency and accountability at all levels.
- Ecologically rich states have very strong local government structures but they are not empowered or resourced. Even under the present laws, a lot can be achieved but we need less cynicism, greater awareness and advocacy.
- Institutional mechanisms to incentivise decentralisation and empowering of people are not politically beneficial, which explains why these agendas have lagged behind.
- Need to build synergies by which parallel structures can work together with local governments.
- Statutory grants are being overshadowed by the centrally sponsored schemes. Bureaucracy of the centrally sponsored schemes is causing problems.
- Incentivising states and local bodies through intergovernmental transfers that recognize environmental improvements is important.
- Building learning organisations and demand driven training programmes, toolkits, sharing of learning etc. will help in strengthening capacity and energising both the states and local governments.

pre-existing capacity and a broader understanding of capacity, which is not restricted to technical or managerial capacity. (Chhatre, 2008) The other complexities involved in discussing these questions are diversified nature of the capacity endowment and capacity need of the state and local governments across the country given the differential socio-economic and ecosystem characteristics. (Honadle, 2001) (Tannenwald, 1998)

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