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## INDIA NEWS

### New rules offer compensation, not freedom from pollution: Manju M and Kanchi K

Manju Menon and Kanchi Kohli, researchers with the Centre for Policy Research, weigh in on the Union environment ministry's latest consultation papers, which seek to increase penalties, but absolve violators of criminal liability.



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By Jayashree Nandi

Last week, the Union environment ministry released public consultation papers on amending four critical environmental laws. Some violations of the air and water acts, the environment protection law, and the public liability insurance law that deals with providing relief to victims of accidents while handling hazardous substances in industries will be decriminalised to remove the fear of imprisonment, the ministry has proposed.

The consultation papers seek to increase penalties, but absolve violators of criminal liability. They also propose to create various funds from the levies that will be utilised to mitigate the environmental damage. Will these amendments improve compliance with environmental laws or reduce pollution?

Manju Menon and Kanchi Kohli, legal researchers with the Centre for Policy Research say they will not help. Fines and monetary penalties on economic entities have a deterrent effect only if they are proportional to the impacts and size of the polluting entity and their earnings. Designing such penalties, how they will be executed and distributed to those harmed by the polluting activities are all very important in law and designing these clauses requires careful thinking, they said.

*Excerpts from the interview:*

**Why do you think the government plans to decriminalise most provisions of the Air, Water, Environment Protection and Public Liability Insurance Acts? Are they effective with their current penal provision?**

India's economy consists of many polluting activities. Many of these activities are those that have been outsourced by countries which have higher legal standards against pollution. So along with our economic growth, pollution has become a very visible public issue across most of the country. There is also a lot of community action against polluting entities in the form of protests and litigation and these do impact project operations and their financing in different ways. So, the government may have felt the need to intervene and insulate economic entities from such disruptions.

However, the government seems to be concerned with the consequences of pollution for one set of actors only. The proposals put out by the government state that they want to create a conducive business environment, achieve real independence by weeding out fear, and reduce compliance burdens. They claim to be responding to concerns raised by some people but don't mention whose concerns these are



the penalty collections in the pollution fund as the action taken against polluting entities. This may reduce the scope of legal challenges against polluting activities. Two, for all of us citizens suffering from pollution in urban and rural areas, the government is offering compensation, and not freedom from pollution.

### **How effective is the criminal prosecution provision in these acts? From your experience, could you cite examples of cases where they have been used?**

It is not at all effective. In fact, it makes pollution laws unenforceable because the liability regime comes in the way of taking timely actions to protect people and the environment that may be damaged due to polluting activities. Building a sound criminal case for environmental pollution is difficult for a number of reasons such as a greater burden of proof, limited resources to generate evidence and long-drawn prosecution procedures.

So, civil liability in environmental law is broadly agreed to be more effective. Many countries that adopted environmental laws around the same time as India have had debates on criminal vs civil liability. Most countries prefer civil liability not only because criminal prosecution is harder, but because you don't want to criminalise the entities which are important to your economy and society. This means that governments have the task of ensuring that economic entities are generally law-abiding even when standards are made stricter if needed, and more importantly, that these entities are held accountable to social values and to care for communities amid whom they run their operations.

### **Does decriminalising these provisions weaken the scope of these acts? And why?**

Our pollution laws are very much in need of reform. We work with communities affected by decades of pollution and we see them struggle with different institutions at all levels to get remedies. They lose precious years in the process. But rarely has anyone come to ask them about their experiences or their suggestions. In these proposals, the government responds to the concerns of a particular set of people and tweaks the laws to ease their troubles. Where does that leave all of us? This form of partisan law-making has become common now and it should be a concern for all.

These proposals over-focus only on the liability questions of these laws but miss the point about why these violations occur. The proposals introduce a lot of ambiguity into the laws by saying "simple violations" will be treated differently. What are simple violations if their consequences are grave, down the road? It also puts a lot of power in the hands of the officials to determine if violations are serious or not. Increasingly the government has been doing such hair-splitting over legal terms. You have also reported how the EIA 2020 draft aimed to distinguish between violations and non-compliance. This legal tweaking will not help anyone in the long run because the environmental crisis that we are in requires more radical solutions at the level of socio-economic systems.

penalties, how they will be executed and distributed to those harmed by the polluting activities are all very important in law and designing these clauses requires careful thinking.

Gujarat has a system of bank guarantees, but it is not effective to deal with pollution. Fines are also not useful if violations are rampant and there is a general state of chaos about the implementation of laws. We still don't maintain publicly accessible data on violations or study them systematically.

So, we don't know if violating units are 20%, 30% or closer to 90%. If violations are on the higher side, then we have to rethink our basic assumptions in regulation and not just the clauses on penalties. In India, it is also hard to execute monetary penalties. There are several cases where we have seen a massive backlash to penalties imposed by regulators or courts. Powerful and prominent companies responsible for causing environmental problems would rather use the media and litigation to discredit the evidence than accept that they have engaged in illegalities and pay up.

**How will the new regime through so-called simplified, decriminalised environmental regulations ensure polluters do not get away with environmental crimes? Can these be monitored?**

It won't. The new proposed regime does not claim to do that. Its aim is to create funds from polluting units and use them to compensate victims of pollution and industrial accidents. It also aims to free economic entities of the fear of being imprisoned for being the source of pollution and industrial accidents. It is not clear who has this fear and why because this fear has not really translated into a reduction in polluting activities. Given the scale and range of entities that have to be regulated for environmental impacts, these laws-the air and water acts and the EPA- are designed to fail. Their central principle is policing and that is not a workable approach.

**What kind of legal clauses do you think can make these environmental laws effective?**

India's pollution laws belong to a time when the economy was a fraction of what it is now and when pollution was an acceptable consequence of industrial activity. It is high time we revised these laws to ensure that approvals are given only to projects that can demonstrate their positive impact on the environment and people. In such regulations that raise the bar on environmental performance of approved projects, liability clauses could include fines that are proportional to the environmental and social impacts of projects operations rather than just violations of legal clauses. Regulatory approval to projects

and their liability aspects of the law should be designed as social processes that involve communities. Presently, the pollution consent and compliance system largely involve only the government and the project.



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