

**Constitution of India Environmental Governance:**  
**Administrative and Adjudicatory Process**  
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**Lecture No. 12**  
**Constitutional Right to Environment**

This particular session on Constitutional Right to Environment is slightly differently. Instead of coming up with a lecture as to what is a constitutional Right to Environment, it is more likely a question and answer session. To break the monotony of a lecture an attempt is made here to present the gist of this law in the form of answering a number of question.

The foremost question that should occur to the mind of a student after having heard the lecture so far on the Constitutional space for allowing the communities and the local bodies to come to the main stream of environmental government to have role, responsibility and function to perfume the that should be right up front to pose should be that the constitution provide for a Right to Environment what is being it?

The considered opinion the constitution makers, when they made the central government the state government the local bodies and communities as a managers as a custodian as the trustees and as the stewards of environment, it still does not answer and explain whether an individual like me and you would also have a role to play, not just a role to play but, a right to demand, your right to demand as a constitutional Right to Environment is that there and if at all it has been in envisaged by whatever mean., How it is actualized? That is the question.

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## IS THERE A FUNDAMENTAL RIGHT TO ENVIRONMENT?



- *STRAIGHT ANSWER- NO. NOT IN THE TEXT OF THE CONSTITUTION*
- *IS IT A PRIVATE RIGHT? A "RIGHT" AT ALL?*
- *BUT, HOW AND WHY HIGHER JUDICIARY START CONSIDERING IT AS A CONSTITUTIONAL QUESTION? AS SOMETHING AFFECTING HUMAN RIGHT?*
- *EVEN IF IT DID, BY WHAT AUTHORITY, CAN THE COURT READ IT INTO THE CONSTITUTION?*
- *BUT, WHY SHOULD THE COURT ACCORD THIS STATUS TO ENVIRONMENT AT ALL, IN THE FIRST PLACE? WHY SHOULD IT LINK IT WITH HUMAN RIGHTS AND THAT TOO TO A FUNDAMENTAL RIGHT?*

- *LET'S FIND OUT.....!*



That is the question we shall currently address. In most specific terms, is there anything like a fundamental Right to Environment? For that the straightforward answer is in that text of the Constitution. No, there is no mention of fundamental Right to Environment. There is ofcourse a mention of Right to Life under article 21 of the constitution but, each one of us have a Right to Life that should be protected unless and until the state, because of certain kinds of legal provisions would have the power to end the life - my life, my privacy, my liberty should be protected.

So, in the text of the constitution this is what has been provided. There is nowhere that Right to Environment is mentioned. Then the question is, if it is not mentioned in the constitution why get into a discussion over that? But, there has been a lot of talk it would that. Ok, in that event is a totally a private right or it is just an aspiration not a right at all But we have heard that the higher judiciary has started considering it as a constitutional question. Is it that in a number of cases the Supreme Court has questioned about right to environment and has decided on that as very much closely related to human right.

But then even if it did how could Supreme Court state something which is not there in a constitution? Why should the court accord a status to the environment at all in the first place, of giving me a fundamental Right to Environment when the constitution makers did not in

their wisdom, in the concerned opinion did not think of making it part of the constitution. Number of questions. So, far unanswered by me. And let us find it out now, how do we approach this and how do we answer this question?

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### **I. RIGHT TO LIFE- RIGHT TO ENVIRONMENT !**



- **SUBHASH KUMAR v. STATE OF BIHAR(1991, SC): " EVERY PERSON ENJOYS THE RIGHT TO A WHOLESOME ENVIRONMENT, WHICH IS A FACET OF RIGHT TO LIFE GUARANTEED UNDER ART. 21 OF THE CONSTITUTION "**
- **A.21: " NO PERSON SHALL BE DEPRIVED OF HIS LIFE OR PERSONAL LIBERTY EXCEPT ACCORDING TO PROCEDURE ESTABLISHED BY LAW"**
- **NO MENTION OF RIGHT TO ENVIRONMENT EITHER HERE OR ANY WHERE ELSE IN THE CONSTITUTION !**
- **RECOOMENDATION OF THE COMMITTEE TO REVIEW THE CONSTITUTION TO MAKE RIGHT TO WATER A FUNDAMENTAL RIGHT- STILL IN COLD STORAGE !!**
- **ONLY A FUNDAMENTAL DUTY , ENVISAGED (A.51A(g))**
- **THEN, HOW DOES THE HIGHER JUDICIARY GET THE POWER TO ADD ANYTHING TO THE CONSTITUTION , WHEN IT IS NEITHER THE CONSTITUENT ASSEMBLY NOR THE PARLIAMENT?**
- **"JUDICIAL ACTIVISM" ?**



As was mentioned earlier, Article 21 of the constitution simply states no person shall be deprived of his life or personal liberty except according to the procedure established by law. That law is the fundamental right to life that I have. Is it a fundamental right to environment? Not in the text of the Constitution. No mention either in this provision or anywhere else in the constitution

As a matter of fact, the constitution review committee was constituted after about 25 -30 years of the constitution being put into work to review and then see whether, some provision of the constitution, do they require some amplification, addition, amendment, reform or some of them have become redundant, to be removed it was a committee headed by former chief justice of India Justice Venkatachaliah.

Justice Venkatachaliah Committee in their recommendation they came up with a number of suggestions. They did come up with a recommendation not about Right to Environment. They came up with a recommendation to make the right to water as a fundamental right. That it is more than 30 years since this recommendation has been made and even now, this is still kept in the court storage. That means what?

It simply means the constitution makers in the first instance and the parliament in the second instance somewhere late in the 1990s even after receiving the recommendation of this review committee did not choose to make right to the environment as a fundamental right. In fact what the parliament did was, which we have already seen, that through the forty second Amendment they made it a fundamental duty of every citizen of India and you a fundamental duty to protect the environment not a fundamental right over the environment.

So, we only have a duty to the environment as has been provided under the constitution text. Then the question is, how is it that the higher judiciary refers this as every citizen's Right to Environment? There are cases which will be presently reflecting on and one case that I mentioned at the top of the screen, the case of Subhash Kumar versus State of Bihar. In that the Supreme Court in very clear terms, look at the year 1991, every person enjoys a right to a wholesome environment which is a facet of Right to Life guaranteed under Article 21 of the constitution. These are the exact words of the Supreme Court. We are in a difficult situation.

Here is something that the text to the constitution says and here the court of law reads something in the constitution. Can you do it? Is it not interference in the constitution making by a constituent assembly or by the parliament which are only empowered to add, insert or do whatever, they want to do within the constitutional frame to the constitution. Is it a case of judicial activism? Did the court assume itself functions, which were not there with it?

But, anyway the court has said every person has a right to wholesome environment, clean air, clean water and all that and it says that it is an adjunct of right to life it is a fundamental right of the Constitution. So, my right to life under the constitutional guarantee of a fundamental right, meaningless if it does not have a right to wholesome environment as an attribute of this, this is what the court said. Can the court say so? Is it the law of the land?

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- HOW CAN IT JUSTIFY?

- COURT DENIES SUCH A ROLE OF "ACTIVISM" FOR ITSELF- PERFORMING ITS ROLE, UNDER THE CONSTITUTION- NOT JUST A " COURT OF LAW", IT IS THE ULTIMATE "COURT OF JUSTICE" & GUARDIAN OF THE CONSTITUTION - HAS THE POWERS TO PASS ANY DECREE OR ISSUE ANY ORDER " FOR DOING COMPLETE JUSTICE". ENFORCEABLE ALL OVER INDIA, JUST LIKE THE LAW MADE BY THE PARLIAMENT (A.142)-

(- THIS IS FURTHER DEVELOPED IN GREATER DEPTH & DETAIL IN MODULES 10 & 11)

- " RIGHT TO ENVIRONMENT AS A FUNDAMENTAL RIGHT" – JUDICIAL CONSTRUCT
- BUT, WHY TREAT IT AS A FUNDAMENTAL RIGHT ? WHAT IS SO SPECIAL ABOUT IT ?
- – THIS REQUIRES A LITTLE ELABORATION OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION.



How can the Supreme Court justify this? First and foremost, it must be stated the court was considering this aspect as well. Is it activism on its part? The court said “nothing doing, we are not exercising a jurisdiction which we do not have, there is no activism involved we are only performing the function assigned to us under the constitution. Please look at the constitution. Look to Article 142 of the constitution. What does it say? Are we just a court of law resolving disputes, that people have conflicts, people have disputes, they come to us, we resolve the disputes. So, the court of laws function is only to settle claims, interest and conflicts, nothing more. That is not what the constitution says. The constitution says that the highest court of law is not just a court of law it is a court of justice not just that it is not only the Court of Justice it is the guardian of the Constitution.”

That means, in the understanding, in the interpretation of the constitution, in the application of the constitution the Supreme Court is the final word whatever, it says that is what is the constitutional intent and will and as the Court of Justice it has all the powers to pass any order, any decree, any judgement, for ensuring complete justice is done.

“And, we are the highest court” the Supreme Court says. They are just performing a function.

Whenever, there is any vacuum in the law whenever, the situation demands, that the existing body of law or the existing understanding of the law is inadequate to meet the ends of justice, we are ordained we are under obligation to do complete justice and for that, we will give our own understanding of it, which shall become the law of the land.

Anyway, this aspect is further developed in greater detail and more in greater depth in two modules which I have reserved for your consideration on the role of the judiciary in developing environment jurisprudence in India. We will discuss that in greater detail. Suffice it to say for the time being, that the courts are not performing the role of an activist, they are performing their constitutional function and in discharging that particular function, they have declared Right to Environment as an extension of Right to Life which is a fundamental right. So, what do we gather from this?

All that we gather from this is although in the text of the constitution there is nothing like Right to Environment as a fundamental right, the judiciary has constructed that and has worked it into the fundamental right part of the constitution. They have given a new lease of life to the right to life as a fundamental right by extending it to Right to Environment as well. But, the question comes, why should the court of law take so, much of pain and explain so many things as to say that we are performing only our functions.

But, why do you write them as a fundamental right, what is so special about Right to Environment? And why accord the status of a fundamental right to it? Can you not making just an ordinary legal right? Can you not just say that this is a concession that is being enjoyed by every member of the public? But, why call it as an extension of fundamental rights? This is a question that makes us go a little deeper into this and for that we need have to understand, why the grant this as a fundamental right on par with the fundamental right and what is so special about fundamental rights? How do you really view it as something superior to an ordinary legal right? And that is what we present here.





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## **II. WHAT IS SPECIAL ABOUT FUNDAMENTAL RIGHTS ?**



- **PART III OF THE CONSTITUTION :**
- **CONSTITUTIONALLY PROTECTED HUMAN RIGHTS – BASIC, INALIENABLE RIGHTS-MORE THAN ORDINARY LEGAL "RIGHTS"**
- **PROTECTION IN THE FORM OF EXERCISE OF "WRIT" JURISDICTION BY H.C & S.C – HABEAS CORPUS (- PRODUCE THE BODY-), MADAMUS (- COMMAND TO AN AUTHORITY-), QUO WARRANTO (- UNDER WHAT AUTHORITY- ), PROHIBITION, CERTIORARI (- DECISION, PATENTLY ILLEGAL/VOID/UNJUST-)**
- **EXERCISABLE EVEN AGAINST THE GOVT.**
- **POWERFUL RIGHT, ALRIGHT, BUT, IS IT NOT JUST AN INDIVIDUAL RIGHT? WHY USE IT IN THE CASE OF ENVIRONMENT, WHEN CONCERNS OVER IT ARE NOT CONFINED TO ONE OR JUST A FEW INDIVIDUALS?**
- **WHY NOT BE SATISFIED BY EXERCISE OF POWER OF "INJUNCTION ", AT PRIMARY JUDICIARY LEVEL?**



What is special about fundamental rights? The fundamental rights enshrined in our constitution are there in part 3 of the constitution. A host of rights are mentioned. These are as a matter of fact, constitutionally protected human rights. These are basic inalienable rights of every citizen of India. They are more than a ordinary legal right, what do you mean? To be an ordinary legal right if in a particular statute, if it is recognised or if it is mentioned that such and such a thing is the right of an individual. That I as the owner of a particular property I can occupy that premises I can gift it away, I can sell it. Where do you find? That is there in statute formulations.

So, statutes give me that particular right and so, it is a recognition of my right which is called as the legal right but, a fundamental right, fundamental right is not just declared by a statute it is a right which is very much there the Constitution, which gives additional the insulation of protection. Not a statutory protection but, a constitutional protection. What is that constitutional protection? Protection in the form of the exercise of what is referred to as a 'writ jurisdiction' by both the High court and the Supreme Court. What is a writ jurisdiction?

Writ jurisdiction is a jurisdiction or an authority exercised by the higher judiciary by

commanding anyone, anything, any authority, any corporate body, any governmental agency, questioning their actions and asking them to see that a human life, limb, entitlement, rights are not violated in any way. How does this manifest? It manifests in a wide variety of forms and I am mentioning them. The first one is, what is referred to as the habeas corpus.

If somebody is detained by the governmental authorities and then, if a petition is made, that this person's liberty is being restrained unnecessarily, unduly, illegally, the court looking at the circumstances may exercise its power of writ. It will issue a writ of habeas corpus and the government. "Look you the government first, you produce the body presented before this court and then, we will decide whether, you were a detention of this individual is proper, just, legal, we will decide on that."

So, production of somebody who has been unreasonably detained is what has been provided under this. Second one is important and which is profusely used in most of the environment litigations. It is called as the writ of mandamus. Mandamus or a command, a command given to an authority that you as an authority in a particular problem situation, you have acted in a particular way and we command you we give you the directions, that instead of having done whatever, that you have carried out, undo that or do it differently or do it in a particular way as we prescribe and report back to us it is a command given to an authority.

That means over an administrator, the court sits as your super administrator right under the constitution, as a super administrator to command them to do a number of things, giving directions to them as to how to behave on a particular environmental issue, you acted in a particular way. No, you need have to act in this particular way as is prescribed to you and that would meet the ends of justice. Or in certain circumstances, certain actions are taken by the authority and these actions are questioned.

The one who is questioning the authority of the government is not too sure which law

actually supports the decision of the authority to act in a particular way. But, I as an individual or the one who is bringing into the action is not the one who has the power of asking this question. What he does? He goes to the court of law and submits before the court, “Your Lordship, we believe that this particular authority has acted not in accordance with law and that is the reason why we bring in this particular action in public interest.”

Then, the court issues a Quo Warranto. Quo Warranto. Under, what authority you have exercised this power? justify and if you cannot justify, roll it back, put it into a status quo at a position and similarly there are other writ jurisdictions like writ of prohibition or prohibiting a particular action or a decision, which is patently illegal or void, unjust, to undo the damage that has been done through what is called as a writ of certiorari. Like that, these are the weapons that are handed to the hands of the High court and Supreme court.

Whenever, individual liberty or a right is affected, it can act this has been used profusely on environmental issues as a matter of public interest and writ jurisdiction is very much there for the Supreme Court and article 32 and with the High court on article 226 of the constitution and this is exercisable even against that government. A statutory right is a right that you exercise against an individual, a private right.

But, this is a right which is a constitutionally guaranteed right it can be exercised even against the government. So, government is not all the powerful, government is an extension of governance, government is a device or a tool which has been entrusted with the responsibility of managing the affairs as an operative tool of governance and people have the right to question, challenge every action of the government like this, it is a powerful right.

But, then the question remains, all that has been mentioned here, what has been shown in article 32 is part of a fundamental right. So, to pursue that fundamental right through the intervention of that higher judiciary you exercise the writ jurisdiction. So, we are referring to

an individual right but, why use it for environment? When the concerns over it are not confined to one or just a few individuals? Why not be satisfied by the power of whatever, there is there in the ordinary law, power of injunction at the primary judicial level, is it not the power that is there with the local courts, the trial court, the district court.

Whereby, they can give an injunction. Injunction, is either asking somebody who has put an obstacle to remove that obstacle or when, the damage has been done, to repair the damage, correction or an injunction not to interfere. This is what is available in ordinary law primary judiciary can act but, why go to high court and Supreme Court and that your individual right, claim it as a right in relation to environment, these questions are not answered yet.

Although, a particular level of answer that to meet the ends of justice the court can interfere on environmental issues.

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### **III. RATIONALE**



- *REMEDIES UNDER EXISTING ENVIRONMENTAL LEGISLATIONS, INADEQUATE*
- *INEFFECTIVENESS OF THE ADMINISTRATIVE MACHINERY IN MAKING THE ENVIRONMENTAL LAWS WORK*
- *MERE INJUNCTIVE RELIEF AT PRIMARY JUDICIARY LEVEL INADEQUATE*
- *ADDRESSING ENVIRONMENTAL CONCERNS FAR MORE IMPORTANT THAN ADDRESSING AND ADJUDICATION UPON VIOLATIONS OVER ORDINARY LEGAL RIGHTS- "PUBLIC INTEREST" INVOLVED – IT NOT ONLY AFFECTS INDIVIDUAL LIFE, BUT "LIVES OF MANY"- HUMAN AND NON-HUMAN AS WELL - NATIONAL INTEREST – TARUN BHARAT SANGH, ALWAR v. UNION OF INDIA (1994,SC)*
- *CONSTITUTIONAL OBLIGATION OF THE HIGHER JUDICIARY TO DO "COMPLETE JUSTICE" (A.142)*



But, why rank the, as a fundamental right has not been explained. Explanation comes like this. It is there in a plethora of case law decided in Supreme Court that whatever, that we have under the environmental legislations, the remedies available are statutory remedies, they have limitations, there are exceptions to the exercise of those remedies and claiming those reliefs. But, in the case of Right to Environment as have been declared to the Supreme Court, those limitations of a statute are not there.

Second, we have environmental related law enacted for the last 50 odd years. But, as a total experience, that administration has not been able to make an impact in addressing all environmental issues, all environmental problems in a effective way. Had they done it, we would have had a better environment, less pollution, less contamination, and hardly any waste but, we have all these problems still there in spite of robust administrative machinery, in spite of a very strong legislative frame work.

So, there are limitations into the working of these laws and so, we need to be elevated to the

status of the constitution and no better agency other than the court of law, which can do and here, the role that is exercised or performed by the primary judiciary is inadequate. They only give an injunctive relief, if at all that is there a statute if it is not that there no relief. In that event you need have to really treat environmental conditions for different from an ordinary inconvenience and ordinary returned or inconvenience of a nuisance-ical kind something much more than that and that is what the higher judiciary has done.

Now considered environmental concerns that is far more important than addressing and adjudicating upon violations over ordinary legal rights. There is public interest involved. It is not only affecting an human being alone and individual life but, the lives of many more and it is not just the life of human beings alone but, that of human and non humans as well. So, it has national interest. Who says that? It is the Supreme Court who said that in the year 1994 in a very interesting case, concerning a national park, the Sariska National Park in the Rajasthan state. A case entitled Tarun Bharat Sangh Alwar versus Union of India, the supreme court stated like this, they invoked, they invoked from the Chanakya's Arthashastra.

This particular statement, look at this: “if the interest of the family is affected, the interest of an individual can be sacrificed but, if the interest of the communities affected, they interest a small family may be sacrificed because, a communitarian interest is superior to the familial but, if the interest of the state is affected, community is only a subset of the state, is a subset of the society at large and so, for meeting the larger interests of the state, larger interest of the nation, the communitarian interest can be subordinated and finally, when the environment is affected, forget about the individual, forget about the family, forget about the community or even the nation. Because, environment is far superior to a nation” Who said that? Chanakya's Arthashastra. Environment is above all. Their concerns, protection, conservation is far superior to that because, without that environment, environmental resources, there is no question of an individual, community or the nation, it does not exist and so, environment takes the top priority, environment is above all and that is exactly the reason why the higher judiciary is concerned about that, not because an individual is an inconvenience but, because it is a larger interest. The very survival, sustenance and development of human and non humans involved.

And so, environment should take the top priority and no better agency than the court of law to address and accommodate that and that is why through a judicial construct it is raised to the level of a fundamental human right, it is also raised to the level of a public interest and so the writ jurisdiction as exercised, nothing like a court of law acting as an activist, the court of law need have to see that justice is done to the environment without that there cannot be anything like human existence or human survival or anything to subsist another.