Constitution of India and Environmental Governance:

Administrative and Adjudicatory Process

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Lecture 13

Overarching Law-Environment Protection Act-II

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From a ringside view of the Indian Environmental Legal Order. We are now in the third module. These include the court area of the enquiry that begins with the environment protection and pollution control laws. This is the focused area of environmental law and perhaps much of whatever the common man would understand by way of law concerning the environment, it is this area of law that is his area of attention and that is what precisely we are going to do now. In this session, we will be discussing the overarching law, the Environment Protection Act.

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Before we get into an analysis of the Environment Protection Act, it is very necessary to look into the National Environment Policy as the starting point of the understanding of this body of law. The National Environment Policy was made in the year 2006 while the Environment Protection Act came into existence in 1986, 2 decades before this. The question arises why the policy comes later and the legislation is already here? What should be the sequence? How should we really understand and relate the policy with the law.

Well, to put it in simple terms, ideally speaking with regard to the law making on any subject, we start with a societal problem and the societal problem which has acquired a lot of importance and that has caught the attention and imagination of the lawmaker. They deliberate over that to resolve the problems associated with that particular subject. They think of formulation, of a policy. What is a policy? A policy is a kind of commitment.

Commitment on the part of the political leadership that "Look we have seized to the problem and in order to resolve the problem and make things easy for the people, we are coming of it a set of principles, a set of programs of action and we would allocate so much of funds budgetarily, we will make available personnel for giving effect to those actions that we contemplate under this." So, in a way, a policy document is the steering wheel of governance indicating the directions the administration should take to reach a desired goal.

It does not work that way when we actually look into the logical evolution of something into law. First you had a problem followed by formulation of the policy and this would lead to an enactment, a legislation because policy is not law. Policy actually lays down the first principles of governance but that is not operable by itself. You do need a tool or a device to bring that into application and for that you envisage a legislation. So, problem, policy, legislation, institutional arrangements to give effect to what has been stated in the legislation and work it, implement it and then the expected result is what has been intended.

That is the logical sequence of things leading to the problem and resolution of the problem in the legal order. But it does not happen that way all the while. Many a time, for a number of reasons the lawmaker may be in a hurry to come up with a legislation first. Then after a little while, he would start reflecting on it and then come up with a policy pronouncement and then later think of an administrative machinery and then think of a budgetary reallocation as and when the resources are made available. But it depends upon the kind of priorities that the policy maker and the lawmakers would have to decide the course of events this way.

When it comes to environment and environmental law, it is a very interesting development that not everything begin with a policy. In fact, we already had the laws in place. The laws in relation to pollution control, made much much earlier, 30 years earlier and then the laws in relation to environment as a whole, made 20 years earlier.

Then comes, all of a sudden it pops up as a policy document, the National Environment Policy. It is both an advantage and disadvantage. If a policy is evolved, at first you clearly know the direction in which you should go and ideally speaking you should start the policy and then go to a law. But it does not always work that way.

That the law may precede the policy and through a bit of trial and error the policymaker would arrive at a conclusion that the kind of law that we have made needs some improvements, certain refinements and other things. First let us lay down a set of policy directives as to how we should go about governance and then bring in changes in the law.

So, there is no set rule that the process should be like this and definitely in relation to the environment, it did not happen that way. The logical sequencing was not there. We had enacted a Water Prevention and Control of Pollution Act in 1974. Then Air Prevention and Control of Pollution in 1981 and Environment Protection Act in 1986, worked in for 2 decades and in 2006 came over the National Environment Policy.

What did this contain? This particular document, as it makes it very clear in the outset that it is something which is a consolidation and a crystallization of a host of policies that were evolved with regard to different sectors of environment. There is already a policy concerning water, a policy concerning forest, a policy concerning abatement of pollution and so these sectors of natural resources and environmental governance were already having sectoral policies.

These sectoral policies were put together and building upon that, a comprehensive policy statement came into existence. To bring in commonality in the approach to various sectoral and cross-sectoral approaches to environmental management, which would definitely include the economic approaches, the developmental approaches, the human rights approach, a scientific approach to environmental management about which we are already familiar with.

So, it is something like giving to the rest of the world a clear statement and assertion of India committing to make a positive contribution to all those international initiatives that are taking place concerning the environment and we get it reflected in the body politic in India. We want to have a clean environment.

We would like to give effect to the constitutional command of not only the state becoming the public trustee, but also the people becoming environmental stewards so that the people could be participants in, partners of and share responsibilities in resource governance in India. That was the basic aspect of the policy document.

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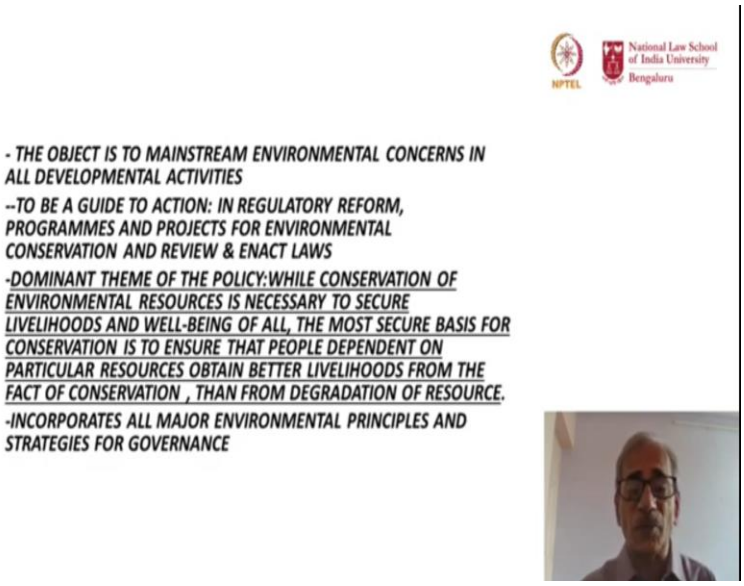

So, the idea was to mainstream environmental concerns in all of our developmental activities and act as a kind of a guide book of action, in regulatory reforms, in coming with programs and projects for environmental conservation and also to have a quick review of all the laws that are made, all the policies that we have in place and then come up with proper effective legislative descriptions.

So, the dominant theme of the policy is while conservation of environmental resources is necessary to secure livelihood and well-being of all, the most secure basis for conservation is to ensure that the people dependent on particular resources obtain better livelihood from conservation than from degradation of resource.

All the major environmental principles that we have already familiarised ourselves with and the strategies of governance that which we had reflected upon, the approaches to environmental management are incorporated in this policy document.

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Now, with this as the backdrop let us get into an understanding of the framework law or the enabling law or the overarching law called the Environment Protection Act. There is a background to this. What is the provocation for making of this law? The primary provocation comes from something that happened just a little over a year and a half before this act was passed. The first environmental industrial disaster humanity ever knew, ever got prepared to, happened in India and that is the Bhopal Gas Tragedy.

The tragedy of mammoth proportions where so many lives were lost that for generations the after effects of this tragedy was being experienced and it is still being experienced even after 35 - 36 years of this particular accident that happened. It was called an accident, it was called as an negligent act, it was also called as an act which was about to take place and there was every indication that necessary measures were not in place and the disaster would occur any time and it did happen. On the dark night of second December 1984, the Indian legal order was in complete disarray.

It did not know it was totally clueless as to what to do with the disaster of that proportion. So, many people suffering, the environment getting contaminated to that level for generations, it will take time to clean it up and whether there is any solution to the law which would really take care of the problems there, you have something on pollution control, but will they be adequate

enough? Then it was felt that it is definitely not adequate and second thing that 12 years before this 1984 tragedy that struck us., in the year 1972 we had made a commitment at the global level that we will come up with a very strong overarching law at the domestic level and time was ticking.

12 years down the line we had nothing to show by way of a single comprehensive piece of legislation tying together all sectors of environmental governance in one single compendium of a law. The urgency of matter was further made acute because of the tragedy that struck us that there are many more Bhopals to take place if we do not really put our house in order and this led to the enactment of the Environment Protection Act. A very unique piece of legislation. A very small enactment. It does not contain more than 26 sections. An enactment of 26 sections which deals with everything concerning the environment.

How can that be? But we have done that and it will be variously described as an overarching law, an umbrella law, a framework law or an enabling law. How do you explain? What exactly is this law about? It is an overarching law. It is an overarching law because if you look to one of the provisions here, section 24, it makes it very clear that this the law has an overriding effect over all other laws that anything concerning the environment whatever that has been prescribed under this law is the ultimate word. No other law can conflict with this, could act as variance from what has been stated here and that way this is overarching. It is overriding.

The second thing that you must note and that is a very interesting position that you see in this provision itself. In the first clause of this provision it says that this law is ultimate, it overrides all other laws on matters concerning the environment and is the final word. But the second clause in the same provision states, but suppose if on any environmental issue, if there is a problem, if there is an offense for which certain kinds of penalties are prescribed in this law and also in so many other laws that whatever has been stated in those other laws will operate, will prevail over what has been stated in this law.

What do you mean? An overriding law should mean that whatever has been stated here, if it is 100 rupees fine here and some 10 rupees or 5000 rupees fine in another, these 100 rupees will be

operated here. Nothing else. That should be the case, but the crafters in their wisdom made it clear that whatever the penalties that are described in other laws would be applicable in a situation which is actually dealt under this statute also. Why did they say so?

They said so for the simple reason that this is a new law that we are creating and this new law would come up with some penalty all right, but in terms of the intensity or the impact of an environmentally unfriendly act as addressed in a very specific piece of legislation. It may be concerning water pollution, it will be there in this body of law and soon we will allow whatever that has been provided in the other laws to operate because they are far more effective and we facilitate that to happen. Please remember that this is not just an overarching law, but the laws are facilitating law. This is also enabling law.

It would enable other laws to work more effectively and so it puts to centre stage the penal sanctions in another law to come into application in spite of the fact that if something has been mentioned in the same aspect under this law as well. Then why mention anything at all in this law? Please remember that this law is also described as an enabling law, enabling for making it possible, giving an opportunity creating a space. For what/ for action. Those other laws that are there in relation to the environment, certain sectors of environment might not have provided for penalties and criminal action for certain of the violations which are actually in the environment unfriendly acts.

In such situations they should not throw up their hands and then say, “Sorry the law does not provide for that we cannot act.” Here is this law which gives you an additional tool, an additional penal sanction. So, in addition to, over and above whatever penalties that you have in that law, we provide you for penalties for those uncharted areas of offensive acts for which punishments are prescribed here. So, that way it is a very unique law which is both an overarching, overriding law but also an enabling law. In addition, this is a law which also provides certain additional tools of implementation.

Many a time, like it happened in the case of Pollution Control Boards, that are created under the pollution control law, there are situations where a number of issues, they may not have the

equipment. they may not have the facility, they may not have the procedures under that law to act and if time is the essence that you should act fast, you cannot just walk to your superiors for directions or anything like that. You have to act or you cannot bring in a court action and then wait till the court judge decides in this particular case and then act on that.

It may be necessary that you will have to act immediately. This is the law - the Environment Protection Act which provides that additional tools. That is why it is also called as an enabling and an umbrella law. An overarching, then overriding, umbrella law, framework and enabling law. Hardly we find any law in India as comparable to this body of law, which has all these attributes and much more. I said that this law has only 26 sections. Will these 26 sections capture everything? No, it does not.

In fact, one of the critiques that has been there on this particular piece of legislation was where this was a law that was prepared in a hurry. It was time to act after the Bhopal Gas Tragedy and so they came up with a very broad outline of a law in 26 sections which is actually a little bit of pollution control law put in a different form. A consolidated version of it. But while doing so they provided a scope. A scope for creation of rules, regulations and notifications.

The standout feature of this law is that the statute, these 26 sections which went to the parliament for approval even the rules and orders that are to be issued under that and creation of authorities under this law need have to go to the parliamentary scrutiny. Normally, the statute or the Act is made by the parliament or the state legislature. Rules, regulations and notifications and guidance documents are prepared by administration. It is administrative handiwork. But here even the rules are elevated to the status of the provisions of the Act, which require parliamentary scrutiny, review and approval.

That means it has so much of importance that they have the same status as the statute itself. Normally, the rules of subordinate groups, subordinate law but here the rules and regulations had the same effect as the Protection Act itself. The Protection Act protecting the environment itself. So, that way in one particular case the Supreme Court has laid down that even the rules and regulations made under this had the same status as that of what has been provided in the statute

and so you cannot pick and choose and say a statute says something the rules and it does not provide for certain situations, rules provide for those additional situations and we are not bound by that. They have the same status that means these rules have the same overriding effect. So, enabling effect, the framework effect, the umbrella effect as an Environment Protection Act has. This was laid down in a very important case decided by the Supreme Court also known as the Aquaculture case.

S. Jagannathan versus Union of India decided in 1997 by the Supreme Court that the rules and notifications under this law also have the same status as what has been prescribed under the Act itself. The Act has another enabling provision. The penalties that are prescribed under section 15 of these Act are for contravention of the provisions of the act, the rules that are made there under, the orders passed under it and even the directions issued under it.

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So, the reach and extent of application is huge, wide, a very wide net is cast on iy. So, in terms of the scope and extent of this body of law, it applies to the entire India, every conceivable aspect of environment discovered water, air, land, the relationship amongst themselves, their relationship with human beings and other living entities and property, issues of pollution degradation and specific provisions, which actually describe what is a environment. So, all these come under the

pair and purview of this law for protection of the environment.

The peculiarity of this law. This is a prescriptive law and it is not a law which has an institution mechanism of enforcement of itself. As a general rule, every legislation will have an institution of enforcement created earlier like under the Forest Act, the Forest Department; pollution control laws, Pollution Control Board like that; revenue law, Revenue Administration. Like that each and every law will have its own institution of enforcement. You call it as the administrative body.

Interestingly this law does not have an administrative body of its own. Then how do you enforce this law? That is the uniqueness of this law. The administrative architecture of this law, let me explain, is kept very simple more like a framework. At the apex level you have the central government, which will have its regional offices in 4 - 5 places in different parts of India and then there was an authority constituted by the central government in the form of what is called the Central Pollution Control Board. We will be seeing about its function a little later.

That is all the structure here. The structure of governance that has been provided under this law is the central government and its regional offices, only 2. And neither the central government nor the regional officers enforce this law. Then the law that has been made under this is enforced through a number of authorities created by the central government from time to time under this law.

So, it is a very dynamic thing. It is not a set idea that for this law only one authority. For this law many authorities may converge or the same authority may perform a coordinating function that it appoints one and then get so many other people to work for him and so that way, in terms of the reach, the scope and extent of the operation of this law is pan-India. All over India it is operative and this law is worked not by a single agency or state but by a number of agencies. Then what do the central government and regional officers do? they are more of a trust policymakers and lawmakers.

Nothing more. No implementers or those are the authorities who are constituted by the central

government. In a case decided in the year 1995 by the Supreme Court of India, the Indian Council for Enviro-Legal Action versus Union of India, the Supreme Court stated that the central government has a very wide power under this Act of creating any number of authorities. It can even make one individual as an administrative authority of a particular area of implementation and then get all the powers under this law to enforce this law. That aspect which has been assigned to that particular thought.