Constitution of India and Environmental Governance:
Administrative and Adjudicatory Process
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Lecture - 46
Environmental Justice Dispensation: Role of Higher Judiciary

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10&11: ENVIRONMENTAL JUSTICE DISPENSATION

10A.B: HIGHER JUDICIARY
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From the 9 modules, we have had a fairly good idea of the contents and the contours of Indian environmental law. As we begin our inquiry, in the next two modules, the 10th, and the 11th, we would be turning towards justice dispensation in relation to environment, law, and governance.

It is a very rare, unprecedented, and unparalleled phenomenon that you can see in any legal system that justice dispensation mechanisms evolved especially by the higher judiciary in India is considered to be non-parallel in all the legal systems of the world.

What is so special about it? And in what way the Indian justice delivery system has blazed a new trail in environmental law making, in environmental law governance, in the understanding and in the application of this body of law?

Just to give you a very simple idea. How many of us know that the real serious effort in knowing about environment, the different dimensions of environment as part of instruction at

the higher educational level began with what the courts of law, the higher courts of law pronounced in a landmark judgment of M. C. Mehta versus Union of India decided by the Supreme Court in 1992, also referred to as the Environmental Education case?

A new era began of creating awareness and conscientization of the environmental concerns in each one of us as students in higher education, in members of the public when display of environmental aspects mandatorily to precede the show of any movie in theatres, in public places, in educational endeavours, at various levels of learning, we need, have to give due credit to the higher judiciary for that. Nowhere in the world has that been done.

Why did the courts of law get into this, of educating people, of making administration perform the task? And why only the Indian judiciary had to behave this way? Or the questions, I am quite sure, everyone who is interested in learning about Indian environmental law would be posing this question for the simple reason that this is what exactly the Indian judiciary, the justice dispensation mechanism has done.

Welcome. In these two modules, we will not only explore that, we will also get an opportunity through this as to why the courts of law conducted themselves in this way and as to what are the other spaces that are available outside the justice dispensation mechanism and the formal frame in seeking and securing environmental justice.

I consider these two modules would also give you a wonderful peep into the way as to how one should understand environmental laws. How should one interpret every provision in the environment legal regulations that we have, especially as seen through the lens of the courts of law. In addition, we will also look to the other mechanisms adopted in dispensing justice, in relation to environment, outside the courts of law.

In the 10th module, we will be viewing it from the formal frame of justice delivery. The first two aspects of this module would only deal with the higher judiciary. The next two aspects would cover specific legislative enactments under which there are inbuilt mechanisms of justice dispensation. And then we refer to special laws which created certain justice dispensation mechanisms designed for the purpose of rendering environmental justice. And that is the remaining part of our inquiry in a subsequent module as well.

So, the two modules together are a clear detailed analysis of environmental justice dispensation in India. And we begin now with the first two aspects of the 10th module, the higher judiciary, environmental justice dispensation as rendered by the higher judiciary in India.

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ENVIRONMENTAL JUSTICE DISPENSATION

- ENVIRONMENTAL JUSTICE, AS A CONCEPT, ADDRESSES INEQUITY RESULTING FROM DISPROPORTIONATE SHARING OF BENEFITS AND BURDENS BETWEEN DIFFERENT CATEGORIES OF SOCIETIES

- FOR OUR ENQUIRY HERE, THIS IS VISUALISED WITH A BROADER UNDERSTANDING, AMBIT AND APPLICATION TO INCLUDE, JUSTICE DISPENSATION THAT WOULD ENSURE BOTH ENVIRONMENTAL AND HUMAN EQUITY, OVER ACTIONS AND DECISIONS THAT IMPACT THE ENVIRONMENT – TO WHICH END THE TOOLS AND TECHNIQUES EMPLOYED BY THE ADJUDICATOR, TO INFLUENCE A WHOLE RANGE OF ACTIVITIES COVERING THE LAW, ITS ENFORCEMENT, INTERPRETATION AND APPLICATION

- PROCESSES INVOLVED, APPROACHES TAKEN AND STRATEGIES ADAPTED BY BOTH THE FORMAL AND NON-FORMAL JUSTICE DISPENSATION MECHANISMS ARE THE FOCUS OF ATTENTION HERE
- STARTING WITH THE KIND OF ROLE PLAYED AND THE TOOLS EMPLOYED BY THE HIGHER JUDICIARY, THROUGH THE IN-BUILT MECHANISM OF JUSTICE DELIVERY WITHIN THE LEGISLATIVE FRAME, THE JOURNEY CONCLUDES WITH SPECIAL LAWS ENACTED FOR AND INSTITUTIONS CREATED FOR ENVIRONMENTAL JUSTICE DISPENSATION, IN INDIA

As we have seen earlier, in one of the earliest of modules that we discussed, environmental justice as a concept addresses inequity resulting from disproportionate sharing of benefits and burdens between different categories of societies, that is, to eliminate any discrepancy, any distortion, any kind of a discrimination that exists in the society on account of caste, community, colour, religion, economic condition or whatever, both within a particular society or at that transnational level.

In overcoming that, what is that that is being worked out to achieve that goal that there is no said discrimination is what you term it as environmental justice. There has been a movement we have seen earlier while discussing about the various movements with regard to environmental governance. Environmental justice movement is one of the very powerful movements, which actually addresses this issue.

But as students of environmental law, our inquiry in this entire discourse and more specifically in these two modules is to visualize a broader spectrum, an understanding, an ambit, and an application of this idea of environmental justice in a very far broader sense to include justice dispensation that would ensure both environmental and human equity. Justice to humans and justice to the environment over actions and decisions that impact the environment and our lives.

To that end, the tools and techniques employed by the adjudicator who has influenced the whole range of activities covering the law, its enforcement, interpretation, and application

become the subject matter of our inquiry now. This also covers the processes involved, the approaches taken, and the strategies adopted by both the formal and non-formal justice dispensation mechanisms. They are in focus here.

Starting with the kind of role played and the kind of tools, implements, and instruments employed by the higher judiciary and walking through the inbuilt mechanism of justice delivery within the legislative frame and the special laws enacted for, especially to render environmental justice, the institutions created for that purpose in making available one to access, approach, and secure environmental justice is what we intend doing.

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HIGHER JUDICIARY AS ENVIRONMENTAL JUSTICE DISPENSER

A.ENVIRONMENTAL LAWS, GOVERNANCE AND COURTS :

- DEEP AND ABIDING INFLUENCE OF HIGHER JUDICIARY, ON LAW AND POLICY-MAKER AND ENFORCER, STAND OUT FEATURE OF INDIAN ENVIRONMENTAL JURISPRUDENCE – RATIONALE:

- POLICY, LAW-MAKING AND INSTITUTIONS OF ENFORCEMENT- NOT OBSERVING A LOGICAL AND SEQUENTIAL PATH OF ADRESSING A FELT NEED AND IN REALISING SOLUTIONS FOR IT ;

- ILL-CONCEIVED NATURE OF LAWS- STATUTES NOT ALIGNED TO CONSTITUTIONAL ASPIRATIONS; POOR DRAFTING; MIS-MATCH AMONG POLICIES,OBJECTS AND OPERATIVE PROVISIONS; DILUTIONS THROUGH FREQUENT AMENDMENTS ; EXTREMITIES OF POLICIES OF SENTENCING, etc.;

- ILL-EQUIPPED ADMINISTRATION; POOR COORDINATION & NON-COOPERATION;CORRUPTION; ADMINISTRATIVE DELAYS AND INACTION ; CENTRALISED AND NON-INCLUSIVE CHARACTER OF GOVERNANCE; POOR PLANNING, POOR MAINTENANCE OF RCORDS AND POOR VIGILANCE

As I did mention earlier, the focus in the first two aspects of the 10th module, A and B is about the higher judiciary as environmental justice dispenser. In the hierarchy of courts that we have in India, we normally classify courts as primary judiciary and higher judiciary.

All courts, starting with the district court to the trial courts, they are all categorized as primary judiciary. High courts and the Supreme Court, high courts at the state level, Supreme Court for the entire country are considered as the higher judiciary.

And the distinction that has been made is that both the high court and the Supreme Court are the courts for the layman and one who is getting initiated to learning about law, suffice it to say that they are treated as such because it is there where all issues concerning the constitution, the highest law of the land gets settled.

Which is the other way of saying that in the primary judiciary, we are not going to deal with the constitutional questions, the constitutional validated of a law, whether a particular provision and a particular action is constitutional or not. These are not the issues taken at the primary judiciary level. At the higher judiciary, this is the primary focus.

In addition to that, the kind of a role that is played by the higher judiciary is far stronger, wider, and of deeper import. And since this is not exactly a constitutional law class or a class on higher judiciary, I will not go into the details of it.

Suffice it to say for the time being that the higher judiciary actually test, check, verify the validity of any law, any course of administrative action on the touch-stone of the constitution of India and then validity. Our focus here is as to how this particular role that the higher judiciary has, is being put into application in the rendering environmental justice.

The first and the foremost question we should address is, if the higher judiciary is to deal with constitutional issues primarily, then why should they be bothered about environmental issues? Are they as important as constitutional issues? Are they of that level as to demand and require the attention of and the time of the higher judiciary? Is it that important? Why did the higher judiciary come into the picture at all?

Initially, I will make an attempt in answering that before I go into what they actually did with regard to environmental issues. The entry of the courts of law, especially if the higher judiciary has a background. One is, as we have seen earlier and also have realized in these nine modules, the entire gamut of policymaking, law making, and enforcement of laws, concerning environment in India have not observed a logical and a sequential path of addressing a felt need and in realizing solutions for it.

Let me explain a little bit. In the society when you have a problem and when there is a conflict, to resolve that conflict, you appeal to your representatives of the people to be seized with the problem and find solution. And these representatives, when once they realize the importance of the problem, which needs resolution, they come up with the policy. Felt the need leading to a policy, which is an expression of the political will of the state as to how they are going to handle this problem.

But policy alone is not actionable. Policy is actually a full stop, a kind of a blueprint of an action. And for that to make it operable from policy, you crystallize a code of conduct, which is referred to as a legislation. So, you come up with the statute, a law. The statute is the vehicle for resolving conflicts and securing justice.

And what does the law contain? The legislation contains? The legislation contains institutional mechanism of enforcing what is prescribed in the law. So, you create an administrative setup, look at the sequence. You start with a felt need in the society, followed by a policy formulation, then a legislation, institutions of enforcement, and working of the law. That is what you call as governance. Environmental law also should follow that.

But unfortunately, that is not the pathway the entire environmental legal regime has taken in India and I had given umpteen number of examples in the previous modules. And let me just pick one of those that I have referred to. Start with need, then go to policy and then to law, and then to institutions of enforcement. This is the sequence.

Look at the forest law. In the 1865, we created a Department of Forest, Forestry Department came into existence in India. That means institution came first, no policy, no law, institution of enforcement had come. In 1879, a legislation called Forest Act was made. So, institution followed by law. Then in 1894, a policy came, so institution, law, policy. The matter does not end there.

In 1927, law comes again, Indian Forest Act comes into existence. Then to complicate the matters in 1952, a forest policy document comes. That was not enough, in 1988, it will come up with another forest policy.

So, there is no sequential evolution of law. You pick any environment-related laws, this is the story. I have, at different points of time, in different modules, while referring to different legislations, I have expressed that, I just picked one strand of that to just show that logical and sequential path has not been a positive feature of Indian environmental law and governance. This is one problem.

The second one is the laws that were made and that still are put into application and we have seen plenty of those laws concerning environment have not necessarily captured the very essence of the problem that have addressed, many a time they are ill-conceived and many a time they statutes are not aligned to the constitutional aspiration.

Please remember, accepting the pollution control regime that we made after our independence, most of the laws concerning environment like the forest, the land, mines and minerals, all-natural resources they were made by the British and they continue to operate even after we became independent.

Now, the expectation is that every law should come within the frame of the constitution. I am not saying that these laws are unconstitutional, but what I am referring to is, they have not absorbed the constitutional ethos, values, and spirit, for the simple reason that they are proceeding the constitution-making it India. So that way there is a bit of a mismatch between the constitutional aspiration and their statutory prescription.

There are problems of poor drafting. I had referred to a number of those, like with regard to the coastal regulation law, or with regard to biodiversity law, problems of poor drafting are a bit of a mismatch between policy, objects, and operative provisions, Forest law is the best example for that.

Dilutions through frequent amendments. You remember our discussion on the coastal regulation laws and environment impact assessment law, how frequently amendments came which diluted the law. And extremities of policies of sentencing.

See, in the framework law, comes with very firm, clear assertion of penalties for violations. Those subsidiary laws that are put into application need have to have the same stringency of other law. We have already seen in our discussion on the pollution control regime. In 1986, when the Environment Protection Act came into existence, the penal sanctions that were there in the Environment Protection Act were quite strong, that is a framework law.

In 1986, Water Prevention and Control of Pollution Act and the Air Prevention and Control of Pollution Act were already in application. They had less punishment. The penal sanctions were having less bite than the Environment Protection Act. So, there was a kind of a

mismatch between these two and the extremities of policies of sentencing made governance, not an easy job.

And remember, the idea of environmental governance and specialized statutes is to have highly professional body to enforce them. When you have a law, which is a little bit amateurishly prepared, not very clear, you can as well imagine how the administration would act and how administration would respond to that.

So, there was this problem of less than visionary legislative documents, less than clear legislative prescriptions. Governance became a serious issue and environment deserved far much more than what we delivered in terms of policy and law.

But the matter did not end here. There has been the problem of administration. We visualized those environmental issues are very serious issues that we are going through an environmental crisis and we need a trained well-equipped professionalized enforcement agencies to put these laws into application so that we will have a better environment, a cleaner air to breathe, a portable water to drink; like that.

But what is actually the ground level? When it comes to administration, we have ill-equipped administration. At different points, I have already referred to how ill-equipped they are. Poor coordination in functioning amongst different agencies of state, when they are supposed to harmonize their functioning. Non-cooperation at times, administrative delays, and inaction.

And even with regard to the laws and governance, it is highly centralized, the state should do everything. In order to take care of the environment, in order to protect the environment, you know, to deal with the relationship that the humans that we have, that we are with the environment, everything the state should do.

There was nothing like an inclusive approach. There was nothing like a participatory approach. There was nothing like a de-centralized approach in environmental governments, which we know is very important.

So centralized and non-inclusive character leading to poor planning, poor maintenance of records, so the databases were not up-to-date and actions also did follow earlier mechanical

approaches. And so, governance was more of a joke, very amateurish, not as professional as was expected.

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- FAILURES IN THE SYSTEM OF GOVERNANCE- ENVIRONMENTALLY ACTIVE GROUPS , KNOCKING AT THE DOOR OF COURTS FOR JUSTICE – ENTRY OF JUDICIARY , TO "EMPOWER THE DIS-EMPOWERED"!

B. COMPLEMENTARY AND CATALYTIC ROLE IN GOOD ENVIRONMENTAL GOVERNANCE:

- Guidelines for Implementation – PH in EIA process(-Centre for Social Justice v. Union of India, Guj.1999)
- Continuing Mandamus - M.C. Mehta v. UOI (Vehicular pollution case), 1991,SC
- Fact finding – leading to policy-making: Banwasi Seva Ashram v. UP, (1987 SC)
- Amicus Curiae(friend of court):Court on its Own Motion v. State of Himachal Pradesh(1994-HP) and T.N.Godaverman v. UOI(1997-SC)
- Special Commissions and Expert Opinions: L.K.Koolwal v. State of

So, you would see a clear failure as a system of governance and whenever environmental problems arose, major ones at that, we already know about the Bhopal gas tragedy. We also know about various developmental activities taken had environment in ruins and administration not doing much about that.

And here, we had another phenomenon. Quite a good number of good Samaritans, people who were very keen on taking care of human rights and environmental concerns. They came together when they found that approaching administration and the legislator has not really borne fruit of that desired results for them. They had no choice or an opportunity to get justice. And so, they had to knock at the doors of court of justice.

So, the courts of justice did not by themselves come in to the picture of the whole system of environmental governance, it was something which was the compulsion of the time. Failures of legislature, failures of the executive, that demand of communities of people, and some activist groups approaching the courts and the courts could not keep quiet; fold their arms.

We are there only to resolve disputes, environmental issues we do not know, courts cannot say that because they are the ones which are presiding duties of renderings justice to us. And so, the court had to come to empower the dis-empower. Environmental justice was an orphan

till the courts of law made up their mind or initiated it to action in a manner of speaking by a number of factors as I have just indicated now and got into it.

Why courts of law? You have the justification. People follow that is the only recourse that they have. If you need justice, you have to go to courts, the environmental justice is languishing and we need have to really have somebody to address that, no better place than a court.

Which court? High courts and the Supreme Court. Why high court and Supreme Court? Because they are the constitutional courts, that it is not just about very mundane, normal day-to-day activities that we are dealing with, which anyway would be handled by the primary judiciary, but the higher judiciary, which actually laid out the law of the land.

If there is a vacuum in law-making, if there is a vacuum in administration, if there are problems, inadequacies, inconsistencies, and shortcomings in the whole system of governance, supplying omissions to meet the ends of justice for which the higher judiciary is meant for, we will approach them.

Having gone to that you must know, and that is exactly the reason why I am saying that the role played by the higher judiciary is something which is very unique in the entire legal lore, all over the world, especially because of the courts in India.