Constitution of India and Environmental Governance: Administrative and Adjudicatory Process

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Catalytic Role and Complementary Role of the Judiciary

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These roles that the courts play, let us quickly examine one by one, the primary one is a kind of a complimentary and a catalytic role that the courts are played in good environmental governance, what is good environmental governance, clear loss, specific directions to relate the objectives with the law and action. And since that is in short supply, the courts have to supply that. So, a kind of a complimentary role. It is not just saying that your administration you are useless, you the lawmaker, you are not doing what you are doing.

That of course, the courts of law can pull them up, but at the same time, do a bit of a proactive things. And what is the proactive measure? Complimentary role and role to activate and catalyse action. How did they do it? I just picked some 5, 6 examples, which would actually illustrate this point of how complimentary, how catalytic, the courts of law have been. One is, guidelines for implementation.

See if the legal language is unclear, the implementer is not very clear as to how to go about the task. And we have problems of administration being clueless as to how to go about the job. You need somebody to guide and nobody to look up to. This is one possibility. But there are instances where the law says that you need to carry on certain activities to ensure that the environment is well protected.

And for that, you as administration, you should have gone about your task with all your heart, soul and mind. And there are instances when the administration did not act the way they should have. Like, for example, in the environment impact assessment process, please recall our discussion on here EIA law. How did this idea of public hearing come about? In 1994, EIA rules that we have there has been mentioned about public hearing.

But the law does not detail out. So, what did the administration do? In order to carry out the environment impact assessment? It was a mockery of a public hearing. Just on paper, there was something like a public hearing, the details were not forthcoming, where it was organized? How it was organized? How many were there? What kind of questions were posed? What kind of clarifications given?

How exactly, the authorities were convinced about a particular course of action? none of them were forthcoming. More of a formality, a very well-informed group of people, a voluntary group called Center for Social Justice, it approached the Gujarat High Court, that look, public hearing is a sham exercise. In the EIA process, which is very vital for the ordinary members of the public to know about what kind of developmental activities proposed, what are the risks involved?

How they are proposed to be overcome? What kind of a safeguard measures that the state has put in place to ensure that environment is not harm and the development is allowed to take place? It does not have to be, will the court of law help us. Lo, behold, the Gujarat High Court in the year 1999 came up with a set of guidelines. Believe me, a very detailed set of guidelines as to when how, who should organize.

Who all should be there, how do you allow public participation, the manner of conducting the public hearing, the stages in which it should be accomplished, how reports are to be written, and what is the weighted that is to be given to that in the entire decision making process. A very detailed set of guidelines were issued by the Gujarat High Court as guidelines for implementation.

This later helped the Government of India to come up with yet another notification on public hearing, incorporating whatever the Gujarat High Court gave, what a complementary role. What a constructively critical role to make people not only aware, not only be participants, but also become partners in the entire decision-making process concerning environmentally impacting developmental activities.

The second one that I would like to bring to our attention is the use of the writ of mandamus. Mandamus is a writ jurisdiction exercised by the higher judiciary commanding an administrative authority to perform its functions. So, what would the court do when an administrative action is questioned, especially with regard to an individual or a group of people whose rights are affected, the higher judiciary will issue a mandamus, it will give a direction to the authority.

Look, in this situation, you need to act in a particular way it is a command. That is why it is called as mandamus a command is given to us an administrative instruction to really safeguard and protect our right. And in a number of environment related cases, the writ of mandamus was used by the higher judiciary, in pulling up administration, in instructing the administration, in commanding the administration to really perform that task assigned to it under law, which is the other way of saying that the law had clearly stipulated a particular function to be performed with authority, the authority did not perform that task.

And so, there are a group of people who are aggrieved. And so, a court commands. Look, this is your job, you perform command, writ of mandamus. Normally, in court processes, when writ of mandamus is issued, the administration promises that you have to perform at once the judgment is given, the case is over, forgotten. And the court moves on to take up other cases, what happens

to the judgment given whether the judgment that has been given by the court of law is executed, giving effect to whatever direction issued by the court of law would never become public.

And certainly, the court is not apprised of it. So, the court has no occasion to know the effect or the impact of the judgment that they deliver. That is the usual thing. Because you cannot expect the court to monitor everything. It will give judgment, and it is for the administration to act upon. But should the administration not act upon the directions given by the court? What to do? One more case, and the court again, asks, look what you have done?

The administration says, sorry, sir, that we had this problem, but we will act. Ok, the case over this act, and supposing they do not act, another case for how long you had to stretch this particular case. And will people have the time, energy and effort to knock at the door of the court of law, all the while being, approaching the court of law itself is a herculean task, and especially more environmental issues, which is nobody is worried or botheration.

Approaching the court once is a huge thing. And now you expect us to go to court every now and then. Here this is what exactly is the innovation of the court. They started issuing what is called as a continuing mandamus after issuing a direction, courts did not close the case. They said we are issuing a continuing mandamus this is the instruction we give; this is the timeframe within which you should act.

You perform, report back to us within that day. Then seek and set your further instructions from us. Look at the advantage of that the court was seized the problem. The court is vigilant and is looking into the administrative action, commissions and omissions. And it is taking the administration to task for its failures and administration has no more excuses to give because the big brother at the court is watching us and if I do not perform it may amount to contempt of court.

I may be jailed as an administrator, I better perform. So, as an administrator look at the mindset he is compelled to perform. So, activating the administration to perform a task by issuance of a continuing mandamus, so that the case is kept alive till it is satisfactorily resolved. In most of the

environmental cases, this was done and please recall the discussion that we had on the vehicular pollution cases earlier. M. C. Mehta versus Union of India.

There is a host of orders which were issued by the Supreme Court to the administration to do certain things at different stages, report back and then further act upon, the further directions that are being issued by the court from time to time. The third illustrative example I would like to give is the tool employed by the court of law to ascertain facts. Normally the courts will not get into the fact finding, you remember that I had actually made the distinction between the lower judiciary and higher judiciary in this way.

That is the higher judiciary facts are not in issue, it is points of law in issue. So, the court normally would not get into facts, but here in order to render justice, if there are distortions of facts, if there is hiding of facts, when actions are taken, it becomes very necessary to ascertain facts. So, on quite a good number of cases, the higher judiciary has gotten into the fact-finding exercise.

Actually, such fact-finding exercise where they established a committee, it happened in the Banwasi Seva Ashram versus the state of Uttar Pradesh. In the year 1987, the Supreme Court constituted a committee to look into a particular proposed course of action by the government, the Uttar Pradesh government, what was that about? It was a course of action for Uttar Pradesh government to set up a reserve forest.

And to set up a reserve forest in a particular area, there were quite a good number of people living there, the government ordered them to leave that place because that place does not belong to them, it is a public property, it is a forest area and the forest area, these people should not be there, they should leave that place. And a reserved forest would be established there to be under the direct administration and control of the forest department.

This was challenged in the Supreme Court through a writ petition. And that is the Banwasi Seva Ashram case, this group brought in action on the part of on behalf of the the oustees from the area, these people were evicted and giving this particular reason or the justification as to why

they should leave, it was argued that the claim of the government is untenable, unacceptable, because they have some other oblique, some other objective in their mind.

What is objective? Actually, they would clear this area. And since it is reserved forest area, which comes under the authority of the forest department, forest department does not want anybody to be there in that area. So, the people will leave and once they leave the government thought of making this land available to a public sector undertaking called as NTPC; National Thermal Power Corporation to set up its power plant, so to establish a power plant they wanted this land, but to say that this is what we require it for people may not leave.

But if this land is required, for the purpose of reserved forest land, in reserve forest, no human beings can exist, because the losses so they could easily remove them. So, there was a distortion of facts. What did the court do? They established a fact-finding body on the basis of which look at the way in which the court dealt with the fact situation. The fact was, yes, people were evicted from this place.

And no rehabilitation was allowed to resettle them, after they were evicted from the place they were living for years together. And National Thermal Power Corporation to generate electricity is national interest. But that will not be at the cost of right to live with dignity for a community of people. So, what did the court do? The court summoned the authorities, called the national power, Thermal Power Corporation.

Look, we are not disputing or questioning the policy decision of the government to set up a power plant here which would actually help the government of India come out of the energy crisis it is in. So, it is in national interest. But it should not be the cost of putting certain sections of people in great jeopardy. Why do not you come up with a policy of resettlement and rehabilitation of people who are removed from those places for you to carry on certain developmental activities in national interest?

The ministry in charge of coal and this particular public sector undertaking the Coal India Limited, very positively responded. And I must tell you, that by 1990s this one authority came

up with perhaps the most imaginative Resettlement and Rehabilitation Packages ever one could think of when there was no law on that point for the oustees of a developmental activity which this particular organization would be engaged in.

And friends, believe me when I say that this was the Harbinger for a national law, to be recast, revoked and reformed to be made into an enactment of national import and application in the year 2011. Just one case, one supreme court order, leading to such a kind of a reform in law-making, law enforcement and law implementation, improving governance at one level, taking care of the interests of the people, and the Environment Protection ensure all attempted at one go.

The fourth illustrative example I would like to give is that of establishment of an Amicus Curie, friend of court. What is that? Every advocate who argues a case in a court of law is an officer of the court. He is there to assist the court of law in justice dispensation, that is the principle as part of the professional code of conduct and ethics. Environmental issues are issues, which are not actually individual issues to be matters of dispute between 2 adversaries.

So, environmental issues require a different kind of an approach for argumentation and decision making. If you are fighting a case, concerning environment, fighting with whom, you are part of the environment. So, there are problems in relation to environment created by us. So, how do we resolve it, through courts of law, the court devised what is called as Amicus Curiae.

They would appoint an advocate, or a group of advocates, to act as the friend of court, to look to the issues on hand, examine the pros and cons, arguments for development, arguments for conservation, look to the relevant laws, do a bit of a research, and give us some total opinion, a kind of a professional, expert opinion on the basis on which the court could act. It is like your homework.

Here, the job of advocate is not to take sides, not to take the side of an industry or not to take the side of a governmental department, not to take the side of any particular community, but to view it in a holistic way. And look into the arguments or accommodate all arguments. And then examine the law and give us some total opinions, it is almost like a judgment based on all

relevant facts, no dispute, but only an examination of facts, relating the facts to law, and giving a professional opinion as to what is the right course of action.

See the judicial time is precious. Judiciary will not be able to do all this kind of a research. So, instead of the judiciary doing it, judiciary would appoint a friend and assistant a support mechanism, Amicus Curiae to do that. The courts of law have that power, the inherent jurisdiction that they have. And to give an example, in 1994, the Himachal Pradesh High Court had a group of advocates appointed as Amicus Curiae in the case of Court on its Own Motion versus state of Himachal Pradesh.

This was about certain kinds of stone crushing and querying activity that was going on in the hilly regions. Of course, Himachal Pradesh is a hilly region on the foothills of Himalayas, in this particular state. This business was going on rampantly. The real problem was not about this industry, but about the impact of this industry on the neighbouring topography, the geographical, geological conditions, the seismic affect, the scope for landslides, ecological harm, and things like that.

And quality of life for the people to breathe fresh air and things like that. All these were involved. So, what did the court do? The court appointed a committee, please look to this issue and come up with a recommendation which is doable, which will cater to industrial demands, which will safeguard the environmental imperatives, take care of the interest of the people, would not act as a deterrent for development, would not be at the cost of environment.

The results are there for you to see, there is a beautiful judgment which accommodated all these interests and provided enough environmental safeguards as to how to go about a particular developmental activity. This was at the high court level in 1994. But still at a larger level, at the national level. This happened in the case of T. N. Godavarman Thirumulpad versus Union of India. I have discussed this case as forest conservation case, in that particular module, which we discussed earlier.

To cut a long story short, on varied issues concerning the forests, their conservation, developmental activities, accommodation of interest and rights of people, to examine that, to act as an Amicus Curiae, one of the senior advocates to the Supreme Court Harish Salve was appointed to look to all the issues and recommend measures for the Supreme Court to act upon landmark judgments. Landmark orders came out of that which actually decorated the very jurisprudence of forest law in India. The next, appointment of special commissions and seeking and securing expert opinions.

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Look to that. See, the higher judiciary with all their special knowledge of law, experience of interpretation showed a lot of humility, they said time and again that look environmental issues are very complex. There is a lot of science and technology involved in it. And we are lawyers. We are journalists. We do not know anything in specific terms as to issues concerning environment.

So, we need aid, advice, guidance and help in dealing with these issues. And so, we would appoint Commissions of Enquiry, we seek expert opinion, who would actually do that job of an expert and come up with an expert opinion on the basis of which we will take decisions. I just pick, I have mentioned a couple of cases, let me just pick the case of Shivrao Shantaram Wagle versus Union of India.

It was a case of import of Irish butter, butter from Ireland and to be put to use in Mumbai in Maharashtra. The question was, and that was the furor. The furor was that this Irish butter is irradiated. And an irradiated food cannot be consumed. That is what science tells us. And so, the issue that came up before the court of law, this was in 1988, before the Supreme Court, whether this Irish butter is irradiated by nuclear energy.

What should the court do? The court is not an expert in nuclear science. It appointed an expert to aid and advise it as to whether it so or not. And based on the advice and what was the advice? The scientist who was put in charge of it, examine the samples and found that it is only a rumour. And as a matter of fact, it is not irradiated. The truth was known only after knowing the truth, the court decided.

Ok, you can go ahead and use it as a food item. There are times when such committees are constituted, which are just not there to advise, but they are also there to even oversee implementation of the orders of the court. This happened in the Doon valley litigation which we have discussed earlier.

The rule of litigation and entitlement Kendra Dehradun versus State of Uttar Pradesh that a number of orders issued by the court to the Uttar Pradesh government of ensuring only licensed mining activity be allowed to take place with enough environment to safeguards, and those without licenses should be stopped from operating and all that this committee was constituted to oversee the implementation the orders of the court.

The other one is in the form of issuing orders and directions. And we have seen in the celebrated forest conservation case, the T. N. Godavarman Thirumulkpad case as to how the orders and directions of the Supreme Court more than 40 of them issued from time to time, give directions, advise, methods and manners of implementation of ensuring, number 1, how a forest to be maintained and managed?

What does forest mean? In what way the forest resources are to be put to use? How are you going to settle claims in relation to forests? So on and so forth You get it through a series of

orders and directions issued by the court. And also, in the form of creation of the institutions, more than 40 orders were passed in this particular case, as you know. And what did the Supreme Court do?

Look, we have issued so many orders over last 10 12 years, right from 1997 to 2008, we have already issued 40 orders, we just do not know what is the stage of satisfactory implementation of each of these orders. So, to oversee the implementation of it, we constitute an expert body called the Centrally Empowered Committee. So, committees were established as a continuing functioning body not only to oversee the implementation of the orders of the court.

But also sit in judgment over the actions whether they are in conformity with the orders of the court or not. So, almost like the CEC the Centrally Empowered Committee, in recent times, it is still alive. This committee, which has very well informed, people have very great integrity and professional competence, constituting this body, look into every major action taken on the decisions of the court of law, or the orders of the courts of law, the higher judiciary, on forest issues, not only aid and advise the court, they also give further directions.

Look, this is the order issued, digitally you should have implemented, you have not done that, court by itself could not have done that. And so, Court made use of this expert body, to give effect to, to give life to its orders and decisions to ensure the ends of environmental justice are met. What do you think of it? So many devices, so many mechanisms to complement good environmental governance, to catalyse environmental governance.

Ok, that is fine. We understand that the courts of law got into this act out of a compulsion, but by what stretch of authority they came up with these many devices, these many artifices in rendering environmental justice? How do you really justify this judicial action? Do not we know that in a democracy, the legislature makes the law? The administration enforces the law. And the judiciary interprets the law.

So, the rules are clearly demarcated that way. But do not you agree that these kinds of actions taken by the courts is like performing the function of a legislature, performing the function of an

administrator in a different avatar and in a different name? I think, is this not making a mockery of democracy? Is it constitutional? Because everything is to be touched, is to be referred to whether it is right or wrong, constitutional or otherwise, are the actions of the courts of law constitutional or not the courts guilty of activism and usurpation the functions of legislature and the executive.

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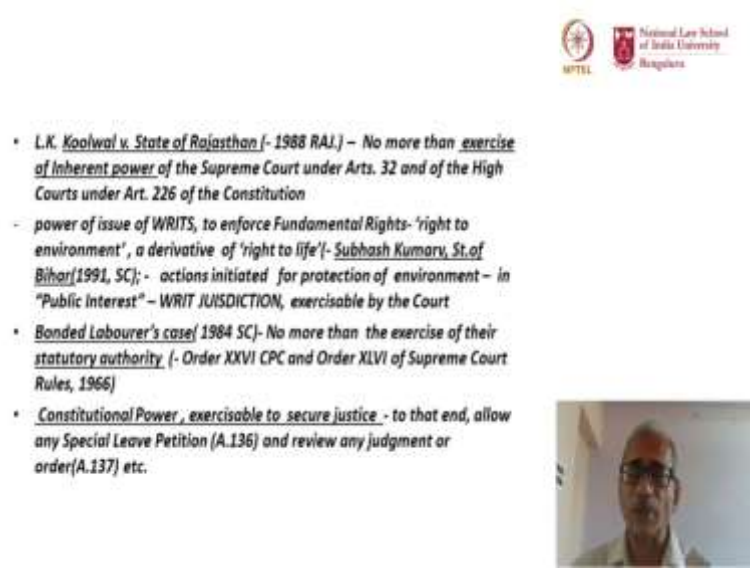

These are the kinds of questions naturally comes to one's mind when one is unfamiliar with the real role responsibilities and functions of the courts of law. And just taking a common sensical approach, these questions are normal, natural and understandable. Why? These are the questions that are lingering in the mind of most of us most of the time, even now. How would the courts of law explain their position?

And is it acceptable or not? Come on? Let us have a look at that. How do the courts justify their interventions in this manner? I gave a few case laws to exposit on what the courts think as to why they have acted the way they have acted on environmental issues. There is this case of L. K. Koolwal versus state of Rajasthan, decided by the Rajasthan High Court 1988. This is with regard to some of the functions of the municipal authorities in Jaipur municipality, which were questioned.

And the court insisted that these are the primary functions that you should perform. Because as a corporation, this is the job of taking care, the health, hygiene and wellbeing of the people. And you cannot come up with any more excuse. What did the court say? How did I exercise this power? The court said, we are doing nothing more than exercising the very power inherently that is there in the Supreme Court under Article 32.

And under, if the High Courts and Article 226 of the Constitution when the health, hygiene and wellbeing of the people are affected. The basic fundamental rights of the people are affected, the right to life. And so, we can issue a writ of mandamus, we can command, we can issue a writ of prohibition, we can issue a habeas corpus. So, many writs are there. And in exercise of that writ jurisdiction, we have performed our task.

There is nothing unconstitutional about what we did. The actions initiated for the protection as environment by making use of this writ jurisdiction is perfectly in order because it is in public interest. And in public interest, we always have the power of exercising this writ jurisdiction. And there is no constitutional bar rather constitutional endorsement of it very much there for the higher judiciary to do that we are just doing our job.

Look at the case of bonded labourers. Here also, the court said what is the kind of role and responsibility that we have? If somebody is engaging laborers for generations, for a pittance not paying proper returns to them? Yes, there is no statutory provision for minimum wages for those who are working with you in your household and all that. But then we have a statutory duty. Let us not even talk of constitution.

We have a statutory function to perform and have invoked what is called as order 26 of Civil Procedure Court. And there are what are called as rules of Supreme Court, Supreme Court Rules of 1966 order number 46. So, under this, we have the power of questioning, seeking explanation. Requiring action on the part of anyone who has violated the fundamental rights of any one or groups of people right to live, livelihood and getting a just reward and a return for the work that has been rendered by him, etc.

So, 2 planks on which the courts have justified their position, power that is already vested in them inherently, under the Constitution. And something which the statute has very clearly said that this is what the court should do. Where is the question of judicial overreach, where the question of usurping somebody else's function by just doing what the law has prescribed? There are instances where the courts of law have further elucidated upon their real role, responsibility and function under the Constitution.

And within that limited time available, let me quickly refer to them that what we are doing is our constitutional power to exercise so that the ends of justice are meant. They are not just a court of law where conflicts are resolved, that is only a role that any court would do. Primary judiciary will do that work. We are a Constitutional Court. And what is our job? Our job is essentially.

Whatever decisions we give, whatever actions we initiate, should ultimately lead to the securing of justice. So, to that end, we all know any special leave petition from any order issued by any high court and review any judgment or an order issued by any authority, including High Courts, we can even review our own decisions, we can revise them. Where do we get that power? Article 136, and 137 gives that power.

So, the kind of power that is vested in the Supreme Court, in particular here. And the High Courts in general makes it amply clear that they are only performing their constitutional power of rendering justice for all, at all times, whenever we are there, to get into that act. This is the kind of justification the courts of law have given.