

# Constitution of India and Environmental Governance: Administrative and Adjudicatory Process

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Positive Aspects of Judicial Activism

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#### D. POSITIVE ASPECTS OF JUDICIAL INNOVATIONS AND "ACTIVISM"

-DRAMATIC TRANSFORMATION OF FORM AND SUBSTANCE OF THE LAW-IMPACTED CHARACTERISATION OF INDIVIDUAL AND COLLECTIVE RIGHTS AND PROCEDURES ESTABLISHED BY LAW AND PRACTICE, IN ACCESSING THEM-CREATED GROUND FOR EVOLUTION OF NEW RIGHTS ,CRYSTALLISED PRINCIPLES AND APPROACHES TO ACCESS AND SECURE THEM

- A FEW ILLUSTRATIVE EXAMPLES:

- Elevating Environmental problems to the status of violation of Fundamental Rights:

- no direct articulation of right to environment under the Constitution (- DISCUSSED IN AN EARLIER MODULE)- impact, insulation, like any other fundamental right, from any legislative prescription or administrative fiat leading to its violation- effort of a municipal corporation to convert the land earmarked for a residential park into building a housing complex, thwarted by the Andhra Pradesh High Court, by holding that it would tantamount to violating the fundamental right to live in a well-planned hygienic environment (- T. Damodar Rao v. S.O. Municipal Corporation of Hyderabad, 1987 AP)



Comment's apart, justifications apart, let us see what are those positive things that have emerged out of this judicial innovation; which was not there in the text. But, in the context the courts have innovated upon, as we have seen in some of the examples; and to put it within courts activism, what are the positive things in it? I must say at the very outset there is a dramatic transformation of form and substance of the law. The law has come alive; it has impacted the very characterization of individual and collective rights, and procedures established by law and practice in accessing them.

See, law is nothing except something put in black and white lying on a piece of paper; it comes alive and it is made to work. That it is activated and that activation the courts of law have done. They without doubt have created the ground for evolution of new rights, crystallized principles and approaches to access and secure them; and environment happened to be the news through which the music of environmental justice was played by the higher judiciary. Let me give a few

illustrative examples: one is elevating environmental problems to the status of violation of fundamental rights.

The first and the foremost things that the courts of law have done is to relate the environmental problems to a violation of fundamental right. A very clever move, a very strategic measure by the court of law; because we have understand the language of fundamental rights. Constitution speaks the language of fundamental rights; it speaks about right to live, right to equality, freedoms, freedom of moment, freedom of speech, freedom of expression; so, primarily it is individualized or even collective rights. So, it is a rights language law knows, people know, administration knows, law maker knows.

So, let us speak in that language and relate environmental problems to that; that this right gets violated if this particular environmental problem persists. Understanding of language is alright, but why do you do that? Why do you take that strain? Now, the simple reason that there are ample provisions of protection of our rights. Fundamental, basic, inalienable rights and there is a constitutional guarantee that at any cost even against the government, you can exercise this right. And here we had a problem that the constitution does not speak the language of the environment.

Please remember, the constitution was inaugurated in 1949; all the provisions came into force in 1950. And at that time, we did not have these environmental crises in our mind. And even amendment that came to the constitution incorporating the environmental right duty and obligation was through the 42nd amendment more than 25 years after the constitution inaugurated.

As such there is no direct articulation of right to environment under the constitution. We have discussed it in an earlier module; so, let me not repeat. So, the impact concerning environment, protection and insulation of protection, as it is available for every fundamental right was very much necessary.

And that is why this bond and link between environmental concerns and human rights or fundamental rights was a dire necessity. And that is what the court did, to ensure protection from

any legislative prescription or an administrative fiat leading to its violation. Let us have an example: there was this effort of a municipal corporation; this is common place, this is happening in all around. And try to relate that reality with this particular case, then perhaps you will be able to appreciate and understand. Here is a municipal corporation which wanted to convert a land earmarked for a residential park into building a housing complex look at that.

Residential Park is for public purpose, housing complex for those who are in need of houses; so both are public purposes. But, what did the court do? The High Court in Andhra Pradesh thwarted such a kind of a measure on the part of the municipal corporation, by holding that such a conversion would tantamount to the violation of the fundamental right to live in a well-planned hygienic environment. The case is T. Damodar Rao versus the Municipal Corporation of Hyderabad.

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- Expanding Horizons of Human Rights:
- used human rights as a just vehicle to drive home the point of the close nexus between protection of environmental and human rights -in Centre for Environmental Law v. State of Orissa (1998, Ori.), issued a number of instructions for the conservation of the Bhitarkarnika Wildlife Sanctuary, to be observed, before permitting certain developmental activities, even when meant for promoting public interest; establishment of World Trade Centre on a wetlands, which was meant to promote the national economic interest, did not find favour with the Calcutta High Court in, People United for Better Living in Calcutta v. State of West Bengal( 1993 Cal.), as such a move, it felt, would adversely impact integrity of a very special eco-system- the Salt Lake
- Recognition of Customary Rights : Environment-friendly activities that protected traditional rights of people found favour of the courts of law in a number of instances(- see, the Aqua Culture cases, discussed under CRZ Law);



The courts expanded not just the linkage between environmental concerns of retaining a particular ecosystem like a public park. As closely related to the ability and the opportunity for the civilians to have fresh air, breath easy, repose and recreation; and which is a quality of life a fundamental right guaranteed, so link those two. Protect the ecosystem and ensure human rights, manifestation its full form.

But, the other innovation was not only they anchored environmental concern to human rights; even they expanded the human right notion itself. They just used human rights as a vehicle to drive home the point of the close nexus between protection of environment and human rights as inseparable, irretrievable.

And one fits to the other, one leads to the other, one comes alive with the other one; and not a isolation. This happened in the Centre for Environmental Law versus State of Orissa case; it is in 1998 decision. In which the court issued a number of instructions for the conservation of Bhattarkarnika Wildlife Sanctuary; that was a national park. And this was considered to be an imperative need, because a particular developmental activity was planned by the government; for which a part of the Bhattarkarnika Wildlife Sanctuary was at some point to be encroached upon in some places would be threaten.

So, what did the court say? It gave instructions; these are the safeguard measures that you should have. They are not coming in the way of developmental activity; you can carry it out. But, have you made provision? And if you have not done that; these are the safeguards that you should put in place so that this particular conservation area, a wildlife sanctuary which became a national park later. We know that these are the developmental activity that you would like to have. Because of certain close proximity with the sea and which would facilitate a particular dockyard to be built; and for moment of traffic and moment of goods, it is necessary.

Even if it is for public interest, the other public interest is also this, and this should be first taken care off while you address the other one. Or there was other case, it is called as the public case P U B L I C case; People United for Better Living in Calcutta versus State of West Bengal, it is a 1993 decision of the Calcutta High Court. What happened? Here was a move on the part of the government that established a huge structure, World Trade Centre. We all know World Trade Centre is a hub of economic activity, not just within a particular state or a region; not just consigned to India, but it has international ramifications.

So, something of very great public interest, so nothing wrong in setting up of a World Trade Centre. But, where do you locate that? That was the issue; this was supposed to be located on a

wetland. In one of the earlier modules, we have also seen what is a wetland? What is the importance and significance?

Here the wetland was the Salt Lake City, Salt Lake area. A huge area, a wet land and that bang in the middle of it; the World's Trade Centre was to come, the court said nothing doing. We have no problems in new establishing a World Trade Centre; but decide on the location taking into consideration, the environmental implications on a particular ecosystem, which is fragile which needs protection.

The court felt such a move would adversely impact the integrity of this very special ecosystem; and so, we will not allow that. It was not just individual human rights or it is not just a particular ecosystem conservation; which was the focus of the court of the law. Look at the tool of fundamental right being employed to give a wide ambit of the application, in relation to not just human rights but also of environmental right. Recognition of customary rights of the people: Environment-friendly activities of communities which have been practiced by traditional communities should be nurtured and protected.

And these traditional practices of communities should never ever be trumped at the altar of bringing a new technology, their application; which will bring in a lot of economic good. But, ecologically ruin us and in clear violation of rights of communities. Where did the court of law say this?

It said that in series of cases concerning aqua culture; or what you refer to as a prawn culture. The aqua culture cases which we have discussed under the CRZ law; please refer to that, where the customary rights of the people in carrying out an aqua forming exercise protected. But, not the modern aqua culture projects, not favoured by the court of law.

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*diversion of a common grazing land was stalled in Gujarat (- Nabipur Gram Panchayat v. State of Gujarat[ 1995 GUJ]), even when the diversion was meant for another public purpose, namely, to provide housing for the under privileged sections of society); in Uttar Pradesh, the meadows and pasture lands in Garhwal region were prevented from being put to use to construct tourist lodges, to protect the unique Himalayan Eco-system and the traditional communitarian right of grazing livestock- the argument of boost to economy, tourism and employment opportunities, did not pass muster(-Omprakash Bhatt v. State of U.P. 1997 ALL.)*

• *Protecting the interests of tribals and conserving forests :*

*To harmonize the interests of the forest-dwelling community with that of the concerns for conservation of the forests; practice of the tribals to obtain bamboo and earn livelihood by selling the articles made out of them, attempted to be rendered unenforceable by the forest department by barring their transport from out of the forest area-action, aimed at compelling them sell the*



Diversion of a common grazing land for the purpose of building low-cost houses, for the benefit of under privileged sections of society, was stalled by the Gujarat High Court in the year 1995; in the case of Nabipur Gram Panchayat versus State of Gujarat. Here is a particular ecosystem, the common grazing land; which is meant to perform certain ecological functions. And also to take care of certain kinds of livelihood interest of communities of people, should not be sacrificed and the alter of the expediency of a space for another public purpose.

You cannot actually undermine one human right to promote another human right; that is the essence of it. But, the result that the common grazing land got protected; look at the innovation. It also happened in Uttar Pradesh in the Omprakash Bhatt versus State of Uttar Pradesh, a judgment of Allahabad High court in 1997.

Here was an effort on the part of government in transforming huge tracks, is it an ordinary land? No. Meadows and pasture lands in the Garhwal region; Garhwal region at that time was under the undivided Uttar Pradesh. Now, it is in Uttarakhand; so, I am referring to a 1997 case.

And the Garhwal region when these meadows and pasture lands were to be transformed into resorts, tourism centres with the argument that it would boost the economy. It would promote tourism and give great employment opportunities for the people, the court did not agree with that. What are you doing?

You have to do all these of boosting economy, promote tourism, improve economic opportunities. We are not coming in the way, but where? Is it a place which is boosting of a very unique internationally renowned ecosystem the Himalayan meadows and pasture lands? This is not only fragile, this is not only something which is prone to any kind of seismic activity, which is any developmental activity would be ruinous.

But, it is a unique Himalayan ecosystem and it is the ecosystem which also caters to the protection of the traditional communitarian practice and right of grazing livestock. You are putting it at great jeopardy all this just for a few economic gains, we do not allow this; or take the measures of the court of law in protecting in interest of tribal's and conserving forest.

How did the courts go about it? The courts in a series of cases successfully carried out, an exercise of harmonizing the interest of forest dwelling community, with that of the concerns of conservation of forests. I make a special reference to this because the cases that I am going to refer now were enacted before the year 2006.

Because in 2006, we have seen in an earlier module in our discussion the Forest Rights Act was passed. So, the rights of forest dwellers were recognized and protected through a new law made in 2006; till then there was no legislative enactment protecting the rights of the forest dwellers. So, there was a vacuum in the law and so those forest dwelling community did not have a clear right of residence there, legally, legislatively protected. The court had to come to their aid. And what was the practice of these communities of people? And I am referring to the forest dwelling tribal community here.

It was to obtain bamboo and earn livelihood for themselves. What were they doing? These are minor forest produce for centuries ever engaged in this activity; as something as a source of livelihood. From bamboo they would create articles, sell it in the market, earn a livelihood for themselves; this is what they were doing.

What did the government do in this particular case? The government attempted to render this not possible; this practice of taking out the articles from the forest to sell it outside, we do not permit. It is a forest property, a minor forest produce; it has to be used whether you want to sell it, you want to consume it, you do within it we allow that.

But, it cannot be taken out of the forest; so they issued an order, you cannot transport these from out of the forest area. Actually, this measure the forest department took mainly for the purpose as it was alleged.



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material to the contractors of the local paper mill - forest department ordered not to interfere in the transit of the bamboo articles from the forests to non-forest areas (-*Fatesing Gimba Vasava v. State of Gujarat, 1987 G U J*); Court struck down a government order that permitted felling of trees and transport of timber from the forest area that was in contravention of the law concerning Tribal Lands- The court reasoned that the statutory provisions were intended to safeguard the interests of Scheduled Tribes and to preserve forests and he executive order that violated this law was invalid

(-*Shankar Reddy v. State of A.P., 1992*)

• Promoting Right to Environmental Information :

Right to access relevant and authentic information is very crucial over environmental issues. It enables one to know and understand about the kind of impact any activity would have on his environment besides forewarning about mishaps, helping in taking precautionary measures and facilitating participation in the processes of environmental planning and decision-making (-REFER, EARLIER MODULE ON THE SUBJECT)



That these forest dwellers when they have this right of using the minor forest produce; let them use it within the forest area. Consume it if they want, because they want to live let them live with that. But if they want to sell or to sell anything including the bamboo or the product; let them sell it within the forest. Come on who are there in the forest to buy things from them.

They have to go out to the outside world, where there is a market for that; and people will buy from them. No no no no, why? There are forest contractors here; they are ready to buy your bamboo. Oh, actually the idea was with license from the forest department; because the local paper mill obtained that license to collect bamboo in the forest area. So, a contract for taking bamboo to the forest to be supply to the local paper mill was the deal was struck between the forest department and the paper mill; to facilitate that these tribals were coming in the way.

Because they had a claim over the bamboo, they wanted to make articles out of it; and sell it in the market. And all that they do is, all that the forest department did was to stop that without saying or claiming to stop the traditional practice; but, it was actually entreated for that purpose. Here in a land mark judgment given by the Gujarat High Court in 1987; the case is *Fatesing Gimba Vasava versus State of Gujarat*. The forest department was ordered by the court not to interfere in the transit of bamboo articles under the circumstances from the forest to non-forest areas.

See, if the government acts in a way which is even violating a statutory provision, through various executive orders; if it is in a civilian area where civilized people exist as they claim. People who are in the know of law, who are in the know of way of life; defending themselves and protecting their interest is possible, they can go to court. But, what about people those people who are living in the forest for whom certain protections are given in law. Ignoring that or in violation of that certain orders are issued by the government; yes, government have issued orders like that.

Where it happened? It happened in one particular case; where in a forest area the government got into an arrangement with a particular industry for felling trees in a particular patch of forest land; and transporting it out of the forest area for business purposes. What is the problem here? Is it not something which is within the powers of the forest department, to decide on which tree to be cut, which tree to be transported; and which agency of the forest department to act on that in dealing with Gimba. Well, they have the power, then what is the objection here?

The objection is that there is a law that within the forest area. If there are tribal's living there, and there is a tribal land within that forest area; and this is a law in Andhra Pradesh state. And this has been the law with so many other states also; most of the states have this kind of a law. A tribal land is inalienable, non-transferable cannot be converted into something else to deny the tribal's of their right over that. Even tribal's cannot sell that land, they can inherit; they have the right of inheritance, but no right of alienation, no right of selling it. The idea is this is one community which is dependent on this resource, to keep up their identity.

As part of their identity the relationship, the land is respected; and so law is made, state government makes the law; AP government has made this law. The case is Shankar Reddy versus State of Andhra Pradesh. What did the court say? The court struck down government order, but permitted felling of trees and transport of timber from the forest area; which was in clear contravention of the law concerning tribal lands. What is the reasoning of the court here? The same as I gave you. The statutory provisions were intended to safeguard the interests of the Scheduled Tribes and to preserve forest land; the executive order was in clear violation of this.

So, right of the Scheduled Tribes and preservation of the forest were integral to each other before the court said. We have also seen in one of our earlier discussions, as to how these expansion of right to environment was achieved by the court by promoting right to environmental information. Please refer to the earlier module of the subject, where right to access relevant and authentic information is a very crucial aspect of good environmental governments. Because this enables one to know and understand about the kind of impact, any activity would have on his environment besides four warning about the impacts any activity would have on his environment, four warnings about mishaps; helps in taking the precaution measures and facilitating participation in the process of environmental planning and decision making. I do not think any further explanation is required than this, and details are there in the earlier module which we have discussed please refer to that.

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• **Relaxation of procedures :-**

*-amazing ability of the higher judiciary in demystifying the law and its processes, by relaxing procedures, so as to empower the affected, aggrieved and concerned entities, ventilate their points of view in the judicial forum and secure justice (-Doon Valley litigation, 1985 SC- where the epistelely jurisdiction was exercised, in Public Interest)- REFER EALIER MODULE DEALING WITH ENVIRONMENTAL RIGHTS)*

• **Broad-basing Environmental Administration:-**

*Supreme Court categorically asserted that it was impossible for a single authority, a governmental institution, exclusively and effectively control environmental damage. Environment is best protected by the people themselves and the governmental agencies should seek and secure the assistance of voluntary groups in this regard(-Indian Council for Enviro-legal Action v. UOI, 1996 SC)*



See, having a right is no doubt important, in realizing the right there are several procedures lay down in the law. Many a time the one who has the right to know about that right itself is a difficult thing in law; many of us are unaware of what kinds of rights that we have. Forget about how we are going to realize these rights, when such is the state of affairs in a country like India. Even in cities I will tell you the level of ignorance is of that level; where knowing about right is itself is a problem. What are the categories and the catalogue of rights that I have? Not very convergent.

And at the same time how to realize these rights? What are the means, mechanisms and procedures I should follow? Very difficult to follow, unless you are lawyer or somebody, who is in the know of law. So, in such cases how do one access justice for a violation of one's rights, and in all the most so more difficult in the case of environment; which unlike a human being does not know cannot also prosecuted on claim. Later on, to know the procedures and whoever who wants to protect the environment; you cannot expect him to know all the procedures as to how to access courts of law and secure justice.

Amazing ability is what you have to give, when the merit is due; for the higher judiciary in demystifying this law. And it processes by relaxing procedures as to empower the affected aggrieved and concerned entities; especially in relation to environment. To ventilate their points of view in the judicial forum and secure justice; we are familiar with this particular case how the procedure was relaxed. To approach a High Court or a Supreme Court what you should do? You should submit a petition; detailing out where exactly is the problem. Who is causing the problem? Who is responsible for this?

And how it is happening? And why the environment is bleeding all that. So, to go to the High Court or the Supreme Court even through a writ jurisdiction you have to follow a certain procedure; of course, you do not have to pay any fee. Because it is in public interest, but what is the procedure?

See I am in activist group; I would like to bring in action. But I just do not have the means, methods and mechanisms as to how to realize the right of the environment. And which is that environment? It is the Doon Valley which is bleeding because of illegal mining activities that is going on; please refer to this case.

We discussed a case decided with the Supreme Court in 1985; in an earlier module we have discussed that which deals with environmental rights. What is the device employed by the court? All that this gentleman Avdhash Kaushal, the chairperson of the Rural Litigation and Entitlement Kendra; did was wrote a post card. And posted it to, it was addressed to who? Posted it to the

addressee by name the Chief Justice of India, the Supreme Court. And what did the Supreme Court do? It received it and elevated it to a public interest litigation petition.

Relaxed the procedure because people may not know things; procedures are important alright, but they are not everything. They are just a means to achieve a goal; the substantive part of the law is important. The substance is environment is suffering, some action is required; can the court help? That was a thing, court came to the aid. It was a knight in shining armory to help the under privileged, the voiceless the environment that the Dehradun Valley. It also did something more, it broadbased the environmental administration; what did court do? Supreme Court categorically asserted that it was impossible for a single authority; a governmental institution exclusively and effectively controls environmental damage.

See, environment is everywhere, the environmental problems are everywhere; the government machinery is small, its personnel are very few. They cannot fan-out to every look and corner of India, to see what violations take place; and how they are happening. The best protection for environment is possible, if people are engaged; they are best protected by the people themselves. And the governmental agencies should seek and secure the assistance of voluntary groups in this regard. Who said this? The Supreme Court of India; when was that? In the year 1996; in which case? Indian Council for Environmental Action versus Union of India.

The gateway if at all if there is any wall or an iron curtain that was there, preventing the government approaching people to engage them in consultation; to involve them in execution, to act as the eyes and ears of the government in reporting about environmental violations. The gates were thrown wide open by this kind of a decision given by the highest court of law; which made environmental administration as not strictly exclusively confined to the agencies of states; specially designed to take care of different sectors of the environment. Where is the constitutional provision for that?

Please recall what we discussed earlier there is article 51A, capital A Clause-G; which makes it a duty of every citizen of India, to maintain protect and care for environment. And aid and assist this state whenever required, and that is precisely what the court amplified in this particular case.

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- Evolving New Principles of Good Environmental Governance :- Like the Polluter Pays Principle, Sustainable Development, Principle of Precaution, Public Trust Doctrine (- the last one, indeed, the contribution of Indian Judiciary and the last but one, Indian Judiciary has made the principle more stricter in application, by its interpretation than what is practiced in the developed Countries!)- **DISCUSSED, IN DETAIL, IN AN EARLIER MODULE**

**E. NEGATIVE ASPECTS:**

- PIL- PART OF THE PROBLEM :- Cases, never fully decided and long drawn out, even leading to administrative inaction and political defiance -Vehicular Pollution Cases, illustrative of this situation
- Highly Individualistic Character: tool becoming personalized, individualistic and attention-seeking. There are instances of their identification with the personality of a judge or a litigant – danger of the environmental concern losing steam, after a particular judge demits office or even the same judge



It evolved new principles of environmental governance; we already know about that; we have discussed it earlier. Or even added a lot of gloss to the principle of polluter pays, sustainable development, the principle of precaution, and public trust doctrine. Especially, the public trust doctrine is our Indian contribution; please read the cases of Kamalnath case of 1996 Supreme Court Vintage. Also read the 2G spectrum case of 2012 of the Supreme Court, which we discussed in great detail in an earlier module; which is supposed to be Indian contribution to environmental jurisprudence of one and over on public trust doctrine.

Or even with respect to principle of precaution, while the principle of precaution only said anticipation, avoidance, attack and look for alternatives as four components of principle of precaution. Indian courts supplied the fifth element that scientific uncertainty is no excuse in taking action of ensuring, that one would not getting to a particular kind of an activity; including a developmental activity, when science is not sure about the likely impact of that activity.

Let science make it certain then you can proceed further. So, like that the courts have been able to bring in human rights expanded on these notions; and through that it was able to act as a sentinel guardian and protector of the environment. And ensure better and more effective environmental governance.