

Constitution of India and Environmental Governance: Administrative and Adjudicatory Process

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Critical Review of Judicial Activism

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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



These are the positive features. Was there nothing negative about it? As a law academic, as a law researcher I cannot just give you one side of the picture, I should give you the downside also, the other side, so that the judgement is possible, as a lawyer I would do. As an amicus curiae query in the environmental issues would do and dawning that mantle if you look at the negative aspects, the public interest litigation itself became part of the problem.

Just see the cases, vehicular pollution case started in 1984, even to this day the case is not closed completely, not fully decided, the court is issuing one order after another, administration is always required to comply with these orders, 30 years, 40 years down the line. Or the forest conservation case of TN Godavarman which had a very humble beginning in 1993, even the year 2020 not over, case is never fully decide and then long drawn out. And as once a particular issue becomes a debatable, actionable for a pretty long period of time. I am referring to the human psychology, the common human psychology, what happens? Do not you know? Do not you

think that people will lose interest? Precisely that is what is happening. Administration is just looking at these series of orders not with that enthusiasm, not with that kind of a fear of counter action.

Many a times there is inaction and there are cases of political defiance. Looked what happened with regard to the vehicular pollution cases, when the Supreme Court said in the vehicular pollution cases, in one of those hearings, this happened in the court that from such and such a day, those vehicles which do not have and which do not conform to Bharat three standards cannot ply in the streets of Delhi, that is what the court said.

Came the day and what you have? For one day there was a clear lull, because many of these vehicles could not ply on the road. What was projected in the public image? Including political leadership and administrators and even members of the public, that is our irony; they started telling, look what the court has done, people are put to so much of inconvenience, people have to move from one area to another.

And because of this condition, many vehicles cannot come, and remember it was done with a very big business motive. Many of the political leadership, many of these administrations were handing globally the businessmen who are plying these vehicles which were not fitted with those equipment which the standard has prescribed, nothing prevented them from doing that, enough time was given to them, they delayed because it costed money.

And they did not want to spend more money, put more misery on the people and now they are talking about people's interest, but this is happening. Many a time, you also know that when once you identify some judges, and some lawyers with that public spirit, bringing in public interest action and being very responsive to causes of public interest, it is human experience that things become personalized, highly individualized.

And it becomes a kind of an attention seeking, whether you want publicity or not, this happens. And this becomes a normal a kind of a new normal, and there are instances in environmental litigations, where these cases and such cases were identified with a personality of a judge or a

litigant. What is the danger? The danger is the environmental concern with lose steam, see this judge is environmentally incline.

But since this case has gone for a long period of time, what happens if judge demits the office and another judge takes over? Number 1, he may not be as inclined as this judge to environmental issues or maybe as convergent as this judge had been because it is natural, because this judge was dealing with this particular case for a long period of time, so he knew the final aspects of it.

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developing "judicial fatigue", if a litigation becomes a long-drawn out affair- scope for inconsistency in approach and arbitrariness in dealing with issues, can not be ruled out

- *Problems Resulting from Reliance on Expert Opinion:- when the opinions so obtained are either based on erroneous assumptions or insufficiency of data -M.C. Mehta v.UOI, 1997 SC(Taj Trapizium case) and Vehicular Pollution Cases, highlight this negative fallout of a PIL!*
- *Non-exhaustion and Neglect of Other Remedies:- danger of end of the road for justice, should anything go wrong, as no further appeal lies; available tools for securing justice (- "representative action", for getting justice in a lower Court, for example-) get rusted ; the advantage of trial court proceedings (- adducing facts, presenting evidences etc..) lost, as only points of law are main issues in the Higher Judiciary*
- *Problems of experience, expertise and professional time- in long drawn out , PILs, where services, as a general rule in India, obtained, pro bono!*



Whereas this is a new judge or even the same judge, for how long you would like to act in public interest? How long you would like to promote this public interest? The activist, judges also developed fatigue, why do you bring in the same action over and over again? If should have been acted upon, do not bother our time; courts have said that. Not only that, even activist for how long they would keep this interest? If there are constant, consistent, persistent violations occurring, even a litigation, then it becomes a long-drawn affair.

These responses you can always expect. So, there is bound to be inconsistency in approach, arbitrariness in dealing with issues, and these are normal and human. And judges are all said and done, with all due respect to them are human too. There is also a problem, see in most of these public interest litigations involve expert opinion because you need expert opinions. Because they

are highly special, highly specialized, require a lot of science and technology, knowledge and experience and expertise in that.

So, courts have actually engaged experts to give opinion, nothing wrong in it. In fact, everything right about that with only a ride up. You engage an expert alright, but when the opinions so obtained are either based on erroneous assumptions, even experts can go wrong or even experts have only limited expertise. And that expert will not have all the information that is required, what do you do? This happened, this happened in the Taj Trapezium case.

What did the court do? In this particular case, the Taj Mahal, the monument of love, a world heritage site, it had developed cancer. There was the discoloration of the marble structure. And what was the expert opinion? Well, there was a public interest litigation in this regard M C Mehta versus Union of India, the Supreme Court judgement of 1997, expert opinion was sort. What was the expert opinion?

Look, it is because of the air pollution that is there in the area, actually right opinion. And the air pollution is due to many of the small-scale foundry work that is there dotting the Agra region. So, what is the advice given? The advice given is move them out of this place, so that the Taj would be saved. That was the expert opinion and that is what the court did. These foundries are moved out of this region. Did the air pollution stop, did the discoloration stop, in the area?

Definitely not. What happened? Well, the expert opinion was partly right, the foundries did contribute to air pollution, to that extent the expert opinion was right. But it was awfully wrong in not having factored another major cause for air pollution, and what was that? The Mathura Refinery. The petroleum oil refinery that was there in Mathura, very close to Agra was also responsible for air pollution in a very big way. Why it was not brought into picture?

There is a story behind that. Mathura Refinery is a public sector undertaking, that is it is part of the government. And who gave the expert opinion here? An expert opinion came from N E E R I, NEERI and organization of the government, expert organization, a research organization,

headquartered in Nagpur. One public sector undertaking, giving an opinion would invariably be very soft on another public sector undertaking and that is what actually happened.

So, it did not give complete information and on the basis of an erroneous assumption and on opinion, the court decided the case. And did things improve? Not much. Same is the case with vehicular pollution cases. We came up with, Euro1, Euro2, Euro3 norms adopted. Based upon expert opinion because the Europeans have better standards on vehicular pollution and we should adopt and we adopted it, made it Bharat1, Bharat2, Bharat3.

But supposing there was another expert opinion available at that time when the court decided this case. What could have been the other opinion? Well, the standards in Europe are not that very big when compared to the standards in United States of America, in California which has the highest standards prescribed, perhaps the court would have decided adopt the Californian standards. How can you come up with such a kind of a decision which is not completely based on full reliable state of the art opinion on science and technology?

Then there is a problem of non-exhaustion and neglect of other remedies, see the public interest litigation became a highway for environmental justice. Everyone started rushing to the High Court and Supreme Court, little realizing that within the existing law, there are certain ways and means of finding and securing justice.

So, if there is a violation, take it to high court and supreme court, so load the High Courts and Supreme Courts with public interest litigation. And that is what every activist group, every lawyer whatever the name, who had made a name on the environmental issues gravitate towards. What happened? Several things happened and I will just speak two of them; one is it actually led to the danger of end of road for justice.

See we approached the highest court, supposing there was an error in judgement by the highest court, where would you appeal to? No more appeals. So, there can be a travesty of justice. I have already referred to some of those instances, no further appeal. Supposing I had explored certain

other remedies before I approached the higher court, if these other remedies failed, then there was stage by stage approach possible.

And many a time not all cases are of that great public import to go to the highest court of law, emergency agree but not so then, there are other available tools for securing justice. Is there no provision for representative action in the lower court? Always there. Several procedural court provides for that, for getting justice in a lower court. Hardly you have cases concerning environment through representative action. They completely got rusted.

They do not have cases in that, and so lower court was keeping quiet, doing nothing about it. There is an advantage of the trial court proceeding. What is the advantage? They look to facts; they allow for presenting of evidences. So where use enough all this, looking into all these aspects before relating into points of law, last forever. Because only points of law matter in the higher judiciary.

I have already mentioned there are problems of experience, expertise and professional type. When you have a long-drawn-out cases, public interest litigations, as I have mentioned, where services as a general rule are obtained pro bono. Most of these cases are free of cost, they are taken in public interest. Many of these lawyers, many of these experts offer their services free of charge, good summer returns. But for how long? For how long? One time, one year? But running to years of time, then they also develop fatigue. How long they can remain pro bono?

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• *Views and Responses of other wings of govt.:*

Neither the legislature, nor the executive have taken kindly to this "judicial take over" of their functions- legislative lethargy and administrative inaction, likely consequence of judiciary "trying to do everything"

- This assumption of "creeping jurisdiction," has not found favour with many of the judges themselves (- as in Sachidananda Pandey v. State of West Bengal, 1987 SC, Justice Khalid advocated judicial restraint in PIL, so that the salutary type of litigation did not lose its credibility!



I also would have to live, I also would have to really survive, I also had to make a profession out of what I know off. Look at the other downside, and this is something common that you all know and I am just amplifying it, views and responses of other wings of government; neither the legislature, nor the executive; mark my words have taken kindly to this judicial takeover of their functions.

While judicial lethargy and administrative inaction was the main trigger for judicial action, even judicial action has led to legislative lethargy and administrative inaction. Because judiciary is trying to everything, when they are doing everything why should we do anything? That has become an attitude now, new mindsets have created that way. So, this assumption of creeping jurisdiction is not just confined to the other wings of government.

Even within the judiciary this is also taking roots. I refer to this case earlier but I will just the opinion of a judge in this particular case, in this case of Sachidananda Pandey versus State of West Bengal, what are the landmark judgements; a judgement on human rights, a judgement on environment, given in 1987 by the Supreme Court. One of the judges Justice Khalid, he advocated judicial restraint in public interest litigations, so that the salutary type of litigation did not lose its credibility.

So, PILs are like a pill, a medicine; medicine should not become a food. Do you have, unfortunately have this experience of the medicine itself becoming the food. Then what are the other medicines available, other than the higher judiciary? We will examine in the remaining sections from now onwards. This concludes the first two parts of the 10th module; the higher judiciary.