Constitution of India and Environmental Governance:

Administrative and Adjudicatory Process

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Lecture 58

Environmental Adjudication

We move into the third segment of our enquiry, as more of a learning from the entire discourse, the third segment being Environmental Adjudication. What has been the learning so far? And from here how do we go about this entire aspect of justice?

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Let us take a quick look at the justice dispensation as it is prevalent in India in retrospect. The Indian brand of environmental justice dispensation as we have noticed and examined in great detail and depth presents three distinct approaches with varying degrees of impact.

The first one, of course that which is delivered the brand of the higher judiciary. This is something which is a trail blazer and a contributor to environmental jurisprudence we have said earlier, it is always treated with a highest respect and this has been full of innovations, it conceptualize rights, it cleared hurdles for access to justice in the processes and procedures as you remember the locus standee principle, how an ordinary member of the public could go to the court of law even though he is not interested party bring in action in public interest over issues concerning environment.

How it was facilitated by the higher judiciary or even in the techniques developed in ensuring execution of its orders and compliance with its instructions. Cases, arguments, decision, wrap up; no, that is what we have seen. After the arguments are over the findings are placed before the court; what does the court do? The court has issued orders and instructions, not the judgement in whole.

A continuous mandamus getting issued, so in a technique that is developed so that its orders are executed and compliance with its instructions are in charge without necessarily going through each word each time when once the judgement is given, there is a long lapse of time and when nothing is done, the same party is going to the court all over again starting the rigmarole process all over again.

No, look at the techniques adopted, the mechanism brought into play very innovative, out of the box, imaginative interpretation and really-really application of constitutional provisions for securing justice. So, everything done within the constitutional frame although there has been imaginative out of the box solutions provided, they have been able to various skilfully anchor to some constitutional provision or a text.

Spread over 4 decades in chronological terms you can further reclassify this particular role of the higher judiciary and it can be identified in the following phases of engagement. Of course, when I say phases, 10 years, first 10 years, next 10 years, other 10 years or anything like that it is actually a bit of an overlap. And when I say 15 years it is not exactly first 15 years, it may be more than 15 years.

In some cases, it has even extended till the other day. But by and large, this is it and there are overlaps and one phase overlaps into other phase and there is nothing like there is water tight compartments of this is the period in which it happened but it is predominantly that and that is what I am bringing in to your attention.

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Look at the early phase which is roughly around 15 years right from around 1980 to 1995 if you put it like that or up to 2000 very activist, proactive and the output is highly productive and it contributed immensely to Indian environmental jurisprudence and most of what I have said earlier is perfectly applicable to this phase. Comes the second phase which is about a decade after the first one for a period of over a decade, it created some space for paying particular attention to dealing with environmental related cases.

So, some innovations in a form of setting up of green benches within courts or identifying a judge for a day-to-day handing of cases or at least identifying one particular day and a judge to deal with only environmental cases and through this particular process with this innovation and over a period of time the judiciary at the higher level catalyzed the central government to come up with a law and a host of laws to create special environmental courts that is second phase, in which you have internal mechanisms for paying focused attention to environmental issues and then nudging the government to come up with special environmental courts. What is the third phase? The last decade and half which we are still going through. The initial enthusiasm in transferring and referring environment related cases to the newly specialized bodies that were set in and also displaying a bit of a judicial fating.

You know the judicial fating is such that if the same issue comes before the court of law over and over and over again, add nauseum, the court would also feel a little uncomfortable, a lot circumspect and they perhaps even think of losing interest, this happened look at the vehicular pollution cases. It started its life around 1984, 30 long years. The case is not over. Look at the Godavarman case staring at 1993. Even to this day the case is alive.

We talk of Godavarman 1, Godavarman 2, Godavarman 3, why? Because of continuing mandamus and so many orders and instructions issued and you have a parallel administrative and adjudicatory mechanism created thereby. With the results that the courts of law's time energy, effort and skill is being put into one particular sector of governance, the court also felt that it is time that we should move on to other things.

And by this time the government should have come up with a host of laws, a robust mechanism which would actually deal with environmental issues exclusively as a skilled the professional would. And that is the stage we are in. Here you see rare display of judicial fatigue and transferring and referring environment related cases to these special bodies, this has happened, by enlarge this has happened at the Supreme Court level.

But at the High Courts it is a different ball game. Although they have expressed resentment and unhappiness over that, they are reluctant to transfer cases which have substantial environmental issues because high courts as courts of original jurisdiction they can admit any plea and games are played by those parties who feel that they will lose out if they go to the National Green Tribunal, they invariably go to the High Courts. We have seen that and we have critic that also in the appropriate module that we discussed.

And thereby the courts also have started admitting appeals, started scrutinizing orders and decisions and approaches of these very special bodies including that of NGT, and they pass their own orders, either in endorsement of these decisions given by the special bodies or giving an altogether spin and approach and conclusion. And whereby the real objective of environmental justice by specialized courts have taken a beating.

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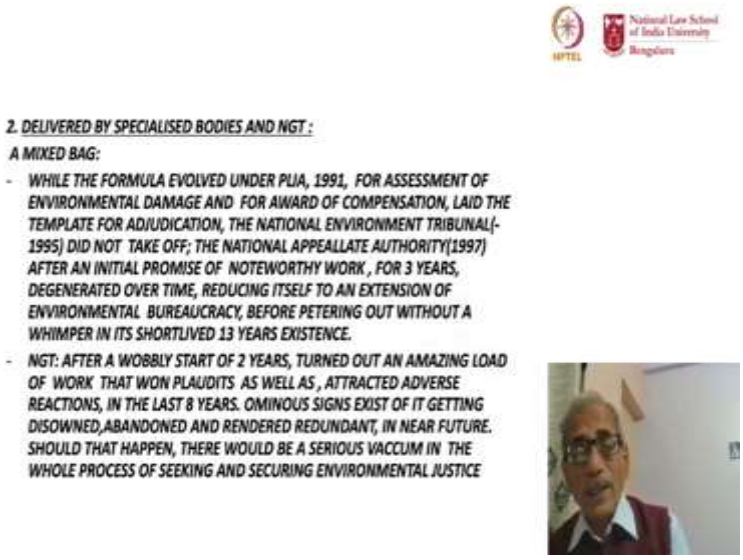

Then what about the specialized bodies? The second feature of environmental justice delivery is by delivery by specialized bodies and NGT, it is a mixed bag. You know the formula evolved under Public Liability Insurance Act in 1991. As we have discussed to assess environmental damage, the kind of a blue print that was made available and for awarding of compensation which actually provided the template for more reasoned weighted adjudication that was the starting point.

So, it was very helpful to start with and for well over 20 years it has been in operation and even now it is certainly a good marker for the National Great Tribunal to work on. The National Environment Tribunal, there is a error here, it should read as the National Environment Tribunal that was created in 1995. As you know it never took off the specialized body, law commission report, the supreme court orders and the retired chief justice preparing the draft it never took off.

So, a law on paper never got translated into practice. Then what happened to the other specialized body? The National Appellate Authority was created in 1997 I think it had a fairly good innings to start with, an initial promise and definitely in noteworthy work for little over 3

years' time, it degenerated over time. We have discussed that reducing itself to an extension of environmental bureaucracy before pattering out without even a whimper in a short-lived 13 years of existence.

So, that is the story about the developments between 1990 and 2010. Now comes an epoch-making event and the development, NGT in 2010. It would have wobbly start for the first couple of years but then it made up for the last time and the next 6, 7 years turned out to be an amazing entity, it came up with an amazing load of work, that one lot of plaudits but at the same time attracted adverse reactions in the last 8 years of its working.

We have discussed the details in that particular module and the real concern as we have expressed in the last module towards the end ominous signs exists of this NGT for having done such great work and for variety of reasons as we have discussed that in detail of it getting disowned, abandoned and rendered redundant in the near future, should that happen then the entire process of seeking and securing justice through a specialized body, a professionally competent body would be lost, a serious void would be created in the process of seeking and securing environmental justice that should not happen. But there are enough signs of this becoming a reality.

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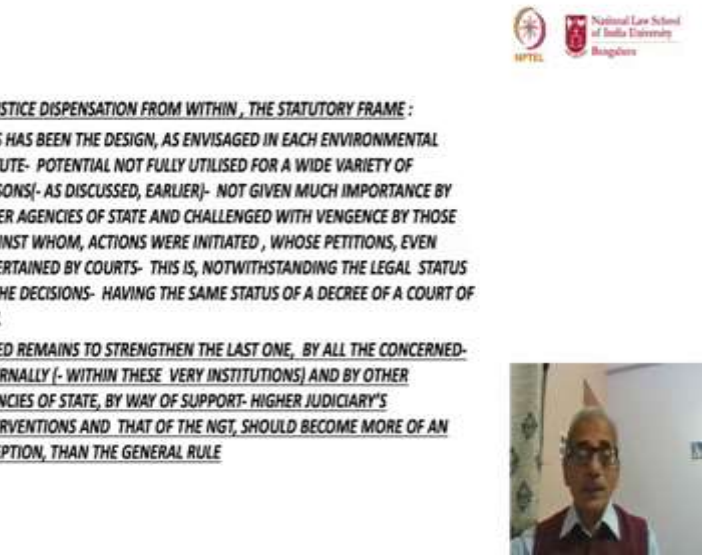

But then we have something very much within the existing body of the statutory frame and we elaborately discussed it in the previous module and that is the third feature of environmental adjudication in India. Justice dispensation from within the statutory frame, actually this has been the design each and environmental legislation provided for this on paper in clear way but unfortunately as we saw the potential is not fully utilized.

And as we know the reasons are quite obvious as put down in detail in the earlier module. Unfortunately, this aspect of an enforcer acting as an adjudicator as a quasi-judicial body is not given much importance by other agencies of state, in fact its actions are challenged with vengeance by those against whom actions were initiated, and this is the most unfortunate part petitions by them are even entertain by the courts.

I think there appears to be a serious lapse here of getting educated as to why they are there, education both for the enforcer, the enforced and the courts of law because you know the statute makes it very clear the legal status of the orders, instructions and decisions of these specialized administrative agencies created under very special laws they are the same status as that of a decree of court of law.

But the recognition is not very much there. Recognition is not there may be because of ignorance or may be because of inconvenience or may even be because of a kind of a jealousy that permeates in the whole system, or may be that those who have to render justice within the system do not have that capacity or competence because of certain internal problems of politicization, certain internal problems of non-creation of appellate bodies within the statute and so justice remains a casualty.

So, there is a clear need, clear need of deepening this aspect, strengthening this third aspect because you want a self-contained code of law and one need to really find solutions from within and that is for the reason all these environmental laws came into existence. And the need for strengthening this all the concern internally within these very institutions themselves by the government and by other agencies of state by way of support and higher judiciaries intervention.

And that of the National Green Tribunal should become more of an exception. Do not entertain it every time, do not make this forest administration, the wildlife administration, the biodiversity administration, the pollution control boards as your favourite whipping boy. Please try to consider them as someone who is sharing your responsibility of justice; enable them, empower them, strengthen them.

Add reasons to their decisions making rather than sit in judgement over their orders and actions and make environmental justice a mockery. So, this aspect needs to be strengthened by all the concern in every possible way. This brings to almost to the fag end of our discourse we have left with a last segment of the 12th Module and that is what we should presently do, of doing a little bit a final set of observations and a wrap up. And that is what we presently do in the final segment.