Constitution of India and Environmental Governance Administrative and Adjudicatory Process
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Module 01
Lecture 06
Theoretical Moorings, Sources and Evolution - Part 05

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II. A FEW GENERAL PRINCIPLES

1. SIC UTERE TUO, ET ALIENUM NON LAEDAS: - So use your property as not to cause harm to others

2.SOVEREIGN RIGHT OVER OWN NATURAL RESOURCES : - Prin.21 of Stockholm Declaration-Prin.2 of Rio- Declaration

3. PRINCIPLE OF PREVENTIVE ACTION: -Obligation to prevent damage to environment with in its jurisdiction and the obligation to take appropriate regulatory ,administrative and other measures- requirement of taking action at an early stage/if possible, even before occurrence of actual damage

4. GOOD NEIGHBOURLINESS & INTERNATIONAL CO-OPERATION:

(Prin.24 of Stockholm and Prin.27 of Rio- Declns. etc.)

- Information Sharing; Technical and Financial Cooperation; Joint Implementation

III. ENVIRONMENT SPECIFIC PRINCIPLES

1.POLLUTER PAYS : -RESPONSIBILITY FOR CAUSING POLLUTION & CONSEQUENTIAL COSTS -THAT ENVIRONMENTAL RESOURCES ARE NOT "FREE GOODS"-THAT ENVIRONMENTAL IMPACTS OF ANY AND EVERY HUMAN ACTIVITY OUGHT TO GET EVALUATED AND ACCOUNTED FOR- BASIS FOR POLLUTION CONTROL LAWS

2. PRINCIPLE OF PRECAUTION: - Prin.15 of Rio- Declaration

KEY ELEMENTS OF THE PRINCIPLE: - ANTICIPATE ; AVOID ; ATTACK AND EXPLORE ALTERNATIVES, TO AVERT/REDUCE SERIOUS AND, POSSIBLE IRREVERSIBLE ADVERSE ENVIRONMENTAL IMPACTS- WHERE THERE ARE THREATS OF SERIOUS AND IRREVERSIBLE DAMAGE,LACK OF SCIENTIFIC CERTAINTY SHOULD NOT BE USED AS A REASON FOR POSTPONING MEASURES TO PREVENT ENVIRONMENTAL DEGRADATION

BURDEN OF PROOF: THE BURDEN OF PROOF OF HARMLESSNESS OF A NEW TECHNOLOGY, PROCESS OR ACTIVITY LIES WITH THE PROPONENT AND NOT ON THE ONE INITIATING LEGAL ACTION AGAINST HIM –" LOOK BEFORE YOU LEAP!"

Having referred to these four general principles of law, we want environment specific principles. About half a dozen environmental principles laud over all the legal formulations and policy perceptions all over the world. If you have mastered these half a dozen principles, understanding the law becomes the easiest task. And I can tell you for sure, that each and every principle is rooted in common sense, applied in special circumstances.

Take for example, the first principle, the ‘Polluter pays’. I do not think it requires any explanation. One who is polluting has an obligation to pay for the damage that he has caused, which is the other way of saying that when you are dealing with environmental resources, you have to act responsibly. That you do not have a right to pollute, there is no right to pollute, you have an obligation not to pollute.

But should you pollute?

Well, you have to pay the clean-up cost, because, like you, the others are also entitled to use this environment. They have to derive the benefits of the good aspects of this environment as you have enjoyed, as you are enjoying. And so, you shall have to keep it intact, you have to keep it clean. You shall not cause pollution.

So, there is nothing like a right to pollute, but an obligation to pay for pollution. And if you are not able to clean up by yourself, well, you have to engage somebody who would be doing that specialized task of cleaning up on your behalf and for which you have to pay him. So responsibility for causing pollution and the consequential costs are very much imposed on the polluter. It is the other way of saying, the environmental resources are not free for all, they are not free goods, they do not come in such a way that you can do anything and everything that you want to do about that. The entire responsibility, you have a duty not to pollute.

Every human activity invariably has some kind of an impact on the environment, and these impacts that a particular activity of a human being need haveto be accounted for, but if it is going to have a good impact, if it does not cause too much of a damage, no problem. But if it causes any kind of a damage and one is the cause for that, the resultant effect is the reduction of the integrity and value of that particular resource, degradation in some form or the other, then you have to make up for a lost value, the reduction in the value of that environmental resource. In fact, the polluter pays principle is a very basis for all pollution control laws that we have all over the world.

And so, in interpreting every pollution control regulation, it is very easy to see whether the prohibition that has been mentioned there deals with a particular kind of pollution, a particular source of pollution and what are the consequential actions resulting therefrom for those violations.

Principle number two -the ‘Principle of Precaution’. This is fairly a recent principle from about some 25-30 years life or a little over 30 years. It is actually reflected in principle 15 of the Rio Declaration of 1992.
What is this principle of precaution? In what way it is different from the principle of prevention? Prevention or preventive action which we saw earlier refers to certain measures that should be taken to ensure, to prevent a damage being caused or when damage starts occurring, minimize the damage. But what about the principle of precaution?

Principle of precaution is a principle for one to act with caution. Act with caution? How? There are four key elements to it; anticipate, avoid, attack and explore alternatives. When an intended course of action of someone is likely to cause damage to environment and environmental resources, you have not started the action yet, nothing has started, but you are proposing it, you have just begun planning, but before you get into execution of that particular proposed course of action with the kind of approval that the government or the governmental agency has given to you, before you start a particular kind of a developmental activity you must look into the pros and cons of this particular activity, even before it has planned.

You must anticipate, think in advance and act in advance. Act in advance? How? Like for example, I would like to carry out certain experiments with regard to your particular species as a plant variety for working on the genetic character of that certain kinds of undesirable qualities that are there in this are removed and certain other qualities which actually give it more immunity are inserted. A welcome thing, I can do that.

But then before I do that, please look into all the consequential effects of your action. Your intention is to improve that particular breed or particular variety of a plant or an animal life. No problem. ‘This is free, more production, better yield.’ These are the justifications as to why you would like to get into that experiment, genetic engineering as you call.

But then before I do that, I need to assure myself and the rest of the world that when I carry this out, is it full proof? Is it assured that this action of mine would actually produce that result? Is there any uncertainty about it? What if it produces just the opposite result? Instead of improving the quality, the very species lost, it gets extinct.

Then, in such cases, where there is a threat or a danger of losing the very resource itself, you must anticipate that and avoid. That is the second component of the principle -Anticipate. And should there be a consequence, which is just the opposite of what you intended, avoid it. Because you would not reach the goal. You are planning to go from one particular place to another from X to Y, but if you start in a opposite direction and start moving in that direction, and if you plan to move it in the, move in the opposite direction, if you are not able to reach Y, instead of reaching Y you reached Z, then avoid it, as simple as that.

The third component of this particular principle is attack. I have taken all precautions, I have taken all such measures that are required, but still there is something that is happening and it is damaging, it is not just a threat, it is just next door, it is just immediately before me then I have no choice. I cannot keep quiet and fold my hands, I have to attack it. Attack it for what?

Attack with all your mind to see that it shall not invade, it shall not cause any adverse effect. And so, you stop at the threshold level. Attack - the fourth component. The first three I just mentioned actually refers to one not undertaking an activity at all.

The impression one gets is that the principle of precaution is a very harsh principle that it shall not encourage development. Every developmental activity would incur some risk or the other. And look, you have a principle if it causes damage, if it is going to cause harm, then avoid. Does it mean that you shall not have any more development? You relieve the environment in a pristine pure environmental condition? Not exactly.

The quintessence of the principle is in the fourth component - explore alternatives. You have planned a particular activity and you have thought of a particular course of action to achieve your goals, but that particular course of action is ill advised, illogical,it will not produce the results. Then, should you avoid the project? No, no. You can still carry out the project, but look for alternatives.

Remember, Thomas Alva Edison said long time back, when I begin an experiment to come up with a product, when I fail, I think and I will not regret about the failure and abandon that particular activity, particular experiment. I will think that there are 1000 other ways and means whereby I can produce that product and let me explore that. This is precisely what the

principle of precaution is about, that you explore for alternatives. That look you wanted to have a heavy industry to be established in a particular locality.
You have the money, you have all the other resources, you have the manpower, you are able to start work hold on, see whether that particular site on which you are going to have heavy machineries moving in and a heavy construction coming up, is it strong enough as to hold? Will it be able to hold all the weight and the superstructure can come up? If so, go ahead. But should you find that this is a particular area which is seismic, prone to earthquakes, all your efforts would come to knot.

You have planned a particular developmental activity, but location is ill suited and so, it is ill advised, you look for an alternative. The same activity if you can carry on in an alternative location with all the safeguards put in place, go ahead.

So, the principle of precaution, if one follows it carefully is a principle for a very careful, scientifically calculated and well rationalized program of action. And through those logical, analytical understanding of a particular activity should one come across a hurdle, better stop it. Is this a principle that is applicable for all cases? No. The examples I gave you must have given you a hint that this is a very powerful principle, which cannot be applied in all situations, it should be applied only in such situations where the consequential effect of a proposed course of action becomes irreversible, you cannot trace well, steps back.

But once you start, you have to go all the way, and as you go all the way you lose track, you lose the direction, you do not reach the goal. You wanted to develop a particular variety of a plant, but this particular proposed course of action or experimentation is actually going to lead to the very demise of that particular resource, the extinction of that particular variety, then what is the point?
And so normally, this is applied in such cases where species and varieties of plants and animals are going to become threatened with extinction, or very severe damage to that resource as not to allow you to achieve your goals. A very important principle. In fact, this is the basis of all the environment impact assessment laws that we have now.

So, where there are threats of serious and irreversible damage, then there are no signs to support your plan that it would be able to result in a particular goal, abandon it, or postpone it till such time you have come up with better technology, better mechanism and better means

to achieve your goal. So, this is a wonderful principle, which seeks to put in an element of rationality in the entire exercise of a particular kind of an activity. The caution, the preparedness, the preparation that is very much necessary to avert any kind of irreversible environmental damage.

So, the one who is proposing such a kind of an activity will have a primary responsibility of establishing that what he has proposed is safe. What he is coming up with and putting into application is not going to harm the environment in any adverse way, that there is always a scope for retracing one's steps and bringing the corrections as and when required, and there is no question of loss, degradation or irreversible damage to the environment.

This is a very interesting legal position because to establish that my proposed course of actions are harmless I need to prove that it is harmless. It is a kind of an exceptional principle, an exceptional rule in the adjudicatory processes that we have, in the litigative processes as we call or in the court cases that we have.

As a general rule, when somebody charges another one with a particular offending act like 'so and so has killed somebody, so and so has caused damage to the property of somebody', the one who is making that complaint has the obligation of proving the person against whom that charges made, we call them as 'accused'.

I have to prove the accused is wrong and produce all documents and evidences that will actually support and corroborate what I have asserted, what I have charged, what I have accused him of. So the burden of proving his guilt is on me. This is under the normal criminal justice process that we have. You have a reversal of that in application of the principle of precaution.

Here, if I am the one who is getting into a particular kind of a technological process or an activity of this kind that I just mentioned, the burden of proof of my activity as harmless is on me. It is not on anybody else or even the state to say that what he is intending to do is harmful. So, it is the other way of saying that I had to prove my innocence so as to get the approval for carrying on a particular kind of an activity.

Exceptional circumstance, when the damage is severe, when the damage is such that you cannot retrace your steps, it is irreversible. The common sensical say, “look before you leap” is perfectly applicable to this principle of precaution.

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We move to a third important principle wrongly numbered as number four, it should be number three - the Principle of Sustainable Development, ‘SD’ for short. Please recall, in the lecture on the evolution of environmental law, there was reference to the constitution of a high powered committee to really come up with a report - a report that would actually satisfy the needs of the developing countries and the demands of the developed country, facilitating development at the same time taking care of conservation concerns, promoting development, the responsible development, and at the same time ensuring that environmental resources and their integrity are not affected and for that, a formula was to be worked out, and for which purpose this particular committee was constituted, as you recall, the ‘Brundtland Commission’.

The report, as was mentioned earlier, was titled ‘Our Common Future’. And in that, the very foundation, on the basis of this particular report is the principle of sustainable development. What is sustainable development in the words of the Brundtland Commission Report? I am reading it for you from the work, Our Common Future ‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. A very beautiful report, and very thoughtfully articulated.

It is that kind of a development that should be encouraged, that should be promoted, that should be facilitated in all global meets and to be taken back to the respective national legal regimes promoting only that kind of development that would satisfy all the requirements of present generation, but while doing so, taking care that similar such right of the future generations to develop are in no way affected.

There is a temporal dimension to this particular principle. It refers to the generation past, the generation current and the generations in relation to environmental resources, all the three generations have rights in relation to resources.

The resources that we have, the present generation, is not something that is created by them, is not something that is owned by them, is not something that is produced by them, that has already been there before they came on earth. It has been the legacy that has been passed on to them by the previous generation, generation past to the generation current.

That means, since you do not own that resource, but you have only a right to derive benefits out of that resource, then you should work this resource and the system in such a way that you only derive benefits without affecting the intrinsic value and worth of this resource because this resource should survive and this resource should be available for future also for future generations of people to come and use these resources for their wellbeing, for their welfare, for their development.

You have a right to develop, you have a right to use resources, but your right to use your resources should not be at the expense of the similar right of the future generation as well that of a stakeholder, like you are a stakeholder over these resources. Around this particular principle, four sub-principles are woven round?

The first one is the principle of intergenerational equity.

There is an element of equity involved in use of resources. Resources are for use, for me, you and everyone in our present generation. But these resources, since we do not own, our right is only of a use right. Use so much, as to meet our needs, our requirements of the day, but leave out the corpus impact. It is almost like money deposited in the bank in a fixed deposit and this money is not deposited by me, but it has been there since time immemorial with only a

concession given to me, or a right given to me that I have a right to use what is referred to as in pure banking terms, the interest on that principle amount.

Only the interest that I can use. I should keep the principle intact. Why? Because this principle should always remain there, not only for my use, but for those who come after me as well because I do not own the principle, but I have every right over the interest.

In pure ecological terms, this has been explained as 'ecological surplus'. Every environmental resource, the bounty of nature is such that every environmental resource produces something or another for the benefit of humankind. And whatever it produces, the fruit, the flower, those produce that come out in the plant, I have a right to use. I have a right over the fruit, but I do not have a right over the trunk or the root. I can not cut it off. I have to nurture it because I have to draw the fruit and use it for myself.

And so, my right of use is limited by my entitlement to use it without affecting its integrity. There is an element of equity involved, equity to me, to my generation and equity to future generations as well, intergenerational equity.

The second component of this principle is, the principle of sustainable use. You have a right to use the resources. You have a right to use the resources without exhausting the resources. Right? For the obvious reason that this particular resource that I am using now is always available for me to use. By using the ecological surplus, I will keep the ecological resource and the ecosystem intact. I can use it constantly, consistently, perennially for all times to come. I can use it for all times to come, which is the other way of saying sustainably use it.

The resource should sustain itself, it should be able to provide you those resources for your use and also for those who come after you. So, the aim should be for the exploitation of the natural resources in a manner that is sustainable. The resource should be able to hold on in a manner that is judicious, in a manner that is appropriate, in a manner that is rational. Every resource, in pure ecological and economic terms, is supposed to have what is called as a 'carrying capacity'. Carrying capacity - capacity to carry stress, load or burden that while you exploit the resource of course, it actually causes some damage, but nature has a wonderful mechanism, a wonderful mechanism of curing itself, healing itself and regenerating itself.

And that capacity to regenerate, that capacity to heal should never be affected. That is called carrying capacity.

So, beyond a particular level of resistance, the ability to take on the load or the pressure, one should not strain that resource. There are scientific calculations available, there are economic formulations available to determine the carrying capacity of a particular resource of an ecosystem and things like that, based on that you can exploit the resources.

And so, use the resource, exploit the resource, but not exhaust it. That is a sum and substance of it, because the resources should be available all times to come in a sustainable way. Sustainable use is a second component of this principle.

Many a time, people have expressed doubts in my discussions with them that 'what are you referring to? That the resource should not be exhausted? But do you not know when you are talking in ecological terms or in economic terms that not all resources are the same? Some are exhaustible resources, perishable resources, they have to be consumed and over a period of time they get exhausted.?' So, there is no question of them either getting replaced or being available for recycling or reusing or anything like that.

So, sustainable use principle is inapplicable in such cases of resources, which are exhaustible, which cannot be renewed. There is no question of the restoration there. For that, my answer is simply this, sustained use principle is applicable there as well. The clarion call given by this particular principle is for a very judicious and scientific application. The renewable resources are renewable anyway, but non-renewable resources also need to be used prudently, need to be used judiciously.

And once you know that this is the resource that is exhaustible, maybe in another 20-30 years like petroleum what should be the ethic that you should practice when you are going to use this particular resource? You should plan for sustainable use. How do you plan? How do I plan?

Well, the planning should be such that you stagger the exhaustion with the science and technological progress that we have now. It is quite possible to look for supplements and alternatives as to reduce the pressure on petroleum and its use, the exhaustible resource, the

non-renewable resource. And thereby, instead of exhausting it in another 20 years, if you should postpone it for 30 years. Say for example, in the case of petroleum, you get an additional 10 years' time. Then what happens?

Well, the human brain is such a wonderful device or an instrument. Given some time, it shall be able to come up with certain new things, it will come up with innovations, it will come up with inventions, and the alternatives that you are able to get, a number of options that you are going to have would be such that you do not need to depend on petroleum at all in the days to come, just a simple example.

In case of renewable resources, do not exhaust them. In case of non-renewable resources, stagger their exhaustion. And with that kind of rational application and use of resources there is always a scope that your objective of reaching a particular goal is always achieved without any late hindrance or difficulty.

The third component, alongside the principle of intergenerational equity is the principle of intra-generational equity or equitable use. We are only talking about equity across generations. The right of the present generation to use is similar to and in a way superior to the right of the future generation so that is fine.

But what about the present generation? Within this particular generation, can you allow some of us to use more and others would have to use less, and through the law of averages we are going to use whatever was allocated our generation? Is that what you mean by the principle of sustainable development? No.

The principle of sustainable development, along with the principle of intergenerational equity also contemplates intragenerational equity our equitable use of natural resources is applicable within the present generation as well. Each one according to his need is one of the guiding principles of this particular rule.

And so, when it is applied amongst the nations, use of resources by one state, even its own resources, should be such that it should take account of the needs of the other states as well. Oh, you are talking of an ideal principle. Well, one is talking about an ideal principle. But this was considered to be a very pragmatic principle and accepted the world over right from

the 1992 Rio de Janeiro Conference and thereafter, it has been brought into application in a host of international arrangements and put into application already.

The Climate Change Convention, for example, has at its very root this principle of intra-generational equity, the principle of sustainable use, the principle of intergenerational equity the entire sustainable development principle as an integral aspect of this particular principle.

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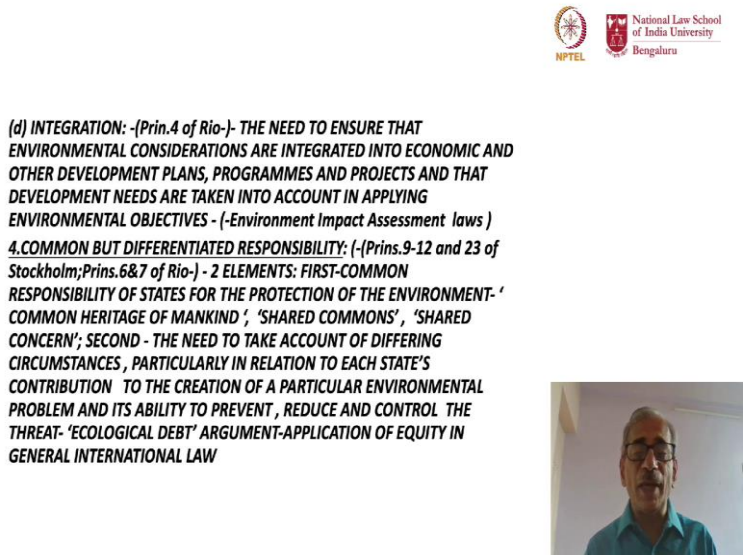

The fourth component, the principle of integration. It is the fourth principle under the Rio Declaration, and it is very simple. It is very necessary that when you think of sustainable development, operationalization becomes easier only when these environmental considerations as I have mentioned of sustainable use, intergenerational equity and intragenerational equity are integrated into the working of all without any single exception on economic and developmental plans, programs and projects and meeting of those developmental needs in the entire country.

That means, in every sector of governance, this should become an integral aspect of it. And it is not just confined to one particular resource for all resources. In fact, the Environment Impact Assessment Law has integrated or engrained this particular principle. That is one reason why, when governments are there all over the world, when you have so many departments working, the expectation is these departments and these ministries or whatever that they have are made to operate in such a way and function in such a manner that they're going to function in a cohesive, coordinated harmonious way so that there is no overlap in

jurisdiction, there is no conflict of jurisdiction and the principle of sustainable development, if it becomes the moving mantra for working amongst all these departments, then you will have a better environment to live and that is part of the environmental impact assessment law.

So, all developmental activities go through this environment impact assessment requirement, the major ones and in which case are only upon satisfying it, the clearance for carrying on that particular developmental activity is being given.

We move to the fifth principle, sorry the fourth principle, the principle of common, but differentiated responsibilities.