Constitution of India and Environmental Governance Administrative and Adjudicatory

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Module 01

Lecture 07

Theoretical Moorings, Sources and Evolution - Part 06

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The fourth foundational law is the principle of common but differentiated responsibilities. This principle was first enunciated in the Stockholm conference in 1972. In the Stockholm declaration, a combination of four principles; principles 9 to 12 and then 23 and then later reiterated and put into far more effective application, both in terms of laying down the norm and also coming up with legal instrumentalities for operationalization in the Rio Summit in Principles 6 and 7 of the Rio declaration and two of the major conventions that was awarded in Rio de Janeiro.

What is this principle of common but differentiated responsibilities? It stems from the general assertion about the environment as a whole on Earth, something which is common for all, like the atmosphere, the seas or the oceans, which are not going to follow the cartographic barriers of the nation state system, do have something for every nation state system. And so, these are common property resources, common concerns, common heritage of the humankind. That is how they visualized at the very basis of the initiation of this particular principle.

The principle has two elements; since we have environmental resources, which are shared commons, common property shared amongst all community of nations, shared not in terms of division of property, but shared in terms of concern, concern to protect, conserve, preserve, maintain, manage and improve its quality, a shared concern to ensure that its integrity is not lost not just for this present generation, but for all generations to come. And it imposes a common general responsibility for all the states for the protection of environment that is the first component.

The second component is that while we have a common responsibility amongst the nations, we do have different economic conditions prevalent among different nations we have. A small group of nations, which are highly industrialized and developed. And so, huge economies and a large number of states, which is actually a combination of leaders among the developing nations, underdeveloped nations, less than developing countries. When you have that kind of a disparity, both in terms of economic abilities, technological accomplishments, and also in terms of the standard of living, the standard of living amongst the people in each and every country. With that kind of differences that exists in economics, social fabric of community of nations, it is very necessary that although the responsibility is commonly shared, but in terms of taking the load of responsibility, like it is done in the case of United Nations, where there are 5 permanent members who take more responsibilities, because they are the ones who can take that load because of their military might, because of their economic progress, because of their technological abilities and the kind of influence that they have in international relations. And so, the primary responsibility of maintaining international peace and security vested in these five nations much more than other nations.

So is the case with regards to the responsibility to take care of the environment and environmental concerns and addressing them making contributions both in terms of technology and in terms of finances that is required for managing the environment. The shared commons, the responsibilities or differentiatedd, differentiated, taking into account differing circumstances, particularly in relation to each state's contribution to the creation of a particular environment problem and its ability to prevent, reduce and control the threat.

Look at that, apart from their economic abilities tagged on to this is this particular aspect that because of their desire to develop at any cost, economically they have been able to exhaust many, many resources, not just in their own countries, but exploit their own resources but also in other parts of the world so that they would have caused a lot more stress in the

environment than the rest. Their contribution in relation to the creation of an environmental problem far greater than the rest of them.

And secondly, many of these industrialized and developed countries having the greater ability because of their economic might, because of the resource's availability aplenty with them, because of the technological advancements that they have made to prevent, reduce and control the threat to the environment. So, taking all this into consideration, they have to take more responsibilities, although the responsibilities are shared amongst nations.

Principle of common but differentiated responsibility, that means undertaking obligations for more in case of many of those who can afford, many of those who have been contributing to the environmental damage, more than anybody else, and the rest who are sharing the concern, but taking responsibilities to the extent that they are capable of and ensuring, together by arrangements of apportionment of responsibilities, a better environmental quality than what it is now in existence.

So, it was a kind of a glorious compromise between the demands of the developing countries to develop and having less resources to make an investment in and the demands or the concerns of the developed world that so much of development has occurred, it is time to cry a halt to unplanned development, unsustainable development, in order to sustain development in an environmentally benign way. And to bring in that kind of a compromise this principle was worked out, the principle of common but differentiated responsibilities.

Underlying this particular principle is the very idea of what is referred to as the ecological debt. Ecological debt of some of these countries described as the industrialized and developed countries that because of their increasing exploitation and industrialization and more stress in the environment, they have exhausted more resources than what they should have done. Equity demands that they owe a debt to the environment. It is an ecological debt.

Historically, they have contributed so much to the emissions in the global commons over the atmosphere, historically speaking, they have created more waste, and they have actually dumped it in other countries than the place from where they have originated and so it is time that they take the responsibilities of doing everything possible that is allowed under the economic system and their abilities to contribute, to cleaning up, to improving the quality of environment and at the same time, reduce their ecological burden, this ecological debt that they owe to humanity, that they owe to the Mother Earth need have to be cleared in a phased

way, and the details needed to be worked out through international environmental legal regulations.

So, for the first time, it was put on the centre stage of global negotiations. A major and an important principle rooted in equity called the Principle of Common but Differentiated Responsibilities and brought into application and working in the Rio Summit in the year 1992, when they came up with two major international environmental agreements, one on climate change and another on biological diversity.

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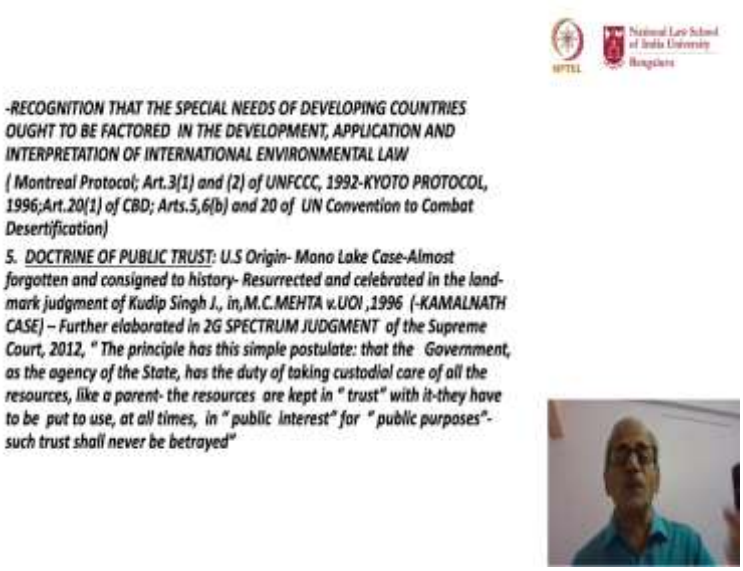

Recognition that the special needs of the developing countries ought to be factored in the entire developmental process. And this is a very important aspect of interpretation of international environmental law, that when you get into arrangements, see that equity is going to all, that one is not made to take more responsibilities than one can afford than what one has contributed to the environmental damage.

And so, it has to be apportioned in an equities manner, that the one who can afford, the one who has caused more damage will take more responsibilities and the one who is not able to afford and who is not the cause for this will take less strain, less burden, and perhaps he helped in adopting those technologies, those state of the art technologies and mechanisms, which are more environment friendly in its industry and developmental processes, and would get the economic resources internationally contributed through a particular funding mechanism, contributions coming from those who can afford to be utilized for this particular

purpose.

And that has been integrated in a number of international environmental agreements. As I was mentioning, the climate change convention of 1992, the biodiversity convention of 1992 and even much earlier in a very limited way. Seven years before this particular principle took the centre stage, the United Nations Framework Convention on protection of the ozone layer, put into application through a protocol called as a Montreal Protocol in 1987. More about these details we will get when we get into a detailed discussion on climate change and biological diversity in a separate module, two modules actually dealing with that.

The fifth major principle is the Doctrine of Public Trust. I must state here the contribution of India, especially the Indian judiciary, in the evolution of this particular principle, and its crystallization for application is non-paren. This particular principle had its origin in one of those county courts in the United States of America, somewhere in the middle of 19th century. It was a case called as a Mono Lake case. And the same United States which is the originator of this particular idea forgot about it for almost more than a century. And it was actually taken out of the ash cans of history, brushed, cleared, resurrected and celebrated in the landmark judgment laid down by Justice Kuldeep Singh in the M.C. Mehta verses Union of India in the year 1996, in the Supreme Court of India.

What is this principle about? And how did it evolve? Is it still the principle and currency? What it means to environment and environmental management? Is it such an outstanding principle as to really deserve the position of the foundational norms of environmental governance? Well, in terms of clarity, understanding and application, two major cases we needed to note. One is the M.C. Mehta case of 1996, which actually started the entire discourse on the public trust doctrine. And then much later in the year 2012, another judgment of the Supreme Court, which elaborated profusely on the principle of public trust in the 2G spectrum judgment.

What I should be doing right now is to very briefly refer to the facts of the case in the M.C. Mehta of 1996, and then elaborate on this principle as to what it conveys and how it is being brought into application. A small resort on the banks of the river Beas up in the north of India is at the focus of a litigation in this particular case, MC Mehta verses Union of India. The owner of the resort, one who want to expand the business, and they had very limited land with them at the disposal, but right very close to the resort, there was this river flowing. And

what they thought was that if the rivers course, the natural course of the river, if it were to be diverted a bit so that more additional land would come would be available.

And very close to this resort, there was huge forest area, and if this forest area is going to be made available for them to expand, there will be more business and there will be more employment, and there would be a boost to the economy in that entire region, that was their objective. And so, with that objective, they approached the state government to give them the necessary permission for acquisition of that forest land and also the permission to divert the riverine system so that they will get more land. And they will pay for that, whatever the cost of acquisition, they will be ready willing and interested in paying.

And once they acquire, they would expand on their resort activity. The irrigation department and the water sources ministry declined to give the permission because the law made it very clear under the state law that a river should be allowed to run its natural course, it cannot be diverted, it cannot be changed, it cannot be stopped, it cannot be obstacled, for any reason other than for a public purpose. If the state interest is involved, if the public interest is involved for the purpose of the public that can be diversion of the riverine system, but hear is a private resort owner who is interested in acquiring this land, and so it is for a private purpose, permissions cannot be given.

The forest department, similarly gave its opinion and negative any kind of effort on the part of this industry to expand because forests are national wealth and forests cannot be diverted for a non-forest purpose, because there is a very clear law, which does not allow any forest land to be diverted for a non-forest purpose. And the state does not have the power of such a kind of a diversion. And if it all that has to be done, it has to be done by the Central Government and the appeal would lie to the central government for such a kind of an action. The state does not have the jurisdiction.

The industry was a very powerful industry. They went all the way up to the central government. They made it happen application to the central government that look, what we are intending to do is not just a mere expansion of the industry. Of course, we want to expand our industry. If we expand our industry, it is a hospitality industry, and the kind of features that we create would attract scores and scores of tourists to this particular place. International tourists would come and that would actually give us a lot of green bucks, dollars, and dollars would contribute to the economy of the nation, foreign exchange reserves would be enriched.

And through this expansion, there will be more employment, the local people would get more employment. And in a nation where development is the mantra that we have, we are actually providing the investment, the money that is required and we are having the wherewithal to provide employment to the people. And so, this is a good economic model that we are presenting and we should be allowed to carry it out, there cannot be a better, greater national interest than earning foreign exchange for the state, there cannot be a better and greater public interest than getting employment to a large number of people and so came the considerable application and approval of this particular project.

We are sure that once these are acquired, we will ensure that there is a proper embankment of the river which used to have floods during the rainy season, causing devastation to the neighbouring area. We will take care that the resources are protected and taken care of and are not going to be harmed anymore. We will take such measures, environment friendly measures, kindly give us the permission. The application was before the environment ministry in the Central Government.

And lo behold! the environment ministry gave them the function and they went on with the intended developmental activity, the resort expanded, the riverine systems' course changed, the forest was cut, there was concrete structure coming up there and so it was doing flourishing business. At that moment, a young lawyer by name MC Mehta appeared before the Supreme Court, presented a public interest petition stating very clearly that here is an activity which is totally detrimental to the environment.

At the cost of Environment, a developmental activity is going on and the central government erred in giving permission without really taking note of the environmental devastation it would cost. When the government authorities were summoned before the court of law, when questioned, the governmental authority said that we have these concerns, and we have already factored these concerns, before we gave the clearance, we are the environment ministry, and nobody knows other than us better than us to really think about environmental concerns. We have looked into all these and we have still given the clearance, which clearly shows that whatever little harm that is caused to the environment that could be reduced.

And the kind of benefits that we are going to gain is far in excess of the environmental inconveniences that we are going to experience. And here, the lawyer came up with a stunning revelation that if everything was fine, environment is taken best care of, and still

developmental activity was allowed to continue, we would not have had any problem. There was objection by the state government, there were objections by the concerned ministries, which had something to do with water and forests, because they were coming directly in conflict with these regulations and still the environment ministry at the central level clear this project, and there must be something much more than meets the eye.

And if you carefully look into the proprietorship of this particular industry, the real reason behind this will come through and that is the environment minister, his family itself is interested in this particular industry. An interested party cannot be a judge in his own cause. And here, the ministry should not have given the clearance because it would favour the ministry himself. The real rationale behind the justification for clearance, environmental clearance when the environment ministry lies here, and so the court should intervene and do environmental justice in this particular case, and redresss the damage caused to the environment.