

Constitution of India and Environmental Governance:

Administrative and Adjudicatory Process

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Lecture No. 10

Constitutional Scheme of Environment and Natural Resources Management

From the inquiry that is rooted in the British traditions spilling over to independent India with regard to environment and natural resource management, we come to the Indian law as reflected in the fundamental law of the land, the constitutional scheme of environment and natural resource management, quite unlike the previous part of our enquiry where we reflected on something that we borrowed and continue to adhere to adopt. And in turn observe in our whole scheme of governance by the British left with us. We get into something which is a brand Indian law how does the brand Indian law look like?

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I. THE FRAME



- VISIONARY DOCUMENT OF FAITH AND FUNDAMENTAL LAW OF THE LAND, STEERING EVERY CONCEIVABLE HUMAN ACTIVITY & ITS RELATIONS WITH RESOURCES
- IRONICALLY, DID NOT CONTAIN THE WORD "ENVIRONMENT" OR CONCERNS FOR ITS PROTECTION, FOR WELL OVER 25 YEARS OF COMING INTO EXISTENCE
- NONETHELESS, HAD A SOLID BASE AND LAID DOWN THE TEMPLATE FOR LAW-MAKING AND GOVERNANCE AT DIFFERENT LEVELS, THROUGH THE LIST OF SUBJECTS UNDER DIFFERENT HEADS (-UNION, CONCURRENT & STATE-) UNDER SCHEDULE VII, BESIDES AUTONOMY OF GOVERNANCE TO COMMUNITIES OF PEOPLE UNDER SCHEDULES V & VI
- BY RECOGNISING, RESPECTING TRADITIONS, CUSTOMS AND PRACTICES OF THE COMMUNITIES OF PEOPLE AND THE CONTINUATION OF THEIR GOOD PRACTICES, IT BROUGHT IN PEOPLE TO BE PART OF ENVIRONMENTAL AND NATURAL RESOURCE GOVERNANCE, IN INDIA



Just look at the frame it is a visionary document a document of faith, a basic fundamental law of the land that steers every conceivable human activity and its relations with all the resources that we have. But come to think of it when you really think of an ideal document there cannot be anything comparable to the Indian constitution. It is supposed to have

everything that we aspire for.

And we want to actualize in an independent India burning with the spirit of independence immediately after liberating ourselves from the colonial yoke. But just think of it that this constitution when it was drafted and inaugurated, the first 25 years of its existence did not contain a single word of environment or concerns for environmental protection. Actually this has given way to a number of understanding and interpretations. And one strong school of thought that has gone to describe this is that the constitution was environmentally blind for well over a quarter century and it is only much, much later the environment become part of the constitution of India as more as an afterthought is the truth.

There is another school of thought which says just because the constitution did not refer to the word environment anywhere to start with. it does not mean that it did not have any environmental concern or anything like that it was just that at that time when we became independent, environmental crisis and environmental concerns were not that dominating as many other conflicting claims, competing claims that demanded the attention of those who held the reins of authority in a state and those who crafted the body of law.

And so obviously, they have not mentioned the word environment, but you could see as you go deeper into the understanding of every aspect of the constitution. It was an integral aspect of environmental concern not just because that word appeared much later than there was some kind of new thinking or awakening. I would rather prefer to take the second position rather than the first school of thought.

Because if you examined the constitution as a whole, a broad template for law making and governance at different levels has been put in place under the constitution. The Centre could make a law, the state could make a law on different aspects of natural resources and if natural resources is environment then what are we talking about and these environmental aspects like water, air, land, forest and wildlife what to be legislated upon at different levels either by the State or by the Center.

Then obviously the environmental concern for the environment was very much there although that exact word was not used for a pretty long period of time and if you further closer examine the constitution you would see that this is this constitution of an independent

nation that recognized and respected traditions, customs and practices of the communities of people that were environment friendly and allowed them to continue and also made people part of environment and natural resource governance in India and if you really buy this idea then you do not have a better frame than Indian constitution which was that inclusive feel about environmental governance than any other system that you can think of.

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- 42nd AMENDMENT TO THE CONSTITUTION, USHERED IN AN "ENVIRONMENTAL AWAKENING", BY MAKING BOTH THE AGENCIES OF THE STATE AND THE PEOPLE, FOCUS UPON AND REALISE THEIR ROLES AND RESPONSIBILITIES TOWARDS THE ENVIRONMENT
- 73rd and 74th AMENDMENTS TOOK IT FURTHER DEEP BY BRINGING IN THE LOCAL GOVERNMENT IN THE WHOLE SCHEME OF ENVIRONMENTAL AND NATURAL RESOURCES ADMINISTRATION



Let us unravel the details of it as we go along. Of course it is true that it was only much later somewhere around bit 1970s an amendment came to the constitution the forty second amendment to be exact. It ushered in what they claim has an environmental awakening because for the first time the word environment appears in the constitution and how did you do?

In a very big way by making both the governmental agencies and the people to pay much more attention to environment and perform certain functions in relation to the environment to protect upkeep, maintain and manage their live. This went a little further a little over a decade later, two more amendments came to the constitution the seventy third and seventy fourth amendments, this environmental concern for both the people.

And from the government was taken to a different level of making even the law used to run

by the ladder of governance through an amendment two amendment actually the seventy third and seventy fourth amendment of decentralizing environment and natural resource administration in India. Let us get into the details now.

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II. FORM AND SUBSTANCE



- 1. LAW-MAKING POWER AND GOVERNANCE:

(a) LISTS (Art. 246) - SHARED RESPONSIBILITY BETWEEN CENTRE (-CENTRAL LEGISLATURE) AND STATES (-STATE LEGISLATURES):

- (i) UNION LIST: SUBJECTS OVER WHICH CENTRE HAS EXCLUSIVE POWER OF MAKING LAWS - NATURAL RESOURCES THAT ARE INTER-STATE IN NATURE AND EXTENT (- LIKE, INTER-STATE RIVERS AND DISPUTES IN RELATION TO THEM) AND MINES AND MAJOR MINERALS
- (ii) STATE LIST: ALL NATURAL RESOURCES - LIKE, LAND, WATER, WITH IN THE RESPECTIVE STATE TERRITORY
- (iii) CONCURRENT LIST: SUBJECTS OVER WHICH BOTH THE CENTRE AND THE STATES CAN MAKE THE LAW - LIKE, ANIMAL WELFARE, FORESTS AND WILDLIFE



If we are looking to the power of making law, it is divided between the Centre and the State. We have 3 tiers of governance, the Centre at the apex, the state at the middle level and the local government at the third level, 3 tiers of governments. Of these 3 tiers of governance the first tier have the power of making the law the Centre can make a law the state also can make a law.

And the entire power of making a law is distributed between these two through a schedule wherein all the list of subjects that could be legislated upon on given under 3 broad categories. As you could see in this slide the shared responsibility of making law between Centre and the states is in 3 lists. The first one is what is referred to as the Union list the subjects that are there over which the Centre has an exclusive power of making laws.

Natural resources that are of inter-state in nature that goes beyond the particular state's jurisdiction an inter-state river for example and any dispute in relation to that over that states cannot make a law. It is only the Centre can make a law because it is inter-state and major minerals and mines and mineral activities to a large extent is a subject that is being handled by a central government in terms of making a law and its administration.

There is a second list which is what is referred to as the State list all the list are subject in fact all natural resources which is very much within a jurisdiction of a particular state like land, water exactly left to the respective states to make their own laws on that it is a third category.

It is called as Concurrent list. Look at the beauty of the law here there are many natural resources over which in this particular list which is referred to as concurrent list.

There are subjects over which both the Centre can make a law and the state also can make a law. Forest and wildlife is one such example.

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- (iv) ALTHOUGH, BOTH THE CENTRE AND STATES CAN CONCURRENTLY LEGISLATE UPON SUBJECTS IN THE CONCURRENT LIST, THE LAWS OF THE LATTER SHOULD BE IN CONSONANCE WITH THOSE OF THE FORMER. IN THE EVENT OF CONFLICT, THE LAWS MADE BY THE CENTRE WOULD PREVAIL.
- (b) RESIDUARY POWER OF MAKING LAWS OVER SUBJECTS, NOT FOUND IN EITHER STATE OR CONCURRENT LIST, RESTS EXCLUSIVELY WITH THE CENTRE(Art.248)- LIKE, ON MATTERS CONCERNING, "ENVIRONMENTAL PROTECTION".
- (c) CENTRE HAS THE POWER TO LEGISLATE UPON A SUBJECT COVERED UNDER STATE LIST, IN NATIONAL INTEREST.SUCH LAW WOULD HAVE A LIFE OF A MAXIMUM OF ONE YEAR, WHICH CAN GET EXTENDED, FROM TIME TO TIME(Art.249). IT HAS A SIMILAR LIFE , DURING THE TIME A PROCLAMATION OF EMERGENCY IS IN FORCE(Art.250)



But here there is a catch where both the Centre and the State can make a law whose writ will run in case there is a conflict between the two. As long as the laws made by the Centre and the laws made by the State are aligned to each other we have no problem, but suppose the State law is in conflict with the Central law what happens. For that it has been provided in the constitution that when once that occurs, the laws that are made by the Centre would prevail over those are the states which is the other way of saying that the state laws should be in consonance with those of the Centre. Then there is another aspect.

Although, the list actually come up with a fairly detailed subjects over which laws can be made, there are subjects which are not in the list, but they crave for attention of the legislature who can make the law. This is what is referred to as a residuary power of making laws. This residuary power of making laws over subjects which are not formed in either the state subject or in the concurrent list rest exclusively with the center.

Like for example as I mentioned now on matters of environment protection even after the forty second amendment of the constitution, wherein the forty second amendment right to environment and other things was referred to the duties in relation to that has been referred. But in the list no reference was made to the environment protection either in the state list or in the concurrent list and since it is not there in any other list the Centre gets a power of making a law and Centre has made laws always on matters relating to environmental protection.

The third aspect that we needed to note in terms of making laws for governance that the state and the Centre have another kind of a relationship. There are subjects which are covered under the state list, but there are times when in national interest if you allow a state subject to be enacted by the states there would be a number of legislations for each and every state which may affect national interest. In such a situation, the Centre gets the power to legislate upon a subject even when it is covered under the State list if the national interest is involved.

But in such case that law that is made by the Centre would operate for a maximum of 1 year of course it can get extended from time to time, this normally happens I have referred to the provisions here you may refer to them during the time of emergency, when a national emergency is proclaimed the Centre gets all the power of law making and all the subjects even when they are there in the State list.

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(d) THE CENTRE ALSO GETS THE POWER OF MAKING LAW, OVER A STATE SUBJECT, EITHER BY CONSENT OF OR ADOPTION BY STATES OF A CENTRAL LAW. IT CAN ALSO DO SO, WHEN SO REQUESTED BY THE STATES (- A.252)

- SUCH AN ENACTMENT OF CENTRAL LAW, UPON THE REQUEST OF STATES, HAPPENED IN THE CASE OF WATER(PREVENTION AND CONTROL OF POLLUTION) ACT, 1974.

(e) CENTRE CAN MAKE A LAW, ON ANY SUBJECT, TO GIVE EFFECT TO INTERNATIONAL AGREEMENTS (- LIKE, AIR(PREVENTION AND CONTROL OF POLLUTION) ACT, 1981; ENVIRONMENT (PROTECTION) ACT, 1986) (-A.253)

(f) ALL THE LAWS IN FORCE, IMMEDIATELY BEFORE THE COMMENCEMENT OF THE CONSTITUTION CONTINUE IN FORCE UNTIL ALTERED OR AMENDED OR REPEALED BY THE COMPETENT LEGISLATURE OR AUTHORITY (-Art.372)- THIS IS THE CASE WITH ALL THE LAWS MADE DURING THE BRITISH PERIOD CONCERNING NATURAL RESOURCES (- LIKE, LAND AND FORESTS)



The fourth major aspect of law making that you should know is the Centre gets some additional power of making a norm. Here is a subject which is there in the State list, but many a time two or more states would find it difficult that if they make a law, enforcement and getting the desired result will not be at that level as that expected. So, they may together go and appeal to the Centre look this is a state subject.

But we find that the way we make a law and enforce them may not serve the purpose and so since you are at the apex level make a law for both of us. There are two circumstances, one circumstance is the Centre makes a model law which is not state central subject or the subject in the Union list. It is there in the State list. Model law for guidance. Supposing the state adopts it fine it becomes a state law.

Although Centre has made it a model for guidance and a model for guidance has been internalize into the state law that one were there whereby the Centre makes a law for the state. No compulsion, just a direction. The other one is as I was mentioning when two or more states through consent amongst themselves submit to the Centre; please legislate on the subject of common interest for both of us. It has been done.

Especially, the laws in relation to pollution control, water prevention and control of pollution act, although water is a state subject more than it does not straight submit it to the Centre make a law because we want to have a uniform law and we do not want to have standards at

different levels at different states leading to different kinds of consequences. So, please enact a law uniformly where you will adopt and apply in our domestic level at our state level.

So, this is the fourth aspect you should know an enactment of the Centre law upon the request of the states can happen as it happened in case of pollution control. The fifth aspect when Centre can make a law? The fifth circumstance it can make a law on any subject to give effect to an international agreement. When India participates in an international conclave, a conference which results in a treaty arrangement.

A treaty arrangement can only take place amongst nations not the components of nations. So, only the Centre can represent the union of India, the government of India can represent that. So, there is only the Centre which will represent the entire country in International Associations and agree on behalf of government of India, certain commitments under international agreement and that has to be internalized at the domestic level.

Even though it is a State subject or even though it is a subject which is not exactly within the central purview. To give effect to an international obligation, a Centre has the power to make a law, to give effect to international agreements. It happened in pollution control again when the government of India have enacted, air prevention and control of pollution act in 1981 is exactly was to give effect what was agreed in the Stockholm conference of enacting domestic laws to ensure that the global environment is taken care of at the national level.

Even the enactment of the Environment Protection Act in 1986 was to give effect to international obligation that India has undertaken. So, this is written in the constitution when the Centre gets the power publically. There is one more aspect to this which I have already mentioned the continuation of the old law to be in operation as long as it is not in conflict with laws enacted in Independent India.

That is how the British law much as what was made by the British continue to operate in independent India were referred to that in common law and communal law and natural resources law. The last lecture actually elaborated on that.

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(g) AS A GENERAL RULE, EVEN THOSE LAWS MADE BY THE CENTRE ON MATTERS CONCERNING NATURAL RESOURCES, ENVIRONMENT AND POLLUTION-RELATED SUBJECTS, GET ENFORCED AT THE STATE LEVEL, BY THE STATE ADMINISTRATIVE MACHINERY. FOR INSTANCE, ALTHOUGH THE CENTRE MADE LAWS CONCERNING POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION, THEY ARE, AS A GENERAL RULE, IMPLEMENTED BY THE STATE ADMINISTRATION. IN THE CASE OF UNION TERRITORIES, THE ADMINISTRATIVE SET UP, CREATED BY THE CENTRE, AS A GENERAL RULE, WOULD IMPLEMENT THE CENTRAL LAW.

(h) ENSURING EQUITY IN RESOURCE MANAGEMENT AND DISTRIBUTION OF BENEFITS DERIVED THERE FROM: (Art.39(b) & (c):

UNIQUE AND CHARACTERISTIC FEATURE OF THE CONSTITUTION, THAT GIVES A DIRECTION TO THE ADMINISTRATION (-DIRECTIVE PRINCIPLE OF STATE POLICY):



Another aspect that we have to note, that those that are there in the Union list and those over which the union government or the Central government makes a law. The general rule is the Centre makes the law especially on all natural resources and environment which is on subject of discussion here. The enactment is made by the Centre, but the enforcement takes place as a general rule at the state level by the state administration.

So, although the Centre makes the law concerning pollution control and environmental protection there is a general rule or implemented by the state administration. In the case of Union Territories of course a Centre sets up an administrative arrangement in that area and under the AGs and control and authority of the central government, this body would administer the Union Territory with regard to the central government.

The other kind of feature of the Indian constitution with regard to natural resources that we have to note is ensuring equity and resource management and distribution of the benefits derivable from that for the benefit of everyone. It is a very important provision this to be seen in a directive principle of State policy which actually gives a direction to the administration the state and state agencies.

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- THAT THE DECISIONS AND ACTIONS OF THE STATE SHALL ALWAYS BE TO
DO GREATEST COMMON GOOD FOR ALL AND THE ECONOMIC SYSTEM TO
BE SO WORKED TO DO EQUITY TO ALL, BY ENSURING NO SECTION OF THE
SOCIETY IS DISCRIMINATED AGAINST IN ANY MANNER – “GREATEST
HAPPINESS AND WELL-BEING OF ALL”, AS AGAINST THE BENTHAMITE
PHILOSOPHY OF, “GREATEST HAPPINESS OF THE LARGEST NUMBER”

2. AUTONOMY IN GOVERNANCE: SCHEDULE V & SCHEDULE VI AREAS :

(-Art.244)- CERTAIN AREAS HAVING SIGNIFICANT TRIBAL PRESENCE,
RECOGNISED AND GIVEN A HIGH LEVEL OF AUTONOMY IN THE
GOVERNANCE OF THEIR RESOURCES (- **DISCUSSED IN THE NEXT PART OF
THE DISCOURSE**)

3. DECENTRALISATION IN GOVERNANCE :- 73RD & 74TH AMENDMENTS:

-A LARGE NUMBER OF SUBJECTS THAT HITHERTO REMAINED WITH THE



Look we are administering the laws in the state, but when you come up with a policy, when you are implementing any law, when you are taking decisions, when you are initiating actions you as a state agency shall always be guided by only one principle and that principle is do the greatest common good for all and the economic system should be worked to do equity to all by ensuring those section of the society is left out from deriving benefit of the huge accessing and management of the national assets the natural resources that we have. Greatest happiness and well being of all is the motto of the Indian constitution.

And it is a signature tune that runs through the entire length and breadth of our constitution. It is very interesting. I would say it is a unique feature because this is not the same in all democratic systems. The mother of democracy as we say, the British system it has actually inherited the political and legal philosophy given to it by Jeremy Bentham, one of the great political and legal philosophers of all time. It is called as a Benthamite philosophy of utilitarianism.

Which says the primary job of the government is to ensure the greatest happiness of the largest number. Such a large majority of people are satisfied, well that can go off as a motherland and that need have to be administered and the administration that have performed its function that well not so in India. The Indian constitution makes it very clear it is not the great happiness of the largest number, but it is the greatest happiness of everyone.

The inclusive policy and that need to do equity to everyone is the undercurrent that runs

through the entire length of and the core and substance of the Indian constitutional law especially when it comes to environment and natural resource management. The second aspect of the Indian constitution which we will be discussing in greater detail especially in the next part of our this course is the autonomy of governance.

That in certain areas as a country there are certain communities of people who have certain kind of unique existence, a unique way of life, something which is peculiar to them quite distinct from the main stream. We should allow them to retain, carry on their activities according to their time honored, time tested traditions like the tribal communities and give a lot of autonomy in the governance of the resources.

It is there in the constitution that these communities of people will have certain level of autonomy in managing their affairs unlike the other group more details will come as we get into the discussion in the next session. So, is the case with another important feature - decentralization in governance. Although the law making power is with the Centre and the State alone, the third tier of governance, the locals of government institutions also get a role actually a major share of the power of administering the local resources.

By and large the local resources are administered by the local government institutions or autonomous institutions created specifically for the purpose of managing those aspects of natural resources more about that as we get into the discussion of this in the next session.

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STATE GOVERNMENT, TRANSFERRED FOR ADMINISTRATION TO THE LOCAL SELF-GOVT. INSTITUTIONS- THESE INCLUDE MANAGEMENT OF LOCAL NATURAL RESOURCES (- DISCUSSED IN THE NEXT PART OF THE DISCOURSE)

4. "ENVIRONMENTAL AWAKENING" : 42ND AMENDMENT- REDRAWING THE STATUS, ROLE, RESPONSIBILITIES AND FUNCTIONS OF THE STATE AND THE PEOPLE, IN RELATION TO RESOURCES –

(i) PROTECTION OF ENVIRONMENT AND SAFEGUARDING OF FORESTS AND WILDLIFE (A.48A)- READ WITH Art. 39(b) & (c), THE GOVT. GETS THE STATUS OF PUBLIC TRUSTEE (- RECALL THE DISCUSSION ON THE PUBLIC TRUST DOCTRINE, IN THE PREVIOUS MODULE)

(ii) CITIZEN'S FUNDAMENTAL DUTY TO PROTECT AND IMPROVE THE ENVIRONMENT AND TO HAVE COMPASSION FOR LIVING CREATURES (A.51A(g))

- CITIZENS GET THE STATUS OF ENVIRONMENTAL STEWARDS



As I was mentioning, the forty second amendment at least gives expression to something that was hidden in the constitution and that got manifested through this amendment which is described as an environment of awakening. Environment appears in the constitution in a very significant way. What does it say now? It comes up with a very clear directive this is article 48 of the constitution and which says that every State agency has the primary responsibility of protection and management of all material resources, all aspects of environment, safeguard and protect, conserve, maintain and manage all forest and wildlife in India.

If you combine this particular provision along with a provision that I mentioned a little while back which has been further elucidated in the annunciation of this principle called in the public trustee doctrine. Recall my discussion with you and the public trust doctrine in the previous module. You will find a wonderful kind of a new insight given as to how the state and state agency should function in relation to the natural resources in protecting, maintaining, managing, and taking custodial care as a parent would take care of a child, the resources or like the child, the state and state agencies have a duty to have that kind of a filial relationship of taking care as a parent who take care.

The state is supposed to be holding the position in loco parentis with whatever resources. And finally in the same amendment you would also the insertion of another provision very important provision till then till this particular insertion came everyone of us as every citizen of India had only rights fundamental rights over a number of things, but now for the first time

to know the responsibilities and our duties a new provision has been inserted.

A fundamental duty of every citizen to protect and improve the environment and have compassion for all living creatures, look at that. The role and responsibility of State and State agencies as a public trustee is not a monopoly of the state to take care of environment. It is a shared responsibility with a people of India that I and you as citizens also have a role to play.

It is not just the role, a duty to perform. This is what we owe to the resources which are responsible for sustaining us which are going to sustain our lives and so it is thanksgiving that not only we derive benefit from that we also exercise a lot of responsibility in taking care of that. We become environmental stewards this is what we learn from the constitution, a wonderful document which actually gives a very great insight interest to how we should deal with our environment and natural resources.

Something that belongs to all, something over which every one of us has a primary duty and responsibility to you, a visionary document, a document of faith which rewrites the role and responsibility of people and the resources with the government the relationship is such that if the government is a public trustee the people are environmental stewards. How exactly the constitution has brought the communities engaged in resource management. How the constitution has ensured that there is a decentralization of power of administration of environment resources will be the subject matter of consideration in the next session.