Constitution of India and Environmental Governance:

Administrative and Adjudicatory Process

Professor. Doctor. M K Ramesh

Department of National Law School of India University, Bengaluru

Lecture No. 11

Communitarian Management and Decentralised Governance

In this lecture, we take our discourse on the Constitutional visions and signs into a different level of Resource Governance the constitutional facilitation of Environment and Natural Resources Management at a grass root level, easy focus or attention for us in the session.

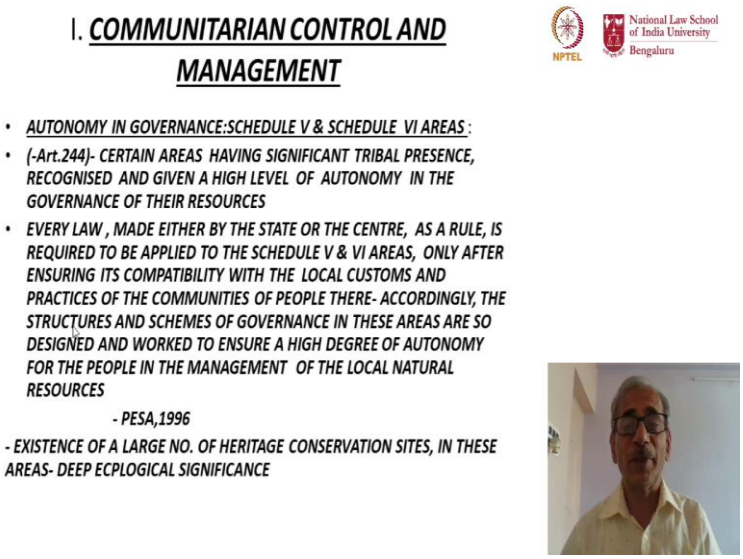
(Refer Slide Time: 0:47)

As you could see on the screen the vision and the direction that the constitution gives for an intervention which is not statist alone but at the low level, at the grass root level, it is governance from the grass roots. There are 3 dimensions to this enquiry here, one is a Communitarian Management, then second one is Decentralised Governance and the third one the Communitarian Engagement, participation and involvement in resource management not necessarily holding the rings of control or power either through a statutory information or a recognition of some practice which has been there since, time memorial and statue administration has no objection for its continuation.

This actually, brings to them fore the idea that we saw in the forty second amendment of the

constitution. In a form of fundamental duty of citizen of being an environmental steward, this environmental steward should concept. I reiterate here has very much being an integral aspect of our constitutional system of governance long before, the forty second amendment came, right from that day the constitution was inaugurated 25 years earlier to the forty second amendment.

(Refer Slide Time: 2:39)



Let us get into the details of it. The first aspect the Communitarian Control and Management. Autonomy in governance is what is being contemplated. There are elaborate provisions made for bringing in communities of people into the main stream of resource governance and this is essentially based upon the basic idea at the inauguration of our constitution that there is one section of Indian community who are not in the main stream but, who have been living a particular way of life predominently tribal and these areas which has a very significant tribal presence, has a distinct team social milieu, has a distinctive political organization, has a distinctively different approach to resource governance and it was a policy decision and the part of Government Community here reflected through these set of provisions under the constitution to enable, facilitate and ensure that particular way of life would continue and would become part of the larger picture of resource governance at various levels including at the level of the community of people.

This is what you do see in those areas which are described as Schedule 5 and Schedule 6 areas under the Constitution. These areas are very clearly maded out but, predominently in the North-Eastern region in India and the rest of India wherever in those areas where you have a significant presence of the tribal population have more than 50 percent or so in which even this is found out a special administration, administration by whom? By the community themselves.

So, you have the relevant provisions Article 244 refers to that and the very important feature of this is that not only they do have that kind of organization put into application irrespective of the other kind of organization or the general administration, the bureaucracy that you have, the revenue department, so many other departments of the government, quite unlike that a specialized administrative setup where something called as the tribal council and you have a particular practice of these communities if people in the administrative setup integrated into scheme governance by them so much so that even the law, that is made either at the State level or in the Central level, in order they should be made of applicable in the religions, care should be taken to ensure that in these Schedule 5 and Schedule 6 areas that these rules and regulations that we have made which has a pan India significance can be applied in these areas only after ensuring their compatibility with the local customs, traditions and practices of communities of people living there. It is almost like a litmus test. You have enacted some law which is perfect for the rest of India but, for these region whether it would be in consonance with the cultural values, moors and practices of these people. And if it so, adopt them.

In fact the governance of each and every state have been interested in responsibility of make to ensure that kind of alignment with that practice of these communities with that of rest of India so as to internalize a National and State Laws at the domestic and local level for these communities. So, these areas are so structured and designed and the schemes of governance is worked out in such a way as to ensure a very High Degree of Autonomy for the people in the accessing the resources, in managing the resources, in having control over the local natural resources.

In the year 1996, the government of India came up with what was referred to as “Panchayat Extension to Scheduled Areas Act” you know following the seventy third and seventy fourth amendment in constitution at the local level especially in the rural areas the Panchayat Raj now came into the existence and by a large tribal areas are rural and so, the question was whether the Panchayat Raj law would extend to them as well.

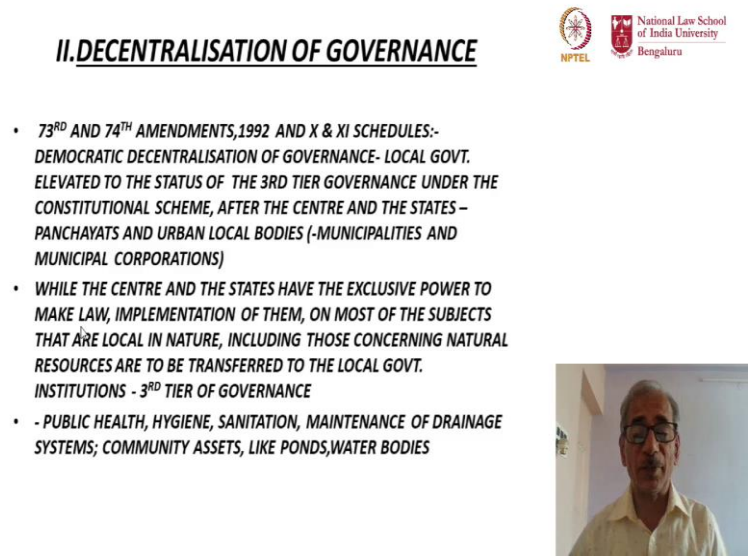
More by way of a clarification and also as a kind of mechanism, this new law was made achronamed as PESA 1996 Panchayat Extension to Schedule Areas Act. It makes it very clear that if, a Panchayat Raj law of having the same Gram Panchayat, Taluk Panchayat, and District Panchayat in a Gram Sabha as the General Assembly which is actually the political composition of that entire outfit with regard to the Panchayat, if it is to translate into application at the local level, the question that should the foremost on the part of the state government is to see whether whether this kind of administrative structure is in line with what is being practiced by these people, what is invoked among this people.

If that is so, go ahead, otherwise no that level of autonomy people at any cost should be retained. Of course, the national law concerning criminal law without any expectation is applicable everywhere including in the Schedule areas so, it is nothing like this people are a law unto themselves. But in order to meet there day to day requirements, in order to continue with cultural tradition and practices there should not be any hindrance or intervention and the autonomy of these people should be respected and to that extent this particular set of provisions are made under the constitution.

So, you manage your own resources, you have your own administrative set up, you have a political organization of your kind and that will take care of your resources so, you become the masters of your own destiny and you do not look up to a governmental agency to work out certain plans and programs and implement them for your betterment or wellbeing, you will take care of your own well being because, you know the best as to how to handle your own lives, your own resources because, you are perfectly in tune with the rest of nature or and recommendation of that these constitution provisions are made.

If, you actually take a scan of all those conservation areas that we have in India, what is being describe as Heritage Conservation Sites of International significance and importance, a large number of them, a large majority of them are there in these areas which has a very deep ecological and spiritual significance that their perfect symbiosis with the rest of nature as a part of their life and they being part of the rest of environment, is manifest in the up keep, maintenance and management of these heritage sites which populate these areas in a far more significant number than what you have in rest of India. A testimony to their environment friendly way of life recognized through the constitutional scheme.

(Refer Slide Time: 12:01)



The second dimension, as has been facilitated under the constitution through the seventy third and seventy fourth amendments that occurred in the 1992, of making the local communities as not just the participants but partners in a system of governance and that is 'Decentralized Governance' of resources. This happens through this seventy third and seventy fourth amendments of the constitution.

The seventy third amendment is for the rural local bodies in the form of Gram Panchayat or the Village Panchayat, Taluk Panchayat and Panchayat at the district level, the Panchayat Raj system. The seventy fourth amendment ushers in the grass root governance at the urban level in the case of Municipalities and Municipal Corporations, Nagar Palikas and Nagar Sabahs and legislation are coming to existence to give effect to these two amendments to make the local government a self-governing area as far as the resources are concerned, their management is concerned, planning to use those resources to be generated from variant and water bodies. Schedules ten and eleven list out all those subjects that come under this particular category governance at the local level by the local self-governing institutions. It is truly a democratic decentralized governance and the third tier of governance under the constitutional scheme.

So, in a manner of speaking the local government has been elevated to the status of the third

tier of governance another constitutional scheme after the Centre at the apex the State at the middle level and at the local level, the local bodies, the Panchayats and the urban local bodies being made the seat of governance at the local level. While` the center and states have of course the exclusive law or making a law. So, municipalities and municipal corporations at the urban level, the Panchayat at the rural level, they cannot make a law, they cannot create a statue.

The statue is the prerogative of being made at the State or at the Central legislative level. So, either the Parliament or the State legislators make these laws. But when it comes to the governance or management, administration of those resources at local level, that is what is being handed over to or transferred to the local government by the state government. As mentioned earlier, if, you have very carefully followed what we have mentioned earlier even those laws made at central level concerning natural resources they are administered at state level and we go to the third level.

Now, that in terms of administration or issues we argue with local which are listed out in the tenth and eleventh Schedule of the constitution, the Panchayats and the urban local bodies due administrator and what are those subjects? Just to give a few examples; public health, hygiene, sanitation, maintenance of drainage systems, community assets like ponds and water bodies, pasture lands, public communities like public conveniences, public parks, public places of recreation.

(Refer Slide Time: 16:07)

PASTURE LANDS, ETC., PUBLIC AMENITIES LIKE PUBLIC CONVENIENCES, PARKS AND PUBLIC PLACES OF RECREATION (- "URBAN & RURAL COMMONS"-) - WITHIN THE PALE AND PERVIEW OF THESE BODIES TO TAKE CARE, MAINTAIN AND MANAGE

RATLAM MUNICIPALITY v. VARDICHAND (1980)- PRIMARY OBLIGATION OF LOCAL BODIES TO TAKE CARE , PROTECT & MAINTAIN ALL CIVIC AMENITIES AND CONVENIENCES (- LIKE DRAINAGE AND SEWAGE SYSTEMS-) – ESSENTIAL AND NON-NEGOTIABLE FUNCTION- BUDGETARY CONSTRAINTS, NO EXCUSE.

All would figure under the system of governance at the urban and rural local bodies under the head 'Urban and Rural commons'. Here, just to retiterate this position that this is what the constitution make and this an ordained duty that the local bodies to care for our local resources without any hindrance at one level, without any excuse at another level that means, you have the right to govern, you also have a duty not to shirk away from that responsibility. Shirking away from that responsibility is unconstitutional. Who says this?

The highest court of law clarified this position in a landmark judgment delivered by the Supreme Court that gives is Ratlam Municipality versus Vardichand. It is a 1980 decision of the Supreme Court. Like it happens in most of the urban areas, the sanitary system was in very bad shape in that municipality called Ratlam in Madhya Pradesh. There was no proper make of drainage system, the sewage system was in shambles. There was no up keep, there was no maintenance and there was stench on and off.

An action is initiated at the local court and at the State High Court at the second level questioning inaction of the part of local administration in not properly maintaining and managing these civic communities and it is going to be a health hazard if it is not taken care of. The high court made it very clear that it is the duty of local bodies to take care and they should ensure that these of the functions that they should not really shirk away from. It is written in the law, it is written the statue under which they are created the Municipality regulations or the Municipal Corporation, they have an ordained duty to perform these

functions and non-maintenance of it is in a excusable. The matter went to the Supreme Court, the municipality challenged “how could we do that? when we have very few people to work, we have shortage of funds, we have budgetary constraints and we have so much of difficulties, you do not understand our difficulties as we when get this we will be able of take care. So, till then you need have to manage with whatever we do” That kind of attitude and that got reflected in the kind of argumentation it is presented before the supreme court of India. Justice V.R. Krishnaier who delivered the judgment on behalf of the Supreme Court of India made it very clear that these provisions of construction of, maintained of, repair and management of these basic civic public communities, the drainage system, sewage system or mandatory functions to be performed by the local bodies, these functions can never ever be delegated to anyone not for that matter be ignored that can neither be a negligence nor an ignorance nor inaction.

All your arguments as to constrain of budgets or anything will not hold up. This is a non-negotiable function that you have to perform. This is a duty that you have to discharge. Your very existence as an authority is to discharge this primary inalienable, non-negotiable function that you have to perform this duty.

The budgetary constraints are no excuse for this. And there can be budgetary constraints for other things like certain kinds of facilities provided for the authorities in performing their functions like vehicles. A fleet of vehicles that you would acquire, you can keep it on hold make provisions for this first and then look to taking care of this requirement and then you can take care of others things if funds are available

So, budgetary constraints are no excuse. In a way, is actually the reiteration of the constitutional spirit of governance that the local bodies are the managers or local environment and the primary level. The State and the Central will come at the secondary and at the tertiary level and local resources need have to be managed locally and for this purpose these bodies are created. The wonderful clarification if all there was any such thing that was required because that were the administration thought that this is not some that could be imposed on them.

And what the court made it clear, it is nothing like an imposition, it is a basic duty that you owe and your very existence and effective way of functioning is dependent on that, you owe your existence for performing this particular kind of function. Then, the next aspect as to what happened with the seventy third and seventy fourth amendment to the constitution and the creation of the tenth and eleventh schedules? I did mention that this led to the Democratic Decentralization of governance. Was governance centralised? By and large, yes. Till this happened in 1992, the role and responsibility of local bodies in the form of the Panchayat Raj was very much like a subordinate entity in carrying those exercises as per the dictation and direction of the state government. The direction dictation of state government would continue. But, this would subject to one thing and that is when the subject the stage were actually administering themselves are being transferred.

(Refer Slide Time: 23:30)

From this we move on to the third dimension of taking governance of natural resources to the grass root level and that is Communitarian Engagement. There is the provision under the constitution, Article 372 which makes it very clear that all the laws in force that are immediately before the commencement of the constitution, will continue to operate and are recognized as the laws of the land and they get renewed even with the inauguration with the

constitution they are not put an end.

And these laws are not confined to statues or at some legislations that are come from straight but, they also extend to customs and traditions of the communities of the people. So, customs having the force of law, has been brought to the forefront here when you refer to Article 372 and this has being clarified by a judgment that was delivered in the year 1992. It is a case of In Re Amina where even customs and traditions would continue to operate and it not confined to statues formulated during the British period.

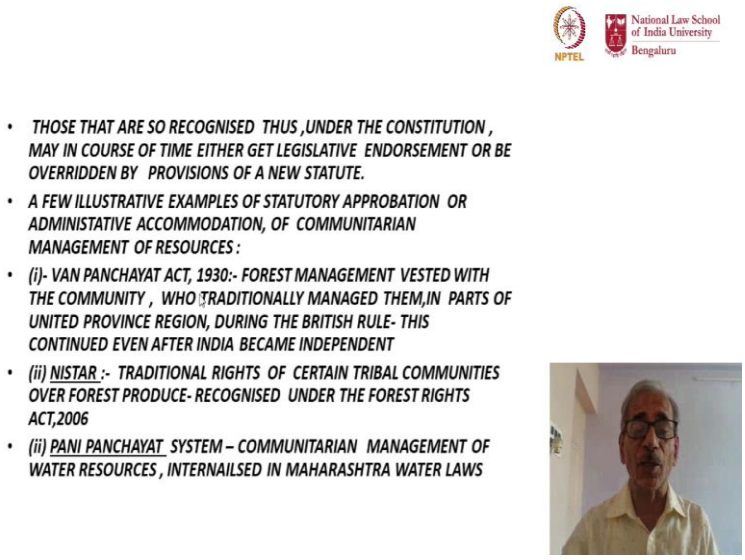
Because, customs and traditions, they spring from the practices of communities of people over a long period of time and we need have to recognize to that. Resource management by the people who are living closest to that particular resource is the normal, general, common practice of the people and this will be in their since time immemorial and we will not disrupt this particular kind of practice.

All that you need have to state and established is whether there has been such a practice. We will continue that till such time these are overtaken by any statue that the legislator choses to make. But, if it does not and if it does not really bother about that, then the communities can continue to manage their local water bodies or sacred groves or whatever that are there in these areas.

So, there is a constitutional recognition of traditions and practices concerning resource management by the people. They are described as common property. They are described as community property. They are referred to community assets, you look to the tenth schedule of the constitution, this is one of the subject that has been mentioned there that the community assets, so there is a recognition that community have assets of their own and you need not the state poverty, it is the communitarian property and this communitarian property and be managed by the community themselves if, there is no statutory prescription excluding them from such a kind of a management..

So, property over which a group of people have a common interest of taking care, of protection , of conservation, of deriving benefits from to a set of practices that they have, they can continue to practice the same and there is a constitutional protection for the same.

(Refer Slide Time: 27:22)



So, the only condition that is lay down for these customary practices to continue is that that these practices should not be opposed to public policy, should not be opposed to public health, should not be opposed to public morality all customs and traditions would continue to operate and have the force of law. But, who determines that these customs and traditions are environment friendly? These customs and traditions are not opposed to any other public values and practices which are recognized as something which is a great ideal or value practice by the people?

Well, the ultimate decision maker is the courts of law should we have a doubt and should there be a dispute between the State agency and these communities of people. The matter can be always be taken to the court and the court will lay down the final law of the land on the point and in accordance with that you need to resolve the government, which is the other way of saying that the state administration and the state legislature unless and until it is very clear that a customary practice with regard to a particular resource is against sustainable,

environmentally sustainable management of the resources or anything like that.

And having decided that way comes out with a very clear statutory formulation to that effort till that time. The practice of people would continue and the community continues to control the management of these resources. I am just giving you a few illustrative examples, as to how either their particular practices is allowed to continue even after the inauguration of our constitution, even to this day or even when statues are made in relation to that, sufficient provisions are made on the exception provision are always the community to continue to adopt and practice and perpetuate the practice that they have. One is the practice with regards to what is referred the as 'Van Panchayat' system. Even during the British period in the then United Province which later became Uttar Pradesh in independent India. Now it is Uttarakhand region. In that region the British recognized a communitarian symbiotic relationship with the forest area that there were living in of its management, of its upkeep and maintenance by the community themselves and not by the Forest department at all.

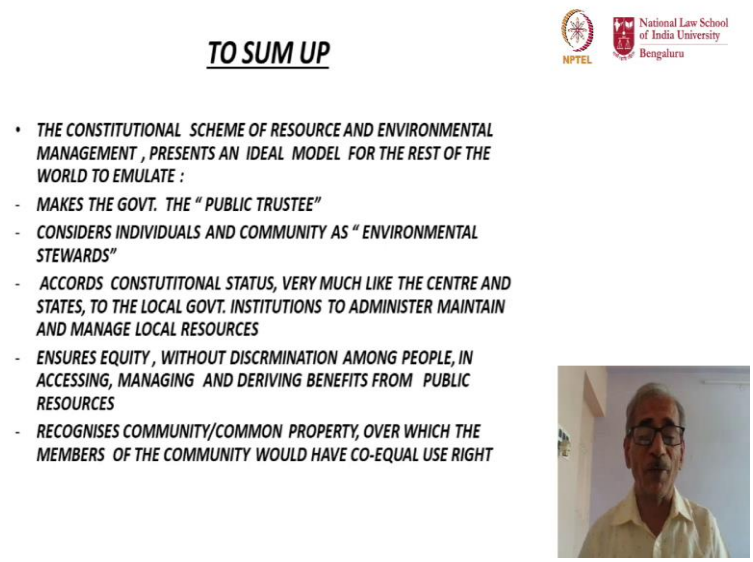
It created a new law called the Van Panchayat Act in 1930 permitting and now legally approving the community to continue to manage those resources and statutory recognition was given to the communitarian practice way back in 1930 by the British, same continued even after Independence till around 1970s this got absorbed in the Forest Rules under Uttar Pradesh Forest Act.

The second example, I can give you is a particular practice in the Western part of India, Maharashtra in Gadchiroli Mendalaka area called the NISTAR practice. It is the traditional practice of the communities there, tribal communities there. Who was certain forest produce. It is a practice of deriving benefits from those forest produce which for their livelihood and for their day to day life, they were accessing and using it for themselves and this along with cultivation practices that they had was described as a NISTAR practice, NISTAR.

And this got legal recognition under the Forest Rights act in 2006 the government of India and even under the rules that has been framed and followed in Maharashtra. This has been

recognized now. The third one in the very same state Maharashtra, there is another system where the communities themselves managing of water bodies and water resources for a wild varieties of purposes referred to as the ‘Pani Panchayat’ system Pani: Water, Panchayat: a group of community leadership which would take care of the management the water that is available at the local level and this practice has been recognized and internalized in the Maharashtra Water Laws now.

(Refer Slide Time: 32:58)



So, to sum up the constitutional scheme of resource and environmental management presents an ideal one of management model for the rest of the world to emulate think globally act locally. Action at the local level has been ingrained the constitutional scheme long long time back much before happened a kind of and jargon, a slow down and the global level think globally act locally local management is main state of governance and recognized under the constitutional scheme and makes the government, the Center and State government has more of a public trustee rather than as the owner of the resources.

Considers individual and communities as environmental stewards. It accounts that the constitutional status very much like the center and states government to the local government institutions to administer, maintain and manage local resources. Look at this scheme that has been evolved by involving and engaging these communities so as to workout among themselves as to apportioning the benefits among themselves, to prevent discrimination amongst them an element of equity has been read into working of this scheme of governance here, for the benefit to the community derived by the public, public at large the communities by themselves.

(Refer Slide Time: 34:50)

It recognizes community or common property over which the members of the community would have a co-equal use right. It creates autonomous regions. The constitution comes first of state on communities of people in certain tribal and scheduled areas to manage their local resources and politically organize themselves to govern their own resources. What a model that we have.

It is such a wonderful model of governance where you have the Center, the State, the local bodies and the local communities, managing the resources that has been worked out in the whole scheme of environmental governance. The next session would invariably focus on, in a more interactive way, as to whether there is something called as a Right to Environment recognized by the constitutional scheme. That is in the next session.