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**PEOPLES' INITIATIVES AND JUDICIAL ACTIVISM AS A CATALYST OF INSTITUTIONAL REFORM**

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**SUMMARY**

The Indian sub-continent with a population of 968 million human beings occupying a geographical area bounded by the world's highest mountains, the Himalayas in the north and three oceans around the peninsular area has seen unprecedented environmental degradation since the turn of this century. There have been weak and intermittent efforts at state levels to arrest the rape of the earth and the saddest part of the story is that 88% of the havoc has taken place under political patronage with no means of controlling it. The enforcement agencies have either been inefficient or corrupt and in most cases a combination of both. The Courts have played an unfortunate role of bending over backwards to interpret the laws in favor of the predator and it is only in the course of the last ten years that a Citizen Movement began to emerge which has achieved results in isolated areas and has received fair support from the judiciary between 1990 and 1996. The Indian Supreme Court under Justice Kuldeep Singh and several of the High Courts, initially started rigorously enforcing environment preservation laws and followed this up by handing down some exemplary punishments. Then came an era of unprecedented judicial activism with the Indian Courts virtually playing the role of a father figure in directing the Government agencies to undertake steps towards creation of environmental awareness and curbing large scale devastations and directions to investigate and to prosecute any cases of motivated inaction and a series of orders for purposes of reversing air and water pollution came from the Courts with a degree of regularity. A whole movement emerged and the media assisted to a very large extent by emphasizing the importance of compliance and as a direct result, a sizeable number of public interest litigations came up before the Courts. The lead that came from the Indian Supreme Court had a spontaneous reaction in the major High Courts of the country notably Bombay, Madras, Delhi, Kerala and Karnataka but then came a sudden set back. With the retirement of Justice Kuldeep Singh, the Supreme Court itself almost stopped entertaining all public interest litigation and even reversed its earlier orders and the High Courts followed suit. All of a sudden, public interest litigation was being virtually shot-down and a conscious effort was made from within the judiciary to kill this field of litigation. This has been a sharp set back to the Citizen Movement and a sorry reflection on the judiciary. Some of the measures taken to eliminate this field of litigation are self evident from the official orders issued by the two chief justices of the Bombay and Karnataka High Courts who have prohibited the rest of the Judges in the whole of the High Court from even entertaining the class of litigation. All such cases in these two High Courts are placed before the Chief Justice's Court and an indication of what is happening is evident from the fact that the success ratio of public interest litigation which was earlier as high as 78% has come down to 1.6% in the last one year. Peoples' initiative in a corrupt and hostile environment such as the one that prevails in this sub-continent can only survive if the one institution that can give it living form and translate it into enforceable action i.e. the Judiciary, were to sustain it and the hope therefore lies in getting this institution to change its attitude and mode of functioning.

## **1 INTRODUCTION**

This paper, though hard hitting in parts, sets out the Indian story over the last one decade which is a movement from disaster to hope and back to deeper disaster. It is a narrative of raging environmental degradation from the forests to the waterways to the air over the sub-continent, the brave attempt of a movement that was part citizen oriented but essentially activated and sustained by the Judiciary, but the story has a sad ending because the forces of corruption have dominated and 1998 has seen a total reversal. The urgent need to restore and rejuvenate the movement by working through a sustained program specially directed at the legal profession is the only way to make things happen in the direction in which they should.

## **2 THE UNHAPPY EPISODE**

Between the years 1950 to 1990 the total forest cover in India was reduced from 39% to 17% due to indiscriminate destruction of the forests. 189 rare species of vegetation have been eliminated and the wildlife has been mercilessly butchered or smuggled out of the country resulting in a decline of 42% over a 40-year period. The systematic poaching of male elephants in Karnataka will result in the extinction of these pachyderms in the next 20 years. Whereas, the charge was that this direction was primarily attributable to abnormal growth of population, which in turn had encroached on the forests and converted them into agricultural areas, a reliable survey undertaken between 1985-1990 revealed some alarming statistics. Of the total encroached areas; it was discovered that the population push had been responsible for reduction of the forests by as little as 13% of the area. Again the allegation that forest destruction was occasioned for production of fuel was a lie because it was revealed that only 4% of the destruction was attributable to this factor and lastly, where the villagers were blamed for over-grazing their cattle and flocks in various areas it emerged that only 1.8% of the damage came from these quarters. The chief contributors to the process of devastation were the armies of forest contractors and poachers acting in collusion with the Forest Department and in partnership with them and 70% of the loss of green cover is attributable to this one source alone. In the case of the Forest Department it was the story of the protector turning predator and the allied damage came from large plantations, quarry owners acting in total collusion with government and public authorities at all levels and the destruction of forests to the extent of over 22% is attributable to this category of avaricious persons. The government justified the protection given to the quarry owner on the ground that their business generated a lot of earnings in foreign exchange but the statistics do not justify this claim. Massive exports in the field of granite, marble and other forms of mineral wealth have taken place but the government has not got to the bottom of the embarrassing question as to how it is that 65% of the earnings have not come back to this country. Every activity constitutes serious offences under the laws of the country but no action has been taken against those involved. Whereas, on the other hand, the Courts have contributed to the disaster by maintaining an acquittal rate of 89% in all such prosecutions and in the remaining 11% of the cases, the sentences and penalties have been so lenient that they could aptly be described as "flea-bite punishments."

## **3 ROLE OF THE JUDICIARY**

Article 51-A of the Indian Constitution enumerates fundamental duties and protection of the environment is one of them. The Courts have unfortunately totally bypassed this aspect and have been rather smug in shelving this responsibility to the State. India possesses the

largest number of laws as far as water, green areas and air protection are concerned. The levels of implementation are abnormally low and in most of the cases where action is taken, the failure rate of an action is as high as 94.6%. It is a combination of inefficient investigation often tainted, due to corrosive factors and disinterested approaches from the Judiciary that is not free of the last factor. What required is a firm and no nonsense approach from the High Courts and the Supreme Court and the willingness to reach out and intervene in every case of non-action or tainted action. In larger issues such as questions relating to the location of industries, effluent treatment and the like, the Courts have been declining to interfere even when patent abuse of power is demonstrated which would be evident from the fact that between 1988 and 1998 of the 23690 petitions presented before the Indian High Courts and the Supreme Court relating to this field alone, whereas the first seven years of the decade has a success rate of 8919, the last three years have been pathetic with the number falling into 117. (1998 has seen only 9 victories). I put this down entirely to the attitudinal change on the part of the Indian Judiciary which has distanced itself from this vital responsibility with the considerable shift evidenced on the part of the Chief Justices both of the States and the Center in the last three years and who have adopted a series of measures to shoot down this class of litigation. Nothing is more important to the country than the rekindling of judicial activism that rose to its highest pinnacle in the mid 80's continued up to the beginning of 1996 and then met with "sudden death".

#### **4 JUDICIAL ACTIVISM**

Judicial Restraint versus Judicial Activism, the eternal debate has contributed to the emergence of a new body of law as confronted with non-liquete (vacuum in the law), law of torts, and has laid down new norms, guiding principles and fresh guidelines as sentinels for administration in particular and the system as a whole. The Indian Courts have innovated almost to an unprecedented extent and I shall briefly catalogue a few of the significant areas where public interest litigation has forged new concepts.

##### **4.1 In the Ratlam Municipal corporation Case**

In the Ratlam Municipal Corporation Case (AIR 1966 SC page 1622)\* for the first time, the enforcement of public duties in relation to civic amenities came about as these had a direct bearing on pollution levels and the Court forced the public authorities to comply.

##### **4.2 The Ganga Pollution Case**

In a series of cases known as the Ganga Pollution Cases (AIR 1988 SC page 1115 and AIR 1988 SC page 1637) where the river was being defiled by everything from city sewage to industrial effluents, the Supreme Court carved out the enforceable nexus between industrial obligations, civic norms and the State liability to enforce all these and promulgated a series of measures to "save the Ganga". Shortly thereafter the Supreme Court once again responded to a Public interest litigation when it was pointed out that industries in Agra were polluting the air to such an extent that the Taj Mahal was in serious danger and the Court ordered the closure of some industries, change of fuel in others and relocation of the rest. The local refinery was forced to adopt stringent emission control measures.

#### 4.3 Irrigation and hydro electric projects

The delicate balance between large irrigation and hydro electric projects, their devastating effects on the Eco-system and the consequences to the local population in matters of resettlement and rehabilitation were the subject matter of the Banwasi Seva Ashram Case (AIR 1992 SC page 920) where the Courts intervened on the ground that the State and public authorities has failed to act in a manner that was in consonance with responsible environmental protection. It needs to be added here that in the case of the massive Narmada River Projects the Court was again required to intervene on similar grounds pursuant to a people's movement and citizen's action.

#### 4.4 Saving the fragile coastal Eco-system

Coming to a specialized area in the matter of saving the fragile coastal Eco-system the Courts were required to examine such diverse issues as the desirability of permitting large scale lucrative shrimp cultivation projects which had a disastrous effect on the local bio diversity to the question of permitting cement factories that had resorted to extensive quarrying and were causing abnormal air pollution hazards in all of which cases rigorous correctives were ordered. (AIR 1977 SC page 811). Next came an extremely delicate problem that arose around the Orissa Sea Coast where in order to preserve the breeding grounds of millions of turtles, the Courts were required to prohibit and curtail the use of certain types of fishing equipment and banned fishing activity altogether in prescribed areas.

#### 4.5 The right to environment

Once again, it was the Courts that came to the rescue of environmentalists when the Indian Supreme Court in a path-breaking judgement laid down that the right to environment is on par with the fundamental rights. The Court on this occasion was amplifying the basic concept that emanates from the right to life (AIR 1991 SC page 420).

#### 4.6 Information Disclosure

An interesting facet of the Citizen Action Movement in relation to decisions taken by public authority arose in the case of Bombay Environmental Action Group versus Pune Cantonment Board (unreported case-Ref. Rosencranz page 143) wherein the Courts held that if the action was prima facie vulnerable, the citizen was entitled to demand that all information relating to that decision be disclosed and that it should be subject to judicial review.

#### 4.7 Rights of tribal peoples

In several cases forest and wildlife degradation has been attributed to tribals who are still resident in and around these areas and who claim the right to minor forest produce as a means of sustenance and a specific dispute arose with regard to their entry into reserved forests for gathering Tandu Patta leaves. The concept was laid down despite much opposition that the access to the forests and to the produce would have to be severely regulated to the extent of ensuring that it does not cause destruction or depletion of scarce resources. (AIR 1987 Guj. Page 9).

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#### 4.8 Establishing liabilities for disasters

The most celebrated decisions relate to the several pronouncements of the Indian Courts following the determination of liabilities in the disastrous Bhopal Gas Case where over 3000 persons lost their lives and 22,000 others were maimed for life and these were followed by the Supreme Court decisions in the Oleum Gas Leak Case wherein the Court held the industry absolutely liable for damage caused as a result of all industrial accidents. (AIR 1987 SC pages 960, 982 and 1086). These decisions led to the enactment of the Public Liability Insurance Act 1991. I could only summarize these decisions by emphasizing that these efforts epitomize the convergence of peoples' initiative with those of the judiciary for a cleaner, greener, healthier environment in India, a signal contribution to the evolution of environment jurisprudence and reform of the system.

### **5 COMPLIANCE VERSUS NON-COMPLIANCE-ACHIEVING GOVERNMENT COMPLIANCE**

As far as the observance of environmental protection norms and regulations are concerned, a private survey done by the law students in Pune indicated that the compliance levels as far as the private sector is concerned average barely 27% whereas the public sector averaged a dismal 11%. The reasons set out are that awareness itself is low but enforcement is abnormally weak and ineffective. The interesting result of this survey was that as far as the government and public bodies were concerned, which incidentally include the police department and the public transport corporations, they proceeded on the assumption that they were immune from the laws. In the more glaring areas an immediate solution is available because the High Courts and the Supreme Court in this country are invested with the power to issue directions for purposes of compelling the observance of the regulations. In a recent article, Arun Shourie, a leading journalist pointed out that despite a very large number of cases in which the Courts have intervened and issued orders and directions that the step has turned out ineffective because these have been carried out in only 18% of the cases. It is perhaps a fault of the judiciary that there is no follow up to the orders, which is an absolute must. In my own case every direction is made time-bound. The Court forwards it to the person responsible for implementation who in turn is ordered to report compliance and the Court monitors the translation of the order into action. In my view, the willingness to intervene, the speedy issuance of firm clear cut practical directions and the insistence on their observance is all that is required to ensure adequate compliance with the laws both in the private and public sectors. There is one area that is contributing to the failures and it is the role of the Courts before which offences relating to environmental cases are brought. The success rate in these cases which are instituted before the subordinate judiciary is as low as 6% and even in those of the microscopically few cases where punishments are awarded the Courts have been bending over backwards and awarding what has been aptly described as "flea-bite sentences". In the State of Karnataka, I have issued specific directions to the subordinate judiciary that firm action is the need of the hour, no compromises can be made and that steps will be taken against the judicial officers whose decisions send out the wrong signals that it is more profitable to breach the law than observe it.

## **6 ANTICIPATORY ACTION**

In the field of environmental offences the tragedy has always been that legal action invariably commences as a damage control step or a compensatory measure. In the last five years the Courts have witnessed new wave legislation whereby anticipatory action is resorted to as a preventive. The success rate of such cases, regrettably has hardly been 1% which does not speak well of the attitude of our courts, but the chief problem has arisen because of the fact that there hardly exists any cause of action when the issue comes up before the Court. I do not share the view that such petitions are premature because they are the most effective forms of preventive action and if the Courts were to be magnanimous enough to spend a little time calling the authority against whom it is directed, it will be found that the project or the action can be modified in good time or in those of the cases where it is contra-indicated, it can be stopped before the damage occurs. The logic behind this argument would be self evident from the fact that the Indian Courts have been dismissing 82.3% of the challenges on the ground that it is too late since the project has already come up at a particular site or that it is too late in the day to reverse the decision. It is high time that the latter view is discarded because the loss of a certain amount of money is far more preferable to permanent ecological damage. In the global context, anticipatory action in this field has been unique to India though it has been resorted to in only a small measure in other parts of the world. In a country where almost all major decisions are invariably polluted by the interaction of unhealthy forces, reversing the step becomes extremely problematic because of the cost factor. Unfortunately, the Courts have been mechanically upholding the argument that the implementation stage has been reached and that massive investment has gone into the planning processes, that contracts have been awarded and that it would be too costly to stop the action. The order of the day appears to be to beat the gun and the simple solution is that no compromise should be permitted and its very clear that if an example is made in one or two of the glaring cases, that the mischief syndrome will be permanently checked. Today too many are allowed to get away.

## **7 GREEN AND BROWN CONCERNS**

Social movements have been triggered off principally due to rapid industrialization and over exploitation of resources, increasing levels of pollution and loss of bio diversity. In this regard, what I need to emphasize is that whereas the rest of the world has moved towards a system of conservation and preservation as a guideline towards sustained developmental activity, these two fundamental principles have not been observed at all in India. Simple principles such as switching to alternate sources of energy, renewing natural resources and even elementary factors such as recycling of scarce water all of which have reached perfection levels in other areas have not been employed and it is this level of thoughtlessness that has impelled social movements that are concerned with the protection of the fragile ecosystem and conservation of scarce resources. NGOs (IUCN, Friends of the Earth, Green Peace, etc.) have been questioning the model of development at various forums, more prominently through Court processes resulting in the spawning of several schools of thought. The Conservationists otherwise known as the Greenists have advocated biotic rights activism which has been widely propagated by the media and the lament is that the judicial system has not been strong enough in its insistence that this must become the dogma in official circles. The Human Rights Activism Movement has focused essentially on the people and the forests and protection of forests along with the rights of the people living there. In an interesting public interest litigation decided by the Karnataka High Court recently, the rights of the tribals in and around the forests were upheld

in preference to a plea that an international chain be permitted to clear the area and set up a forest resort. Interestingly, the defense pleaded was that thousands of tourists would visit the area and would be automatically converted to the ecological wave-length that they would otherwise never have been exposed to if they had not spent some time in the area. The High Court refused to uphold the decision on the ground that it offended the provisions of the Forest Conservation Act.

This country has seen, what has been defined as a Deep Ecology Movement which started in the forests of north India when Bahuguna unleashed the Chipko Movement whereby huge forests were saved because the young villagers particularly women embraced the trees and refused to allow them to be cut. The principal benefit of this movement has been the build up of ecological integrity and it has contributed towards fostering an environmental jurisprudence covering law, policy and practice. Another facet of interest as also importance in India has been the opposition to certain developmental activities such as Mega Projects. The Narmada Bachao Andolan (Save Narmada River Agitation) has contributed to the creation of a new body of law viz. Law of resettlement and rehabilitation. July-August 1998 have witnessed unprecedented landslides in the Himalayas leading to the loss of over 5000 lives and the annihilation of whole villages all due to uncontrolled tree-falling and terracing of the mountain slopes for agriculture. The non-action on the part of the government in the face of a series of reports and warnings from reputed environmental agencies and the government's own Geographical Survey of India has just been taken before the Supreme Court in the hope that correctives can be ordered at least at this late stage.

## **8           ROLE OF THE JUDICIARY**

The higher Judiciary is the vanguard of the movement in reforming the system in India. The unique position of the Indian Judiciary in the Constitutional scheme distinguishes it in so far as its role is not just confined to dispute resolutions and interpretation of law. The Judiciary at the highest level is invested with the power to lay down law so as to bind every authority (Article 141 of the Constitution), the power to interpret, declare, refined, reform and create new law for observance and the insistence on due process and valuable addition to the very substance of the law. It is the guardian angel of individual and collective rights and the real protection against every form of arbitrary exercise of power, abuse of power and non-action. A recent off-shoot as far as the field of enforcement is concerned, has been amplified in the case of VASUDEVAN (Secretary of State) where the Court attached personal liability on State Functionaries and the Supreme Court took the unusual step of punishing him through a jail sentence of six months rigorous imprisonment. That the Judiciary is virtually omnipotent in this field only heightens the sad comment that it is not using its power often enough and in a manner that could enhance the quality of life.

The Indian courts are hopelessly overloaded at all levels, but this is hardly a ground for the Judiciary distancing itself from this crucial area. What is unfortunately overlooked is that the Courts are apprehensive of being inundated with this field of litigation, whereas in fact, a few firm, hard-hitting judgement would send the message out loud and clear that non-compliance will meet with rigorous action. I would also like to see a strong disapproval through enlightened public opinion directed against the anti-public interest litigation measures adopted by certain areas of the Judiciary in this country.

## **9 CONCLUSION**

In the Indian context, miracles can be achieved through minor institutional reform. I have recommended to the Environmental Law Institute which is at present actively engaged in the India program to concentrate on an adaptation of the law syllabus in order to include Environmental Law and Social Responsibility as compulsory subjects so that the new generation of lawyers will be compulsorily exposed to this field. I have also suggested that the Bar Associations through seminars and the like be oriented towards instilling in their Members not only an awareness but much needed militancy in relation to these issues. The most important sector of the institution i.e. the Judiciary, is the most difficult to deal with because it is a delicate issue involving sensitizing the Judges at all levels and bringing about a change of attitude.

This can be achieved through a sustained program directed towards the Judiciary through institutions such as the Law Schools and the Universities and the entire effort has got to be directed towards a program to nudge the Judges into action without offending them. This undoubtedly is a precarious action, but one that is absolutely essential, and to my mind achievable.

## **REFERENCES**

1. AIR denoted All India Reporter, the leading Indian Law Reporter