
INSTITUTIONAL REFORM THROUGH JUDICIAL ACTIVISM

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001 India**SUMMARY**

The role of the Judiciary in achieving radical environmental institutional reform has hitherto been overlooked in so far as the emphasis has always been on Governmental action and its implementation. While the role of the NGOs has been assumed to be more of a vigilante nature they have also been ascribed with the important task of achieving higher compliance even in the absence of strict policing by the State. At the end of 1998 a critical audit in India will indicate that the achievement levels have still been low in vital areas principally because the Courts have been playing a minimal role in the arena. While it is true that punishing environmental offenders in a manner that has to be a deterrent is the need of the day, it must be simultaneously emphasized that the two other important means namely the power to prohibit and the power to direct are two of the quickest and most effective weapons that need to be used more frequently. In the Indian context, the subordinate Courts which deal with environmental transgressions have failed miserably in achieving any respect for the laws or any fear of the consequences of breaking it. Compliance from society will be forthcoming when the message goes out loud and clear from these Courts that whereas today one can transgress nature's laws and State laws almost with impunity, that the Courts will ensure that it is no longer safer or cheaper to break the law than to observe it. What is required is a no nonsense approach whereby fear is the key — a respect built on the understanding that the consequences of a breach will be very very serious. The Indian Supreme Court's interpretation that the fundamental right to life does include the right to clean environment elevates what is otherwise an ordinary legal right to that of a basic human right constitutionally protected through writ jurisdiction of the Supreme Court and High Courts. Therefore, despite failure of administrative and legal arrangements in the effective protection of environment, human rights standards and procedures have advanced the cause of a right to a clean environment by putting administrators on the defensive and generating a positive enthusiasm to give priority to environment issues.

1 INTRODUCTION

Are environmental rights, individual rights? They most certainly are, as it affects the individual's right to life. At the same time, they are group rights as well, since a safe and clean environment is the basic need of all living creatures, particularly human beings. However, at the end of the day, the discourse on rights invariably aims at articulating potentially enforceable individual rights, as all human rights are inherently anthropocentric (focus on people).

Many aspects of environmental rights reaffirm the substantive content of such rights. Thus, environmental rights emanated out of the right life, right to health, right to privacy, and right to sustainable development. At the same time, without individuals having the standing to challenge perceived violations of the environment and the system following "due process of law" as a prerequisite for interference with fundamental rights, the development of

environmental rights has evolved as part of human rights. It is the Courts and more importantly the Judges in many of these Courts who are required to give body and soul to these vibrant concepts.

2 JUDICIAL ACTIVISM

The Indian Constitution invests the higher Judiciary with the powers that were originally possessed by the sovereign and to provide complete justice these Judges are the repositories of unbridled powers. India is a subcontinent and it has as many as 438 High Court Judges and 29 Supreme Court Judges and the figures are being set out in order to illustrate that if this virtual army of Judges were to use the powers vested in them both individually and collectively to the extent that is expected, that every erring institution or every defaulting institution could have been reformed in no time. The gravity of this argument would be illustrative from the fact that out of the 248,860 cases that these Judges handled in 1997, as many as 16,480 pertained directly to environmental issues and the failure rate is as high as 93.8%. The orders indicated that the Courts generally refused to interfere and virtually redirected the parties to the authorities at a slightly higher level. It was an appeal from Ceasar to Ceasar, an exercise in futility that demoralized the complainants and encouraged environmental vandalism. Why did this happen? My only regret is that in the higher Judiciary, which is otherwise overloaded, an almost universal trend has manifested itself among the fraternity built on the fallacious notion that environmental issues belong to a field which is really directly not the business of the Courts, which should be agitated elsewhere and that even the few cases that come up should be beaten down in order to reduce the volume of such litigation and lighten the load on the Judiciary. To my mind, the whole approach is wrong and requires drastic change.

The Indian Constitution incorporates some unique features such as Art.51A which enumerates Fundamental Duties one of which is "to protect and improve the environment including forests, lakes, rivers and wildlife and to have compassion for living creatures." This is a provision that is more overlooked than observed but it does postulate as much a duty on the Judges as on the citizens to ensure environmental preservation. The number of cases that come up before the Courts are severely limited because the chances of success are relatively low. There are also other reasons, the main one being that the offenders invariably belong to powerful or dangerous lobbies and in the majority of instances, there is total back-up and political patronage. A classic example is where the State or its departments acting through its representatives are the offenders, such as in the case of widespread destruction that takes place through the forest department which in turn is riddled with corruption. The complainants would either be afraid or are resigned to the fact that the offending party is too big or powerful to be rectified. I mention these features deliberately because the higher Judiciary is the one and only institution and the avenue of last resort available to an aggrieved citizen or an endangered population to obtain corrective action; if the Judiciary shows a high degree of reluctance in entertaining the complaints, for its own defensive reasons, the number of approaches would necessarily fall. Nothing is more eloquent than the analysis of the cases belonging to this category which increased by 11% between 1980 and 1985, by another 47% between 1985 and 1990 thanks to a responsive Judiciary and then declined by 22% between 1990 and 1995 and, dived even more by 44% between 1995 and 1998. These figures demonstrate a dangerous trend and one which requires urgent reversal. Whereas a decade ago the situation was in the process of reform, a change of Judicial attitude has today restored it to a situation of pathos.

Undoubtedly, the entertaining of this class of litigation results in a flood of complaints and it is up to the Judiciary to weed out the grain from the chaff, but the aspect of significance is that if the message goes out loud and clear that the Courts will not tolerate atrocities in this field, the compliance levels will climb immensely. Conversely, if there is a confidence that the Courts will turn a Nelson's eye to the problem, infringements will only grow. This itself establishes the total and absolute need for Judicial activism in this field.

Sad as it may seem, the activist Judges who include the writer of this paper, are labeled by their own colleagues as being ones who are interfering in areas which they should not and are publicity seekers. It is inevitable that the few Judges who apply themselves seriously to the task of enforcing Environmental Law compliance which includes rigorously punishing the offenders, do get noticed. The media in this country is very sensitive to environmental issues and is about the only institution that has relentlessly fought against all forms of degradation. Undoubtedly therefore it highlights every instance where there has been significant and worthwhile Judicial intervention which to my mind is essential because it ensures the message of compliance.

Judicial activism only connoted responsible responsiveness, a willingness to intervene and above all the moral courage to take on environmental predators. True, it involves more than moral courage, the spirit of preservation and as Dr. Albert Schweitzer put it, "a reverence for life in all its forms." A Judge who is true to his office needs to address to himself the question "What has God given you a neck for if not to stick it out?" (An anonymous British poet). If Environmentalism is to make headway, judicial activism is a must.

What are the concrete steps of ensuring Judicial activism which is really the need of the hour?

- A well defined program aimed at feeding the Judges with the right type of literature, highlighting the all important aspect that they man the only institution that can hold the fort.
- A sustained media campaign directed towards bringing home the message that if the Courts and the Judges do not intervene, nobody else will and that therefore they must.
- An immediate directive from the Chief Justice of India that a Green Bench be set up in the Supreme Court and in every High Court to handle this class of cases expeditiously and efficiently and that the Judiciary be more responsive to these issues.

3 WRIT JURISDICTION

Under the Judicial set up in India, every Judge of the High Court and the Supreme Court is invested with inherent powers whereby writs can be issued to every government, state and public authority. These inherent powers are absolute and an order or a direction issued is bound to be observed and in cases of breach, the Courts have the powers to enforce their orders. Nothing can be more effective in enforcing environmental compliance than this mechanism and to my mind, it is the single, most expedient and effective means of achieving institutional reform. Time-factor wise and cost-wise again, it is the finest remedy and the one that needs to be utilized far more effectively than at present. To the question as to whether the addition of this field of litigation would abnormally pressurize the already overworked Judiciary, my answer is in the negative. First of all, there is no problem whatsoever in

increasing the number of Judges but even if that takes a while, with mere better time management, work management and a degree of mechanization, there is absolutely no difficulty in accommodating these cases. What needs to be emphasized is that this class of litigation involves comparatively uncomplicated cases which can be disposed of very fast. To my mind, if every High Court and the Supreme Court were to firmly and seriously order corrective steps and enforce them for a period of one year the compliance levels will shoot up to a point that the need to approach the Courts will be reduced by as much as 75%. I say this from a position of experience and with total confidence.

4 JUDICIAL MILITANCY

Shocking as it may seem, this expression may appear totally out of place in relation to Judicial functioning. While it is accepted in most quarters that a definite degree of Judicial activism is desirable, eyebrows would probably be raised of one advocates Judicial Militancy. I have already referred to the more serious issue namely that in respect of major transgressions the aspects of personal safety and survival invariably deter public interest litigation. In 1983 the Indian Supreme Court entertained a series of letters from convicts and later on from journalists which were treated as letter petitions and converted these into writ petitions on the basis of which the Courts proceeded to summon the respondents and to pass appropriate orders. Over the years, the Indian Courts have accepted the practice of entertaining such complaints which are initially screened and thereafter acted upon. These may concern individual grievances or in many instances involve a request for Judicial intervention in cases where the problem is brought to the notice of the Court. In the first of such cases it was brought to the notice of the Supreme Court that in one of the States a number of undertrial prisoners had been victims of police torture which had resulted in their being blinded and that the authorities had never produced them before the Courts thereafter and had indefinitely retained them in custody and the Supreme Court came down heavily on the authorities and ordered exemplary compensations. Some years later, when the capital city of India, New Delhi, was preparing for the Asian Games, thousands of migrant laborers had been brought to Delhi to work on construction sites without even the provision of basic amenities resulting in abnormally high civic pollution, and a journalist took the matter up with the Supreme Court which intervened and brought about immediate corrective action. This avenue of approaching the Courts still continues but the irony of the situation is that only 1.2% of the letter complaints get to be entertained. An examination of a cross section of these complaints indicates that 92% of them deal with aspects of pollution, degradation of forests, tanks and rivers, noise pollution, dangers to public health and generally matters that require redressal in the public interest. All that is required is that a well qualified scrutiny mechanism be set up in the Courts to sift these complaints and to act on ones which require redressal. Even in cases relating to pollution by small industries, the residents of that area invariably do not disclose their names for fear of reprisals but this is no ground on which a Court should ignore the complaint. Where it is a question of the public good and the public interest the predominant consideration must always be to correct and not to permit injustice.

What I am coming to really is that through this source, complaints are addressed directly to the Judges and additionally through the media and even through ones own observation, instances do arise when serious illegalities come to the personal notice of a Judge. A Judge being a Constitutional functionary the Judicial Officer is vested with "suo motto" powers to direct corrective action and for doing this, it is not necessary that a public interest petition or a formal complaint should be on record. Undoubtedly, the Judge will follow

a procedure whereby the issue is investigated and the party against whom action is proposed would be given a fair opportunity of being heard but the fact remains that while exercising suo motto powers, the members of the superior Judiciary are reaching out further than and activist Judge would normally do. I have used the expression Judicial Militancy because I believe that in order to bring about social change and institutional reform a Judge would have to be militant to the extent of keeping one's eyes and ears open and acting on one's own. The impetus has to come from within and for this, there has to be a background of deep seated dedication fired by a commitment to reform.

I advocate a resort to this mechanism in the context of the Indian sub-continent because the Judges have the power, the competence and the means to achieve rapid institutional reform as they do not have to wait for complaints which may or may not come.

5 SENSITIZING THE JUDGES

For all this, a process has to be initiated to very quickly but very firmly sensitize the Judges towards the importance of environmental action. The Bar Councils and the Universities need to be moved towards including the subject in the Law curriculum. The Bar Associations from where the majority of Judges emerge need to be stimulated and spurred into action by increasing awareness of environmental issues but as far as the existing Judges are concerned what would perhaps help immensely would be through the setting up of a Judicial Academy in each State which could hold orientation courses for the Judges in order to increase the sensitivity levels that are absolutely necessary, if the levels of activism or militancy are to be increased. Whereas various international bodies have hitherto concentrated on government bodies, NGOs., private enterprises, the legal profession appears to have gone by default so far. I have attempted to highlight how vital this area is and while I do not dispute that a tremendous amount has been done towards formulation of laws, regulations and the like, that the role of the Courts has not been sufficiently emphasized is a sad truth. This paper has therefore attempted to place before this Conference how vital this sector is in achieving rapid and radical institutional reform.

