

CHAPTER
THREE

**The Changing Role of the
Indian Judiciary**

A strong ambivalence clouds the public image of the Indian judiciary. On a superficial level, it reflects the shaky state of India's democracy. Both are basically in place, but both are also seriously troubled. Galanter (1984: 500) summarizes the public's perception as follows:

Courts in India are viewed with a curious ambivalence; they are simultaneously fountains of justice and cesspools of manipulation. Litigation is widely regarded as infested with dishonesty and corruption. But courts, especially High Courts ... are among the most respected and trusted institutions.

To judge by recent literature, this ambivalence has increased. On the one hand, judicial activism is seen as a sign of hope to set shortcomings right. Social awareness, insistence on human rights and the attempt to check governmental lawlessness are said to have 'transformed the Supreme Court *of* India into a Supreme Court *for* Indians' (Baxi 1994a: 143, his emphasis). In the words of a former Supreme Court Justice, 'the judiciary has ensured that howsoever

high you may otherwise be, the law is above you' (Khanna, 1999: 25).

On the other hand, symptoms of inefficiency haunt the courts as they do other state institutions. The courts are not free of corruption (Khannabiran, 1995). The legal process is even said to have become 'more and more intractable, dilatory, whimsical and protective of the criminal and law breaker having influence or financial clout' (Anand, 1996: 16). There are serious complaints of 'widely reported allegations of judicial misconduct and a disconcerting compromise of integrity and impartiality' (Jethmalani, 1999: 22).

This mixed picture is reinforced by a recent assessment of a high ranking expert group including a former chief justice of the Indian Supreme Court, A.M. Ahmadi (Chodosh et al., 1997:5):

Widespread and profound backlog and delay currently undermine the fundamental priorities of a law-based society. Backlog and delay in the resolution of civil disputes in India erode public trust and confidence in legal institutions, and act as significant barriers to India's chosen path to social justice and economic development. The inability to enter final legal decisions within a reasonable time renders state action functionally immune, turns obligations to perform contractual duties into effective rights to breach with impunity, and devalues remedies eventually provided. In sum, the inability to resolve disputes in a timely manner eviscerates public and private rights and obligations.

While it is acknowledged that trials are delayed throughout the world, the authors go on to state that 'nowhere, however, does backlog and delay appear to be *more* accentuated than in modern-day India' (Chodosh et al., 1997; 5f, their emphasis).

The same essay, however, mentions signs of hope. Most important, it suggests that court administrations and case management be reformed. Such reforms should dramatically enhance the efficiency of the judiciary. They include computerization, systematic classification of cases, comprehensive tracking of ongoing proceedings, and similar measures. The essay stresses the remarkable success of reforms along these lines that were initiated by A.M. Ahmadi in the Supreme Court: 'These initiatives dramatically reduced the Supreme Court caseload from approximately 120,000 cases in October 1994 to 28,000 cases in September 1996' (Chodosh et al., 1997: 12f). The essay also places hope on alternative dispute settlement through, for instance, *lok adalats*, or people's courts.

Chodosh et al. stress the relevance of a trustworthy and efficient

judiciary for a ‘diverse and exploding population, the largest democracy and the seventh largest national market in the world’ (p. 7). They mention ‘the recent drive toward greater accountability in public administration’ and the relevance of judicial reliability in view of ‘post-1991 market reforms’. In a nutshell, their analysis once again reflects the exigencies of functional differentiation and modernization as discussed in Chapter 2.¹

In order to sociologically assess the role of the courts in India’s democracy, this chapter first delves into history. The first section looks at how the trials and tribulations of the legal system during British rule have been discussed in academic writing. The second section deals with the relation of the judiciary to the other branches of government in independent India. The third section then focuses on public interest litigation, the clearest expression of judicial activism to clean up state affairs in contemporary India. It was initiated two decades ago and has since been gaining momentum.

3.1 Problematic Rule of Law in a Historical Perspective

Generally speaking, there are reasons to be sceptical about the capacities of the judiciary in developing countries (Betz, 1996). Poverty, lack of education and social exclusion in general reduce access to the legal system. Poor infrastructure is likely to limit the judiciary’s scope to urban areas. Not all judges can be expected to play by the official rules. All these admonitions make sense in the Indian context. Even more so, they must have made sense at the time of the British Empire.

Indeed, the British did not firmly establish their ideas of rule of law in colonial India.² Cohn (1990) describes the problems of the judicial system during that period. According to him, the courts were used more to harass people than to settle disputes. Corruption was rampant and legal matters would drag on for long periods, providing

¹ In line with such an assessment, the proposed reforms are result-oriented rather than emphatically ideological.

² As a matter of fact, it may also be doubted that the way legal matters were dealt with in Victorian Britain would meet standards considered normal and fair in today’s United Kingdom as governed by Tony Blair’s New Labour government. ‘Western’ modernity is not a static, ahistoric social setting but rather undergoes constant change.

opportunity for more bribes and a constant source of income for lawyers. The enforcement of court rulings was not to be taken for granted.³

A similar picture emerges from other academic writing (Mendelsohn, 1981; Washbrook, 1981). The 'pathology' of the Indian legal system is considered to be rooted in 'a turbulent agrarian structure' which was in turn 'reflected in an immensely problematical judicial system' during colonial rule (Mendelsohn, 1981: 859). Similarly, Washbrook (1981: 670) sees the inefficiency of the judicial system as a consequence of the needs of the colonial power. The East India Company had subjected India 'less to the rule of property and law than to that of bureaucratic despotism and state monopoly'.

Washbrook criticizes Cohn for blaming the sorry state of the legal system on attitudes of the Indian subjects of British rule rather than on the colonial power itself. He stresses that the East India Company did not set up a judicial infrastructure powerful enough to enforce its rulings. Corruption was rife, appeals might intolerably prolong individual litigations and the courts were run by incompetent personnel who were incapable of jobs more important for the colonial regime or who, after retirement, needed some additional income. Moreover, the insistence on British conventions of mostly written evidence was unrealistic.⁴

Later in the 19th century, judicial institutions were only very slowly and, overall, inadequately enhanced. Washbrook makes out an ambivalence on the side of the British. They did have an inherent economic interest in liberal, market-friendly legislation on the one hand, but, for political reasons, also were keen to maintain a system of personal law alien to individual landed property on the other.⁵

According to Washbrook, the colonial power depended more on controlling the country than on introducing liberal standards of rule of

³ From a functionalist perspective, it is more interesting to note that the courts could (and can) be used for harassment. It is less relevant to try to explain this through attitudes and disposition of the people. If the legal system operates in such a dysfunctional manner, that is likely to shape the expectation people have. One should not blame the people going to court for the fact that the judiciary does not settle conflicts but rather prolongs litigation (Kidder, 1973).

⁴ Cohn similarly leaves little doubt that rule of law was not of high priority for the colonial power.

⁵ In this sense, the British, in a policy of divide and rule, created or at least exacerbated the communitarian binds that are today sometimes seen as traditional obstacles to the viability of democracy after the British model.

law. After the authority of the East India Company had been shattered by the early nationalist uprising of the ‘mutiny’, the continuously problematic reality of the legal system reflected delicately balanced power arrangements. Such informal coalitions included the colonial bureaucracy and local landlords, urban commerce and, from the early 20th century on, local industrialists.

In a similar vein, R. Sudarshan (1985) analyses the legal system in post-independence India. He points out that the British approach to law was not abandoned in 1947 and therefore must have served some domestic needs. The suggestion is that it actually was useful to broker compromise between powerful landowners and a strong domestic bourgeoisie.

While not being totally implausible, Sudarshan’s approach subordinates the judiciary (and the State apparatus as a whole) to the forces of class struggle. This implies that the judiciary is not conceived as a source of socially relevant power that, in its own right, might be expected to have an impact of society. Whereas law and judiciary are seen as depending and thriving on their basic autonomy in systems theory, they are ‘only’ part of a more or less irrelevant superstructure in the Marxist view.

More generally speaking, the problem with the Marxist paradigm is as follows: It is always possible to analyse social history along its lines in retrospect, but its prognostic qualities are doubtful, to say the least. In this sense, the chaos theory approach of contemporary systems analysis in terms of functional differentiation has the advantages of being based on the notion of contingency from the outset and of not being teleological.⁶

Recent Indian history does confirm the potential of the judiciary’s autonomy. Its upper echelons have been playing an increasingly assertive and important role. This was essentially recognized by R. Sudarshan in a later essay (1990: 60) on the political relevance of the judiciary: ‘With the exception of the judiciary to some degree, no other institution appears to have realised the importance of the quest for the idea of state.’

⁶ In a free interpretation of Luhmann it might be said that, at the end of the 20th century, it seems more advisable to expect the unexpected than the eventual triumph of the working class.

3.2 The Courts and the Political System

At independence, India was seen to be subjected to the rule of law in a modern sense. After all, the British legal system was basically maintained and a new constitution put in place that combined the principles of liberal democracy with socialist aspirations of general equality and welfare. Today, there is a strong sense of disillusionment. The concept of universalist legalism, of equal rights, in fact of the very rule of law, has been said to be alien to Indian tradition (Baxi, 1982).

However, as in the above discussion of the 'state erosion' theory, it is again doubtful that matters were all that different immediately after independence. Why should the Indian public have had a better understanding of law and judiciary then, if undemocratic attitudes are prevalent today? And if courts today suffer from the same symptoms they showed during colonial rule, why would it have been all that different immediately after 1947?

Rather than seeing the idea of rule of law as inherently alien to the Indian mindset, it is interesting to note the high relevance of legal experts in the struggle for independence, for instance Gandhi, Jinnah, Nehru and Ambedkar. Indeed, the use of constitutional law was intended to reach a wide societal comprise, and not only between competing capital factions. In spite of undeniable difficulties, it is clear that it has not failed to serve the nation. On a fundamental level, it is important to emphasize that today's legal system is an Indian institution, and not simply something left behind by the former colonial power.

The Indian constitution does have some inherent ambiguities. It stresses property among personal, inalienable rights and thus protects the traditional social structure. The directive principles of the constitution have strong redistributive qualities and thus call for the transformation of society. In general, old laws protecting privileges are actively enforced, whereas reforms in favour of the oppressed, meant to foster social change, are inadequately implemented (Baxi, 1994a). Moreover, parliament and state assemblies pay scant attention to the issue of implementation while drafting reform legislation (Sivaramayya, 1993). Reservation policies have not only benefited disadvantaged sections of society, but also re-emphasized the

relevance of caste, which is officially abolished by the constitution (D. Kumar, 1992; Béteille, 1997a).⁷

In any case, a latent sense of lawlessness is, of course, reinforced by the fact that those holding political office or positions of the civil services are not expected to play by the rules themselves. Bending or evading rules is often understood to be an appropriate way of wielding power (Baxi, 1982). It is obvious that court procedures in this context will tend to be considered volatile and subject to personal manipulation and arbitrary decision-making rather than the application of impersonal, abstract rules to specific cases.⁸

However, such negative assessments are only one part of a mixed picture. The other is a long-standing, surprising propensity in India to hold the judiciary in high regard (Gadbois, 1985; Sudarshan, 1985; Galanter, 1989; Chodosh et al., 1997). It is largely perceived to be independent of politics and comparatively less affected by corruption. Its integrity is considered to be the basis of its power. In retrospect, the judiciary (particularly the Supreme Court) has been the most effective opposition to the central government. This can already be stated for the Nehru era.

From the prime ministership of Jawaharlal Nehru to his daughter Indira Gandhi's first term in office, the Indian Supreme Court was not seen as an ally of the poor and oppressed. Rather, it was considered to be a conservative protector of the economically better-off (Sudarshan, 1990; Rudolph and Rudolph, 1987). Nehru was in favour of radical land reform. But the Supreme Court insisted on full financial compensation of former landlords, reducing the Indian Republic's redistribution options. Nehru repeatedly criticized specific rulings,

⁷ As argued already in Chapter 1, increased assertiveness of the Scheduled Castes and Tribes and perhaps also the Other Backward Classes is a consequence of deliberate policies meant to enforce equal citizenship. It is part of the paradox of affirmative action anywhere that it emphasizes and thereby reinforces the distinctions of caste, gender or—in the case of the United States—race that it attempts to transcend. However, once such difficulties become apparent after decades of reservation policies, they should not obscure the fact that there has been social change, mostly to the benefit of individual members of the deprived social groups.

⁸ In this study of courts in Bangalore and Mysore, Robert L. Kidder (1973: 123) states that 'the skills developed by the various specialists of legal administration and the interest structure which has evolved within and around the bureaucracies of legal administration have produced a maze of such intricate and unstable practices and relationships that the legal system cannot provide predictable, decisive, final outcomes through knowledge of, and appeal to, "the law" in Bangalore'.

but, being a trained lawyer himself, he never put the judicial processes or institutions in doubt (Gadbois, 1985).

Indira Gandhi did not follow his example. She intended to nationalize the Indian banking sector and abolish the privy purses and other privileges of the nobility that had formally ruled the Indian princely states in colonial days. The Supreme Court overruled her decrees as not being in line with the constitution. This led to a full-blown attack by the prime minister on the Supreme Court.

Indira Gandhi portrayed the government as being obliged to pursue socialist policies by Part IV of the constitution, the Directive Principles of State Policy. She accused the Supreme Court of not being committed to these goals and instead stubbornly defending inequitable property arrangements in favour of a privileged few by its insistence on the fundamental rights laid out in Part III. The prime minister claimed that the directive principles were superior to the fundamental rights. She also insisted on the notion of parliamentary sovereignty and attacked the notion of legislations being judicially reviewed.

In its 1973 *Kesavananda* ruling, the Supreme Court granted that parliament was entitled to amend fundamental rights. However, it also insisted on the Supreme Court's duty to defend the 'basic structure' and the 'essential features' of the constitution. These included, among others, judicial review, the federal structure of the State, and the principle of free and fair elections. The Court thus upheld its right to check legislation while basically accepting that the contradiction between Parts III and IV of the constitution granted parliament space for far-reaching amendments.

Two years later, the Allahabad High Court ruled that there had been irregularities in the election campaign and that Indira Gandhi was consequently to lose her seat in the Lok Sabha. This led to the imposition of emergency rule by the prime minister. In 1976, during her dictatorship, Indira Gandhi had parliament pass the 42nd Amendment. It radically limited judicial review and writ jurisdiction. The amendment granted parliament unlimited constituent powers. It legally subordinated the fundamental rights to the directive principles. Property rights were amended according to Indira Gandhi's redistributive policy approaches.

In what were surprising political developments, Indira Gandhi first lost the 1977 general election and then won the 1980 general election. Four months after her return to power, the Supreme Court

upheld its 1973 Kesavananda doctrine, undoing much, but not all, of the 42nd Amendment. Property rights (and, as will be discussed in Chapter 4, Section 4.1, environment principles) were upheld according to Indira Gandhi's terms. The Court did, however, reclaim judicial review and vast writ petition competences.

After the legal breakdown of emergency rule, the Supreme Court had to reassert its position. R. Sudarshan (1990:55f) assesses the situation as follows:

[The Supreme Court] sought to refurbish its image with a new activism which championed the rights of those who are prevented from claiming the privileges of full citizenship because of social and economic disability. The success of the [Supreme] Court's attempt to open its doors to new constituencies, and its efforts to curb the lawlessness of government and enhance public accountability, greatly depend on the strength of social action movements which have produced a new consciousness about problems and struggle for survival of the poor.

Akhileshwar Pathak (1994) also interprets the move towards public interest litigation as an expression of the ongoing conflict between parliament and the Supreme Court. The latter, after the emergency rule in the late 1970s, sought to assert its position by espousing the cause of the poor and disadvantaged strata of society. This was all the more so, as several Supreme Court justices had been politically close to Indira Gandhi and had been perceived as favouring her even though they had 'stopped short of overtly legitimating the emergency regime' (Baxi, 1985: 293).

The current trend of insisting on liberal legalism at the upper ranks of the Indian legal system can thus be traced back to the traumas of Indira Gandhi's brief dictatorship. Ever since, liberal legalism coincides with what is publicly perceived as governmental lawlessness. Clearly, the judiciary is reacting to such lawlessness, struggling to assert its own position in Indian society. The role of courts depends on the rule of law. It therefore comes as little surprise that judges are in the forefront of this conflict (Ganguly, 1977).⁹

Generally speaking, scholarship regards judicial activism as a sane reaction to incidences of governmental lawlessness (Agrawala,

⁹ In a cynical vein, one might even say that, in an overall corrupt State, members of the judiciary can only take a share of the spoils if they make sure that a minimal level of rule of law is maintained. If legal provisions were to become totally obsolete, so would the courts of law.

1985; Baxi, 1996; Béteille, 1997a; Conrad, 1995, 1997). Claims that the judges are overstepping their competences and need to be curbed are common in the media and quite obviously motivated by political interests. This line of argument misses the point that the judiciary in India has not interfered with administrative powers that were being exercised according to the law (Spathe, 1997).

What gives its activism particular potential clout is that the Indian judiciary enjoys an especially high degree of autonomy (Galanter, 1984). The chief justices of the Supreme Court and of the High Courts determine the agenda and the personnel of the benches. Judges actively direct proceedings, admitting and even inviting parties and witnesses. They enjoy life-long tenure and high public esteem. The Supreme Court is the only central judicial institution. It deals with cases of any kind and binds the lower courts with its decisions. By assuming the authority of appointing judges of the two highest judicial levels, the Supreme Court in 1993 further enhanced its already high autonomy (V. Kumar, 1996).

From a sociological point of view, it is also interesting that judges are a very homogeneous group. They share the same background of higher education and the professional use of English. It is not surprising that such common ground has served as a basis for judicial activists.

Unsurprisingly, this has given rise to the critical notion that they have become overactive. The question of judicial accountability is on the public's agenda, with regular claims of politicians and bureaucrats that the judges are overstepping their competences (V. Kumar, 1996; Bhatia and Singh, 1993). In this context, it is important to remember that the esteem in which the Indian public holds the judiciary is high only in relative and not in absolute terms. The courts have a better reputation than, for instance, the bureaucracy or the police.

Nevertheless, the judiciary is itself not necessarily beyond reproach. To many, it appears corrupt and even increasingly so (Anand, 1996; Kannabiran, 1995; Bhatia and Singh, 1993; Jethmalani, 1999). Chandra Pal (1993) points out that inadequate pay and pensions along with the convention of governments appointing retired judges to high-profile, well-paid commissions put judicial independence in doubt. Judicial activism is therefore by no means unproblematic. Its controversial instrument is that of public interest

litigation. This ‘crowning glory’ of the judges (Baxi, 1996: I, 11) will be discussed next.¹⁰

3.3 Public Interest Litigation

Essentially, public interest litigation consists of writ petitions by people who are not immediately affected by the grievances cited. Social workers, journalists and other politically aware persons now file petitions if they feel that certain matters are of public relevance (Agrawala, 1985; Baxi, 1985; Iyer, 1985; Galanter, 1989; Hurra, 1993; Baxi, 1994a; Ahuja, 1994; Jethmalani, 1995).

The new activism of the courts goes along with a sense of public awareness fostered by the press (Baxi, 1985). After having themselves been exposed to illegitimate violence during the emergency of 1975 to 1977, many members of the Indian middle classes became more aware of the importance of the rule of law. They were less willing to tolerate violations of human rights of members of disadvantaged social groups.

The judiciary assumed an activist role. A good example is what one might call ‘epistolary jurisdiction’, the fact that Supreme Court justices have gone so far as to accept mere postcards concerning infringements of fundamental rights as writ petitions (Agrawala, 1985; Iyer, 1985; Rudolph and Rudolph, 1987). Public interest litigation has been on the rise since the early 1980s and has ‘brought justice to the doors of those who live a hand-to-mouth existence and are illiterate and unorganized’ (Prakash, 1984: 332).

Human rights issues, such as those of detained but untried prisoners, industrial relations, as in the case of labour bonded by debt, and environmental matters have been subjects of such litigation (P. Singh, 1985, 1990). There has been a noteworthy trend towards environmental litigation (P. Singh, 1985; Shastri, 1990; A. Sharma, 1993; Mukul, 1997). Issues dealt with by the courts include domestic violence and dowry deaths (Jethmalani, 1995), the situation of institutionalized mentally ill persons (Dhanda, 1990) and even the

¹⁰ Upendra Baxi (1985: 290f) prefers the term ‘social action litigation’ because he sees it as primarily serving the needs of India’s deprived masses. However, this term does not emphasize that the rule of law is not only relevant in terms of class strife but is indeed an issue of public interest. Therefore, I find ‘public interest litigation’ more appropriate.

social acceptance of homosexuality (Balasubrahmanyam, 1996). In the mid-1990s, the judiciary began to tackle the issue of corruption by taking up public interest litigations. As Manoj Mitta pointed out in *India Today* (15.2.1966), 'to many legal observers... the Supreme Court's assertive role in the Jain hawala case wasn't one it had suddenly assumed'.

The judiciary has thus become a potential ally of individual citizens and of action groups insisting on better performance of State institutions. It has 'become a byword for judicial involvement in social, political and economic affairs', with a range so wide that 'anything under the sun is covered under the rubric PIL' (P. Singh, 1992: 239).

Public interest litigation thus provides an important forum for agents of civil society to stake their claims. It has turned the judiciary into an arena in which government lawlessness and malfunctioning are debated, providing public exposure and, to a certain extent, relief for frustrated and even traumatized citizens. However, the impact of public interest litigation must not be overestimated.

Basically, there are three factors that put its success in doubt. The first is the unreliability of court-order enforcement, the second is the limited access to a remote, English-speaking judiciary, and the third is the inherently slow and onerous judicial administration. In other words, many of the phenomena of government malfunctioning reappear in connection with public interest litigation, an instrument applied in an attempt to purge them.

Parmanand Singh (1992) generally questions the effectiveness of public interest litigation and suggests more research is needed to understand its impact on social movements and Indian society in general. Particularly the enforcement of judgements cannot be taken for granted. As early as 1985, S.K. Agrawala (p. 41) found it 'highly questionable if there has been tangible improvement in administration in any arena through PIL'.

B. Sivaramayya (1993) and Madhu Kishwar (1994) appreciate progressive rulings by the Supreme Court but complain that the judgements were not enforced by the administration, which thus rendered the public interest litigation futile. They suggest that public interest litigation may be more beneficial for the public profile of the lawyers and the social activists involved than for the marginalized people suffering from governmental lawlessness. Kishwar emphasizes

that proceedings in English do little to empower uneducated and otherwise deprived people.

According to Marc Galanter (1989), public interest litigation tends merely to react to episodic cases of outrage. It still depends largely on legal initiatives of members of the middle classes because poverty, lack of literacy and scarce legal knowledge deprive oppressed strata of Indian society of access to the courts.

Sivaramayya (1993: 296) even concludes that public interest litigation appears to be more a 'sedative' than the 'cure' and that 'its effectiveness' is 'limited to the judicial arena'. His empirical base for so vast an assessment, however, is one single, admittedly prominent, case concerning illegally bonded labour near Delhi. Oliver Mendelsohn (1991: 67), dealing with the same case, found that, indeed, 'nothing much' had changed for the workers concerned after the Supreme Court intervention.

Other authors are more optimistic, granting that public interest litigation judgements did result in some improvements on the ground (Dhanda, 1990; Mehta, 1996; Jethmalani, 1995). However, in the Indian context, the enforcement of judgements can no more be taken for granted than the implementation of laws. This comes as little surprise, as both would have to be carried out by the very same administrative bodies.

In principle, the judiciary can resort to contempt of court proceedings. Disobeying court orders is a criminal offence. Prison sentences are possible. However, they appear to occur rarely, as do proceedings for contempt of court. Agrawala (1985) writes that the judiciary thus avoids confronting high-ranking officials head on. This is particularly so, as it might be difficult to prove wilful contempt of court by holding individual members responsible for the shortcomings of an entire bureaucracy. Sadly, there has been reason to warn judges against abusing the instrument of contempt of court as a means to silence critical voices (Khanna, 1999; Narayanan, 1999). It seems irritating that judges might rather sue persons who find their rulings worthy of serious public debate than those who not even find them worthy of obedience.

Equally troubling is that the very enforceability of court orders appears to be questionable in many instances (Delhi Janwadi, 1997; Economic and Political Weekly, 1996; Kishwar, 1994; Sivaramayya, 1993). Dealing with environmental matters, Banerji and Martin (1997) claim that the Supreme Court does not have adequate technical

know-how and should refrain from giving detailed, unrealistic orders. Ashok Sharma (1993) mentions similar concerns. This admonition is all the more relevant as the credibility of the judges 'depends wholly on the conviction that the relief granted by the Supreme Court is enforceable' (Agrawala, 1985: 34).

The efficiency of public interest litigation is further undermined by the fact that court administrations, like other bureaucracies in India, do not have the reputation of being fast and efficient (Kishwar, 1994). Public interest litigations may drag on for years. For petitioners this is highly frustrating, particularly if the court is far away, perhaps in Delhi or a state capital. Conrad (1995) warns of the judiciary running the risk of overburdening itself by taking up too many politically controversial issues.

Such efficiency problems are exacerbated by the excess workload of Indian courts. They are generally perceived to be poorly equipped in terms of manpower and facilities. Some 600,000 cases were pending before the Supreme Court and the eighteen High Courts in 1978 (Baxi, 1982: 61). That figure dropped to 500,000 by early 1996 (*Economist*, 23.3.1996: 63).

As discussed in the opening section of this chapter, administrative reforms and computerization have dramatically shored up the judicial process in the Supreme Court. However, such reforms still need to be implemented in the High Courts. The assessment of Chodosh et al. (1997:4) for what was to be expected of judges working under normal conditions is bleak: 'Judges are so under-paid and over-worked that they often adjourn and delay the preparation of a case, if only to put off the demands of reaching a decision.' The frequent transfer of justices from one bench to another or, even more so, from one court to another, was said to serve as an incentive for such strategies.

Obviously, public interest litigation proceedings are prone to be erratic as the institutional setting they are undertaken in. Even the enthusiastic supporter of judicial activism Upendra Baxi (1994a) bemoans that not all courts – and much less all judges – are progressive.

Most of this criticism of public interest litigation held true in the empirical cases of environmental disputes I studied in Calcutta. As will be elaborated in Chapters 5 to 7, court proceedings tended to be long and potentially frustrating. Judgements were by no means automatically enforced. Some of them were technically inadequate. Nonetheless, the situation was often affected for the better, provided

the petitioners kept up the pressure on the government by monitoring the results of litigation. Even then, however, results might diverge from what was ordered by the judges.

It can be generalized that, through the instrument of public interest litigation, the judiciary has become a forum in which to debate governmental lawlessness. It can provide some transparency and, while not being a guaranteed road to relief, it does provide at least a chance of improvement. It is strengthening the sense of public sphere by forcing government agencies to become involved in serious discourse with citizens in an arena that is not as inconsequential as promises on the campaign trail tend to be.

My findings do not support a regularly vented concern in the Indian discussion of public interest litigation, that of litigation depoliticizing (Ray, 1997, Raj 1996a; Baxi, 1994a; Economic and Political Weekly, 1996) and thus weakening social movements. Rather, public interest litigation appears to be an increasingly important resource for political movements. It needs to be accompanied by monitoring and other mobilizing activities. This suggests that the concern that legal action may deprive social movements of their scope might be a primarily academic one.

The struggle for a democratic public sphere is waged in all arenas of public life. This study is concerned with the arena of environmental politics. In the case of Calcutta, the courts have become probably the most important forum in this respect, with some, but not altogether convincing consequences. However, it would be cynical to dismiss public interest litigation as an irrelevant epiphenomenon. It has had some effect on actual conditions, and that is more than many would expect under the circumstances of poverty and human resource underdevelopment in India. The role of the judiciary has changed since colonial rule; it is no longer to be perceived as a primarily oppressive system (Baxi, 1994a). Rather, it has to a certain extent become a centre of activism to clean up the State apparatus, while still being affected by some malfunctions itself.

We will return to this topic in the case studies after a discussion of environmental politics in India in the next chapter. It will again illustrate that the gap between the ground reality and official policies tends to be unacceptably wide.