Social Watch Perspective Series Vol.: 1

LAW UNDER GLOBALIZATION

VIDEH UPADHYAY

SOCIAL WATCH INDIA

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Assessing 'Donor Supported' Law Making and Judicial Behaviour in India

VIDEH UPADHYAY

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The Paper hopes to provide an insight into recent trends in both law making processes and judicial behavior with a view to understand how the logic and instruments of globalization is directly affecting the rule of law. After evaluating the impact of global forces on law making, and examining this closely with respect to law reform in one particular area - that of irrigation laws - the paper reviews the case law from the Supreme Court of India to ascertain whether the dominant economic ideology of today is beginning to influence the 'inarticulate major premises' of the verdicts or not. In doing so it asks: Has the way the Supreme Court been 'framing' issues before it changed, with what consequences and what is the way ahead?

The National Social Watch Coalition is a broad based network of civil society organisations, citizens and communities to build a process of monitoring governance towards professed goals of social development, particularly with respect to the marginalised sections of our country. As an attempt to check rhetoric against the real, it tries to monitor the institutions of governance and their commitment towards citizens and principles of democracy.

National Social Watch Coalition
N-13, Second Floor, Green Park Extension
New Delhi-110 016, India
Tel./Fax: +91-11-41644576
E-mail: info@socialwatchindia.net
Web: www.socialwatchindia.net

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FOREWORD

The Constitution declared India to be a "Socialist" republic. Parts III and IV of the Constitution explain how it is to be constructed even while different models of economic development are employed by the Central, State and local governments under different political regimes. Many people who have not fully comprehended the Constitutional philosophy have wondered at the ease with which post-1991 India took to liberalization, privatization and globalization. Political alliances and coalition governments based on common minimum programmes have attempted to evolve broad consensus on how inclusive growth and distributive justice can well be organized amidst market forces dominating the economy. India's Socialism is thus an experiment to be watched by development experts committed to democracy, rule of law and human rights.

Law follows politics in democratic governance. If the politics of the 1970s gave a definitive thrust to leftist thoughts and processes, the contemporary trend is to try out capitalist ideas packaged in mixed economy frameworks (e.g. private public partnerships) for popular consumption. There is nothing unconstitutional in this as the Constitution does not profess any particular brand of State policies in this regard. The question therefore is how far political regimes and Constitutional institutions are honest in implementing the "Directives" while employing different models of economic development. This is the question which the author seeks to explore in this short essay. The National Social Watch Coalition which has been preparing Social Watch Reports for the last several years has now come out with a new project of 'Occasional Papers' looking at critical issues in the development agenda thereby promoting informed public discourse and better governance. It is a welcome initiative and the topic chosen for its first issue is Videh Upadhyay's "Law Under Globalisation". I am happy in being asked to write a Foreword to the series.

While admiring the selection of the theme and the approach adopted by the author, there is difficulty in accepting the concept of "donor-funded law making" as a process in vogue in India. One cannot, however, dispute that "the manner of making laws and the style of Court verdicts" have changed over the years particularly in the economic sphere. It is as it should be and there is no surprise in it. Rule of Law reflects this change. It does not upset the stability and predictability of

the legal order which are necessary to facilitate development. Whenever such changes go contrary to basic features of the Constitution, Courts have stepped in to correct the distortions and redeem the Constitutional balance prescribed in Parts III and IV. There are differences in perception on how such changes impact on poverty and growth. Globalisation not only affects economic processes but also influences the laws and policies which regulate them. Countries with long tradition of law and judicial review have institutional devices to accommodate change without giving up basic Constitutional values. Changes in patent law illustrate the point.

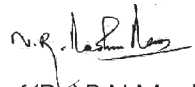
The idea of globalization driven law making examined in the essay relate to water and irrigation projects. The attempt is to explain that "participatory irrigation management" is not people-friendly because of the processes behind the projects that were "donor-funded". Involvement of irrigation user associations in water management is seen as privatization reducing space for State in the irrigation sector. Distinguishing it from traditional community managed systems and government policy of decentralized governance, the author contends that the change has come about because of the World Bank and ADB conditionalities based on globalization regimes. Coupled with the fact to the author there is a distinct "hollowing out" of the States -and thus interventions by the States on the conditionality being imposed being naturally limited - he argues that water user associations are not truly voluntary bodies and in their form are products "imported from outside". Laws are framed more to suit management demands rather than to honour rights and entitlements. The author senses that even where the stated and implicit intention is to empower the poor because of 'short-circuiting' of a due law making process, the results would always stay elusive.

In the Constitutional Scheme, judiciary admittedly plays a decisive role in protecting the rights of individuals, especially those belonging to the weaker sections. Mr. Upadhyay finds that the dominant economic ideology is influencing the way judges decide cases. He discerns inconsistencies in the logic of the Courts while deciding issues of economic policy and tries to illustrate it by pointing to the "hands off" approach adopted in the Telecom privatization case, Cogentrix power project case, Sardar Sarovar project case, the Tehri Hydro project case and the Balco case. The author says that such a 'bias' is evident in judicial behaviour while dealing with large infra-structure projects. From such a premise, the author goes on to question how Courts adopted a

Different approach when environmental issues were raised. He finds it difficult to reconcile the "hands off" approach on privatization and infra-structure with the 'activist intervention' approach on environmental matters. Finally, the author locates the change of judicial behaviour in the way the Court frames the issues in post-globalisation era. Refusing to frame the issue in a larger sociological context, it is argued, Courts tended to be 'positivistic' and non-compassionate. If the Court was compassionate to the slum dweller (Olga Tellis case) in the mid 1980s, the same Court under the same law dubbed slum dwellers as urban encroachers deserving evacuation as otherwise it will be like "rewarding a pick pocket". (Almitra Patel Case, 2003). This is the change in judicial behaviour which the author condemns as which he finds as a consequence of globalization. He therefore concludes that both law making and adjudication have become anti-poor!

While writing a foreword, it is not expected of me to support or argue against the perceptions and conclusions of the author. As a student of law, I can understand the influences that shape the making and interpretation of laws; at the same time, I cannot subscribe to theories which relate changes in law making behaviour to anti-people ideologies or lack of sensitivity to human rights of the poor. No doubt, the law makers and judges are products of the times and it is expected of them to mould the law in terms of larger public good. There may be aberrations and distortions which can be by and large explained in terms of the facts and circumstances of the case. This is no doubt the conventional wisdom of rule of law. Mr. Videh Upadhyay, an activist lawyer and development analyst in an iconoclastic style questions the conventional wisdom and tries to discover biases and elitism on the part of the law persons under the influence of dominant economic ideologies of globalisation. I admire his courage and scholarship in doing so. It is part of the critical dialogue which has its useful role in public discourse. There is bound to be rejoinders to the premises taken and conclusions arrived at.

I am sure the booklet will be as informative and instructive to every reader as it has been to me. I look forward to more such publications from the National Social Watch Coalition to enrich the Development Debate in Contemporary times.



Prof (Dr.) R.N.Madhava Menon
New Delhi
10th July, 2008

The present paper seeks to explore a hitherto untouched area of enquiry in India - how the logic and instruments of globalization is directly affecting the rule of law. In doing so it first assesses the nature and impact of donor funded law making processes after seeing this phenomenon in a global context and before examining this closely with respect to reform in irrigation laws in India. This is followed by an analysis of possible changes in judicial behavior in the present era to ascertain whether the dominant economic ideology of globalization is beginning to influence the 'inarticulate major premises' of the verdicts or not. In this context it is shown that one of the reasons behind the inconsistencies in judicial approaches in the globalization era is the way the Supreme Court has been 'framing' issues before it. The analysis hopes to show that with the coming of liberalization and privatization there has been distinct changes in the both the manner of making laws and in judicial behaviour as evidenced from the court verdicts. It concludes by saying that emerging patterns mean that for the legal fraternity - including both the members of the Bar and the Bench - a real challenge lies ahead in strengthening techniques for affording the protection of law to the poor in India's increasingly globalizing economy. The paper is in four parts as below.

I

LAW UNDER GLOBALIZATION: THE GLOBAL CONTEXT OF LAW MAKING TODAY

Introduction of globalised legal, economic and fiscal regimes have led to a proliferation of institutions and instruments that directly, and subtly, affect the lives of people around the world. Although there has been a reasonable analysis of the legislative frameworks laid down by these instruments of governance, more attention needs to be focused on the unstated premises of these legal regimes especially the manner in which they come into being and as a consequence how they impact the poor and the marginalized around the world. On feels - at least from a theoretical standpoint that it is critical to 'insulate' law and policy decisions, keeping it out of the long reach of the powerful and the influential while making it respond to the vulnerable and the marginalized. However even as the need for such insulation of policies and laws may be well grounded on principle across the world it is little achieved in practice. The system of globalization at work today has unleashed forces where it is no longer possible for any country to hold on to 'back box theories' that sees legal orders as impervious entities.

An overview of 'Rule of Law projects' across the world suggest the pervasive disaggregating of state power associated with globalization is also influencing legal systems. Note here that the driving force behind judicial reform projects in most parts of the world is that a stable legal order, respect for rule of law and facilitative legal instruments has to be essential preconditions for the market economy to take root and grow rapidly. Take for example the 'law and policy reform' work of the Asian Development Bank. The Office of the General Counsel (OGC) of the ADB has initiated and administered about 70 projects involving law and policy reform activities since 1993. The ADB itself claims that OGC channels its law and policy reform work into four priority areas and identifies the first of these priority areas as the need to "strengthen the enabling environment for economic growth". Likewise, a World Bank evaluation in 2004 of it its initiatives in legal and judicial reform identifies one of the principal factors that have contributed to the prominence accorded to legal and judicial reform in the development agenda, thus: "The developing countries' transition toward market economies necessitated strategies to encourage domestic and foreign private investment. This goal could not be reached without modifying or overhauling the legal and institutional framework and firmly establishing the rule of law to create the necessary climate of *stability* and *predictability*." [1]

An overview of the World Bank funded judicial reform projects throws more light on the issue. Since the early 1990s, the Bank has supported projects where reform of the legal and judicial system has been the primary objective. Projects aimed at reforming legal and judicial institutions are also included as components of larger initiatives. Since projects that may include a judicial reform component exist in every sector of the Bank, an exhaustive list is impossible. Besides many World Bank projects include a legal reform or law reform component. The reform of the power sector or telecommunications system might, for example, require the creation of a new legal and regulatory framework or significant amendments to existing law.[2] One specific and clear example from the port-folio of law reform project in this era of liberalization is the World Bank funded '*Reform in Regulatory and Legal Policy Environment Project*' in Pakistan.[3] A 2004 update by the World

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1 World Bank. 2004. Initiatives in Legal and Judicial Reform and available at www.worldbank.org/legal/publications/initiatives-final.pdf.

2 See http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/for more details on the scope of the World Banks' projects in this area.

3 The Project is being carried out though the Minister of Industries & Production (MOI&P) Government of Pakistan.

Bank of the Project which began in 2002 indicates the nature of law reform envisaged and being carried out in Pakistan:

"A detailed review of the regulatory regime and recommended changes to outdated and market-unfriendly laws, regulations, procedures, and institutions are being undertaken. Revision of labor legislation generally, the Factories Act 1934, and the Drug Act 1976 are underway. Work on reviewing the interface between the private sector and government institutions, in order to improve the investment climate for business, is also being undertaken. The next stages of the project include seeking stakeholder feedback on the reforms implemented, and undertaking a number of further reviews focusing on company law, industrial policy, and areas where there are monopolies, cartels and price controls in Pakistan…"[4]

Internationally there has been some useful analysis of the donor funded 'Rule of Law' Projects. While it may be axiomatic to say that judicial reform projects cannot succeed without a strong understanding of the actual function of the legal system and related institutions in a particular local context, there are studies showing that there is a standard donor template when it comes to rule-of law reform projects. One author sees all reforms falling essentially into three types: *Type One Reform* involves changing of substantive laws; *Type Two Reform* focuses on law related institutions to make them more efficient and accountable, and; *Type Three Reform* that focuses on deeper goals of government compliance with the law, particularly in the area of judicial independence.[5] Examining further it could also be seen that in the 'standard package' most donor resources are concentrated on Type Two Reform, making formal judicial institutions more competent, efficient and accountable. A standard package in principle militates against context specific law reform although naturally the World Bank also points out the other side of it saying that "While laws are country-specific, they benefit from regional harmonization and from incorporation of global best practice principles to foster empowerment, security, and opportunities."[6]

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4 World Bank. 2004. Initiatives in Legal and Judicial Reform and available at www.worldbank.org/legal/publications/initiatives-final.pdf.

5 See Carothers, Thomas 1998. The Rule of Law Revival. Foreign Affairs 77, No.2: 95-106

6 World Bank. 2004. Initiatives in Legal and Judicial Reform. Available at www.worldbank.org/legal/publications/initiatives-final.pdf. The evaluation points out that there are approximately 600 Bank-financed projects related to legal and judicial reform,

There are other studies which show that activities related to access to justice for disadvantaged sectors women, poor, lower castes are always part of the standard package, but more often than not, the very last part.[7] Having said that, traditionally, improving the access of disadvantaged groups to the justice delivery mechanisms has been the area of greatest investment by the Ford Foundation across the world.[8] In India at present UNDP is presently engaged in supporting research on Access to Justice from the standpoint of the poor and the disadvantaged. That one Project apart the author is not aware of any research/ study on the views of the poor on how they can access justice, their understanding of the legal system and the efficacy of the judicial process and the justice delivery mechanism from their standpoint.[9]

Finally, the fact that 'loan conditionalities' determine the shape of donor funded law projects is today not a guarded secret but an openly admitted fact. Thus the World Bank in its review of initiatives of legal and judicial reforms makes clear that:

After being introduced as a lending instrument, structural and sector adjustment loans were the Bank's most common instrument to induce changes in legislation and reforms in the administration of justice in borrowing countries. The "conditionality" of these loans often includes the preparation and adoption of certain laws and regulations that reflect policies agreed upon with the Bank….In addition, the Bank's Legal Vice Presidency provides advice on draft legislation in a number of areas related to project lending……Promoting markets and private sector development frequently requires reform in areas such as financial and banking laws, companies law, corporate governance and insolvency, infrastructure, and property rights.[10]

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7 See Jensen,Erik 2003. The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses in Beyond Common Knowledge, Jensen Erik & Heller Thomas, Stanford University Press. Here it useful to keep in mind that the World Bank has tried to refocus on poverty in recent years. In this context the Bank has suggested three activities to increase access to justice: legal counseling and advocacy (especially for the vulnerable sections), ADR mechanisms and modern court facilities. ADB has also commissioned some recent studies in this regard.

8 See Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World, McClymont Mary &Golub,Stephan (ed.) The Ford Foundation 2003.

9 See Upadhyay Videh; Justice And The Poor: Does the Poverty of Law Explain Elusive Justice to Poor? in JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS, Arnab Hazra and Bibek Debroy (eds.), Academic Foundation, 2007

10 World Bank. 2004. Initiatives in Legal and Judicial Reform and available at www.worldbank.org/legal/publications/initiatives-final.pdf.

II

GLOBALIZATION AND LAW MAKING: THE PHENOMENA OF DONOR FUNDED LAW REFORMS

In the backdrop of the premise set in the section above and the specific context of donor supported law projects, this section focuses on how they are beginning to impact directly the law-making processes in India. This is done through close examination of law reform initiatives in one specific field -'Water Sector Reforms' - which has far reaching implications in rural parts of the country.

There has been a near complete absence of any attempt to closely see the impact of donor supported policy and law making processes in India. The following analysis aims to show that the policy and law making in avowedly 'demand driven' and 'people oriented' water and irrigation projects is not compatible with the very nature of these projects. A closer look below at the donor supported Projects in the area of 'Participatory Irrigation Management' can provide a further light on this aspect.

'Hollowing Out' of Law Making Processes: The case of Law Reform Projects for Participatory Irrigation Management

Participatory Irrigation Management (PIM) has come to be accepted as a national policy strategy eventually resulting in a spate of almost identical laws in different states over the last decades which are generally commonly titled as Participation in Management of Irrigation Systems Acts. A few words on it origins can help put things in perspective for the present purposes.

An influential study traces the origins of PIM in the context of structural adjustment and notes further that "Irrigation management turnover is part of a broader process of structural adjustment programs in developing countries in the 1980s and 1990s. …The purpose of these reforms is to reduce the role of government in the economy and allow the private sector to take over more management of the production of goods and services."[11] Thus beginning in the 1980's, there have been

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11 The study adds: "It is further argued that this will lead to greater efficiency, productivity and responsiveness to demand." These extracts are taken from a study of the International Irrigation Management Institute available unpublished with the Author.

large-scale programs to turn over irrigation management from Government Agencies to organized Water User Associations in a number of countries such as Philippines, Indonesia, Senegal, Madagascar, Columbia and Mexico. An Indian study saw this trend interestingly as the result of convergence of a number of global policy trends including decentralization, privatization, participation and democratization.[12] An inevitable result of these processes has been 'rolling back of the boundaries of the state' within the irrigation sector.[13]

Donor Supported Legal History of PIM

In this light an area of critical inquiry is whether and how much the donor pressures have had an impact in shaping the adoption of policies of PIM in India. To be sure India has had a long history of farmer managed irrigation systems with as number of examples from the Kuhls of Himachal to the tanks of South India.[14] However, the success of traditional community managed systems cannot be said to be the immediate motivation for shaping new policies involving local people for managing irrigation. In fact it is notable that the widespread state and national level acceptance of PIM in early 1990s coincided with influential policy papers of the World Bank and Asian Development Bank pushing for greater stakeholder participation in water resources management.[15] It is also noteworthy here that serious fiscal crises leading to structural adjustment initiatives have been a direct impetus behind the adopting of irrigation management transfer programmes.[16]

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12 See Joshi, Hooja Rakesh (ed.) Participatory Irrigation Management: New Paradigms for 21st Century, Rawat Publications, 2000

13 For more comments on PIM in India from a legal perspective see Upadhyay, Videh; Beyond the Buzz: Panchayats,Water User Groups and Law in India, CSLG Working Paper Series, JNU, March 2005

14 For a detailed review on these aspects see Dying Wisdom, The Fourth Citizens Report, Centre for Science and Environment, 1997

15 One such 'high profile' and influential paper was by the World Bank in 1993. See World Bank, 1993 Water Resources Management. World Bank Policy Papers, Washington D.C

16 The point is important because in an international context fiscal crisis have been identified as a major reason behind the most sweeping internal adoption of irrigation management transfer programs. Examples of Senegal and Mexico are cited in this regard. Incidentally, an initial comparison of the approaches of the Indian State to PIM also brings forth this point and it has been pointed out that most dramatic changes were proposed by the state of Bihar where again severe fiscal crisis had precipitated a clear breakdown of the government's ability to deliver irrigation service. See Joshi, Hooja Rakesh (ed.) Participatory Irrigation Management: New Paradigms for 21st Century, Rawat Publications, 2000.

The legal history of PIM in India can easily show that the each of the legal regime in the States have evolved as part of larger 'Water Resources Restructuring Projects' or 'Water Resources Consolidation Projects' or 'Irrigation Development Projects' funded by the World Bank, Asian Development Bank, the European Community (EC) amongst others. Thus evolution of legal regimes creating Water User Associations in Andhra Pradesh, Maharashtra, Madhya Pradesh and Rajasthan should be directly seen as part of World Bank Projects, in Chhatisgarh as part of an ADB project and in Orrisa as part of an EC project. It is thus safe to argue that donor pressures have had an impact in fact a decisive impact - in shaping the adoption of policies of PIM in India.

If the above is understood then it can also be said that the proliferation of legal regimes creating Water User Associations (WUAs) under the policy of PIM is not necessarily a consequence of legislatures convincingly responding to the Constitutional mandate of decentralized governance in water and irrigation management. These regimes need to be seen more directly as outcomes of 'policy networks' at best trying to 'adjust' institutional arrangements to 'reflect'- even if not genuinely give effect to the Constitutional mandate.[17] Even though these policy networks are by no means a new phenomena in India, their increasing prominence could be attributed to 'hollowing out' of the sovereign nation states in terms of a diminishing capacity to perform conventional governing functions. The dismal failure of public delivery systems could be giving further credibility to this 'policy community' perceptively characterized by a scholar as comprising 'of a highly restricted membership… and insulation from other networks and invariably from the general public (including Parliament)'

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[17] Commenting on the process behind the coming of the recent National Environment Policy the present author had felt that in the hidden hierarchies of the Experts, the Counter-experts, the 'Citizen-expert' and common man, it is only the first category of people those forming the policy community of the day- who are likely to have a decisive influence. See Upadhyay Videh In the Closed Kingdom of Experts, The Indian Express, November 27 2004.

Project Law': Law Making on a Project Mode

A natural corollary of the increasing role of the 'policy community' is that Policy and Law-making is increasingly a part of donor funded projects across the country. As the exercise is done on a project mode there are inevitable severe constraints of time where it is often predetermined that within certain months, weeks and in some cases even days a draft legal framework need to be put in place. In best cases a hired legal specialist would draft this though in many cases even they are not needed. The adoption of this mode means that a participatory mode for establishment of the WUAs is simply not possible. The fact that this can be done has been shown by other countries where intensive preparatory steps are taken before enactment of a legislation beginning with the identification of potential participants as well as the area of operation of the WUA. For example, the Romanian legislation creating WUA calls for the establishment of an 'initiation committee' composed of several potential members of the WUA. The committee must call a preliminary meeting to which all potential members are invited. At that meeting, decisions are taken on the proposed delimitation of the territory of the WUA, *on the individuals to be responsible for drafting the WUA governing document* and for taking the necessary steps for the establishment of the WUO.[18] *(Emphasis mine)* In other places the decision to establish a Water Users Association is itself through petitions supported by farmers and landowners themselves.[19]

Pressures on time - a typical feature of the donor driven Projects - means that the forms of bottom up initiatives in law making suggested in some other countries as above can simply not be adopted. This then means that such Associations created for the people are not owned by the people- at least to begin with. A direct result is that Water User Associations are never voluntary associations reflecting the will of the water users/farmers but are typically Associations ensuring compulsory participation of all farmers through a specially drafted legal regime.

The above law making process partly explains why the appearance of

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[18] *A similar procedure is foreseen by the Bulgarian legislation.*

[19] *Take for example California where the process of establishing an Irrigation District is initiated by petition. Such a petition must be supported by a majority of land owners or at least 500 land owners who hold title to not less than 20 percent of the value of the land to be included within the*

the various state legislation on the subject is remarkably similar. But various laws look like replicas of each other also because of the fact that there is little expertise on the 'subject vocabulary' locally which means that central features of the laws are imported from both across international borders and then state borders in a federal country like India. Thus what has been referred to as 'legal transplantation' is one of the key features of the law making process establishing Water Users' Associations. There is a growing literature on the efficacy and the morality of legal transplantations so much so that perhaps there are as many arguments on it from both sides as perhaps the numbers of author writing on it. Quite apart from the merits and demerits of legal transplantation at least this much has to be said that every time a legal transplantation happens an opportunity for understanding of law from the standpoint of poor people is lost. This also explains why under a nationwide initiative on Participatory Irrigation Management that aims at managing irrigations systems with active participation of the farmers there is still a very little understanding of what precisely are the felt needs of the farmers that should find place in the laws. Another reason why this is more so is that most donor driven projects tend to view issues and problems from a management prism and invariably tinker little with the governance paradigms and rights framework. Recent 'project driven laws' have tended to be more politically correct and there is greater usage of terms like entitlements.[20] But even wherever they are used none of the 'Water Resources Regulatory Authority' can ever be questioned on the extent of distribution of these entitlements, creating thus a strange fiction - a system where 'entitlements' exist without corresponding obligations to ensure that one gets them! This fits well into an increasing trend where the word 'entitlements' is increasingly being used, mostly by economists who are part of a select community of 'policy experts', in a manner that violates the basic meaning of the word.[21]

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[20] Thus for example the Maharashtra Water Resources Regulatory Authority Act, 2005 creates a high powered State Water Resource Regulatory Authority which is to oversee the issuance and distribution of water entitlements by designated river basin agencies and, among other things, is also responsible to fix the criteria for trading of water entitlements or quotas on the annual or seasonal basis by a water entitlement holder.

[21] An entitlement is something that one 'has a title to', and more importantly, has this title as a matter of right, i.e. a right to demand and receive. See Upadhyay Videh, Confusing Quotas with Rights, www.indiatogether.org, October 2005

Law Making and the 'Hollowing Out' of Government and Legislatures

The non-inclusive law making process outlined above also means that there is little space for 'counter arguments' that can feed into building a stronger legislation. The fact that the poor farmers are ill equipped to understand, internalize and contribute to a discourse on law making is not difficult to understand. What however adds on to this problem is that the coming of any donor funded project goes simultaneously with the 'hollowing out' of the state government especially in terms of having a capacity to intervene on behalf of the community they represent. Their virtual non-existent role in formulation of laws means larger than needed influence of the hired policy specialists in deciding what goes in and what stays out of the laws. Finally, to complete the law making circle, such laws are passed in the State Legislative Assemblies without much debate for essentially two reasons: (a) Generally the legislation in these areas are perceived to be in public good and this general stand camouflages the specific details of these laws where meaningful critiques, questioning and debate is possible, and (b) The government taking the law into the Assembly is normally in majority and the existence of party whip ensures that it doesn't have to worry too much in terms of defining the finer nuances of the law. The drafted law in such situations gets passed and comes into force.

An ideal law making process needs to 'reconcile the role of participatory approaches at the drafting stage with the role of elected representatives of the people i.e. parliaments at the approval stage.' Under the donor supported projects leading to law reforms, especially in parts of the country where the state government care little about significance of law making, both stages are seriously compromised. This is increasingly the reality in the era of globalization where the rush to strengthen the enabling environment for economic growth has been greater than ever before with inevitable consequence on time, processes and its impact on law making as explained above.

III

GLOBALIZATION AND JUDICIAL BEHAVIOUR

The evaluation of the impact of donor funded law making processes in India, is followed in this part by a review of case law of the Supreme Court of India to ascertain whether the dominant economic ideology of globalization is beginning to influence the 'inarticulate major premises' of the verdicts or not. This can be figured by a close analysis of specific cases beginning form the early Nineties to the present essentially the period when the country is being run under the dominant sway of liberalization, privatization and globalization including cases overtly impacting economic policy issues along with the ones on infrastructure projects. More specifically during this period critical case law in areas relating to economic policy, challenges to large infrastructure projects and those invoking corporate liability include the challenge to disinvestment of a government company (The BALCO case), the questionable validity of a Power Projects (Enron and Cogentrix Power Projects), challenge to the Government's decision to sell off developed offshore gas and oilfields to a private joint venture (Panna Mukta Oil fields near Mumbai to Reliance Enron Consortium), the award of telecom licenses to private companies (amongst others the HFCL), Privatisation Of Nationalised Oil Companies (Bharat Petroleum Company Limited and Hindustan Petroleum Company Limited), the challenge to the River valley Projects (Including the Tehri Dam and the Sardar Sarovar Projects), amongst others. [22]

One of the hypothesis of the paper has been that there are problems with the logic of the Court while dealing with cases challenging aspects of perceived economic policy decisions and those relating to mega infrastructure projects and that these problems could be identified with the help of critical premises of jurisprudence. A close hard look at the judgements could show that there is now some evidence that is gathering which reveal that the logic of the Courts in delivering these verdicts could have major inconsistencies. The fault-lines reveal themselves in the following paragraphs.

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22 For a good critique of some of these cases see Prashant Bhushan, Supreme Court and PIL, Economic and Political Weekly, May 1 2004

Globalisation precipitating a new wave of judicial 'hands off' on Policy Issues

There is a growing feeling amongst senior members of the Bar and also legal scholars today that Globalisation and liberalisation has had a dramatic and drastic impact on judicial behaviour as evidenced from the nature of recent verdicts. [23] A prominent public interest lawyer believes that amongst the cases decided by the Supreme Court in the Globalisation era there is only one decision where the Supreme Court ' has allowed a challenge to any purported implementation of the new economic policy'. In all the rest the Court has actually "frowned upon the challenges to any action of the executive taken in purported furtherance of the 'economic reforms'..." To him this happens because the "Court has in fact bought the ideology underlying the economic reforms" and that this is the reason behind "the recent drawing back of the Court in Public Interest Litigation and the fear expressed by it of the possible abuse of Public Interest Litigation ".[24]

The argument of the Court buying the ideology of economic reforms however is not restricted to some recent last years alone. Such arguments have been effectively made when the Supreme Court stuck down the Privy Purse abolition, the bank nationalisation and the agrarian reforms in Kerela. In fact these cases impelled Justice Krishna Iyer to conclude that "On several occasions the judiciary gave the impression of being the conscience keeper of the Capitalist class." Thus if the Court buying an economic ideology is leading to dilution of judicial review, it is not a phenomena restricted to the liberalisation era beginning in the 90's. Supreme Court has responded to an economic ideology in the past with the same effect of adversely affecting the poor.

What is new however in the last decade is the fact that the Court has clearly taken a definitive stand on privatisation and liberalization. The Supreme Court has taken a view in a number of verdicts that while 'Privatisation is a fundamental concept underlying the question about

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23 See for example some recent essays in Constitutional Development through Judicial Process, Asia Law House, 2006. One Author Dean of a Law University points out that "in the first part of the 1990s....the judicial movement towards socialism was virtually eclipsed. It was almost as if the 'cause' was half abandoned and the mission only half fulfilled before the Court ran out of steam."

24 He also points out that "such an ideology underlying the economic reforms runs counter to the Court's earlier extensive interpretation of Article 21."See Prashant Bhushan, Supreme Court and PIL, Economic and Political Weekly, May 1 2004

the power to make economic decisions' it raises issues that rest with the policy makers of the nation and with a vigilant Parliament. These words from a 1996 case points out to the logic of the Court in clear terms and in the specific context of privatisation. [25] In that case the Court said that it is simply in no position to review and examine whether the new telecom policy that was placed before the Parliament should have been adopted or not. The words of the Court are worth quoting in detail:

Privatisation is a fundamental concept underlying the question about the power to make economic decisions. What should be the role of the State in economic development of the nation? How the resources of the country should be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations- because these issues rest with the policy makers of the nation. No direction can be given or is expected from the Courts unless while implementing such policies, there is violation or infringement of any Constitutional or statutory provision.

Likewise in the well known Cogentrix Power project case the Courts spoke that

"The reference of the High Court to the liberalization policy, reforms approved by amendment of Electricity Supply Act to enable induction of private sector in participate in power generation, to provide for level playing field for domestic and foreign companies in terms of the Government of India is a policy matter.. "[26]

In the context of large Infrastructure Projects, the Courts have been very conscious of not intervening in policy matters and in such cases the Supreme Court have repeatedly and consistently taken this position. For example in the Sardar Sarovar Project case the Court made it clear:

"It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an

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[25] For example, these words were used by the Supreme Court in Delhi Science Forum Versus Union of India and Another. See AIR 1996 SC 1356

[26] State of Karnataka V. Arun Kumar Agarwal AIR 2000 SC 411

infrastructure project or not is and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill equipped to adjudicate on a policy decision so undertaken."[27]

In 2003 while giving its judgement on the challenge to the Tehri Hydro project in Uttaranchal hills, the Court contextualised its reasoning by asserting that all such decisions by the Executive are in the realm of policy where judicial interference is uncalled for. In fact right at the start of the judgement it says:

"Before adverting to the contention of safety, environmental clearance and rehabilitation, it is necessary to draw a demarcating line between the realm of policy and the permissible areas for judicial interference in the context of present case."[28]

The logic was further affirmed in the BALCO case where the Court held that:

"in the sphere of economic policy or reforms the Court is not the appropriate forum… Courts will interfere only if there is a clear violation of Constitutional or Statutory provisions or non-compliance by the state with it's Constitutional or statutory duties. None of these contingencies arise in the present case."[29]

Analysis of the Judicial Deference under Globalisation

The 'Grey Area' of Economic Policy Cases

All the verdicts above point to a clear approach of the Court to look for statutory violations or else it will not interfere in policy decisions. However, it has been pointed out that the Supreme Court has dismissed cases challenging executive action in pursuance of economic reforms "even when such challenges were based on violation of statute and evidence

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27 *Narmada Bachao Andolan Versus Union of India and Others AIR 2000 SC 375*

28 *N. D. Jayal Versus Union of India 2003 (7) Scale 54*

29 *See BALCO Employees Union (Regd.) Versus Union of India and Others, AIR 2002 SC 350*

.of corruption."[30] Having said that it's inappropriate to club cases based on 'violation of statute and evidence of corruption' together.[31] Arguably, clear violation of a statutory provision presents a black and white situation to the Court while evidence of corruption tend to provide the grey area where the Court could see more black or white in it depending on both the strength of the evidence and indeed the bias of the judges. Again, much like violations of Statute and evidence of corruption being at two different levels for judicial review, violation of a Statute and violation of the Constitution also need to be seen at two different levels for the purpose of how the court approaches the two violations. Unlike a statute which tends to provide for a clear black and white scenario once the facts are ascertained, Constitution requires the state and its instrumentalities to act in a manner which is fair, just and equitable and after taking relatively all the options into consideration and in a manner that is reasonable, relevant and germane to public interest. All these requirements again provide for a grey area where ultimately a judge is called upon to pronounce on fairness, reasonableness, relevance etc. on available facts. The decisions that the Court has been giving relating to what it calls economic policy issues invariably fall in this grey area because evidence of corruption and violation of the Constitution tend to be the primary grounds of challenge in most cases. For the reasons above the Court is liable to be unpredictable in such cases.

Evolving Judicial Patterns as Evidence of Bias

The above context however only explains that the Courts can be unpredictable in cases involving components of economic policy. It is still not a good explanation for why the Courts have in fact been 'predictably negative' in all cases relating to economic policy and rights, large projects and those invoking corporate liability. A clutch of cases on large infrastructure projects shows this judicial pattern in clear terms. In the liberalisation era in i.e. in the last decade and a half a very large number of public interest petitions got filed to challenge large infrastructure projects including primarily Dams, Power and Mining

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30 For example critics would wonder if that is the case why did the Court not intervene in the Enron Power Project case where challenge was grounded on violation of a specific provision of the Electricity Supply Act? There the jurisdiction of the Central Electricity Authority under the law was deliberately circumscribed to enable a 'go-ahead' for the Project.

31 The verdict in disinvestments case as against other cases like the Cogentrix Power Project case or the Oil fields of Panna Mukta ones would suggest that the Court sees violations of Statute and evidence of corruption at two different levels.

projects. The grounds of challenge had included adverse environmental impacts[32], safety aspects[33], inadequate Environment Impact Assessment and Environment Management Plan[34], extraneous financial considerations[35], forced displacement[36] and inadequate resettlement and rehabilitation measures[37] arising there from. Despite these diverse grounds on which the challenges were made the general response of the Courts to litigation against large infrastructure projects has been very conservative to say the least. A distinct judicial deference on the questions raised in these cases with similar line of reasoning has also been evident. If judicial review has to be closely evaluated on case-to-case basis any detection of exactly same patterns both in the operative decision and in the reasons supporting the decision, despite the petition being made on different grounds, constitutes serious evidence showing that the Courts response in these areas could be really flawed, and perhaps more accurately, biased.

This judicial bias has not been because the judge has been provided the grey area for want of evidence of corruption or failure to assert Constitutional violation. The bias has crept in because the Court have, to use the words of Justice Sinha, chosen to allow "it hands to be tied up by the principle of law that a government policy decision should not be interfered by the judiciary". The fact that similar sounding decisions have been a result of judicial bias and not objectivity is borne out by two significant points as below:

Two Judicial positions for Infrastructure Projects and Environment

The Supreme Court in regard to challenges to Dams, Power and Mining Projects has said that the policy decisions and fact-finding tasks are fields appropriate for legislative enactments and executive action. Yet in a sharp departure from this position, the last decade and a half has shown that in a large number of cases, and especially those relating to the prevention of pollution, policy and technical constraints have not

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32 The Society for Protection of Silent Valley v. Union of India (Unreported)

33 Tehri Bandh Virodhi Sangharsh Samiti V. State of U.P 1992 SUPP (1) SCC 44.

34 The Goa Foundation and Anr. V. The Konkan Railway Corporation and Others AIR 1992 BOM 471.

35 Centre for Public Interest Litigation V. Union of India, 78(1999) DLT 389.

36 See for instance Tehri Bandh Virodhi Sangharsh Samiti V. State of U.P 1992 SUPP (1) SCC 44

37 See for instance Karajan Jalasay Yojana Assargrasth Shakhar Ane Sangharsh Samiti V. Gujarat (AIR 1987 SC 532

prevented the Court from taking remedial action. A sure testimony of this has been the plethora of committees and commissions appointed and relied upon by the courts for this purpose.[38] The proliferation of court-appointed committees has been rightly seen as the inevitable consequence of the failure of the executive to bring in timely correctives. The high-water mark in the series of cases on pollution control law is the judgment of the Supreme Court in 1999 in Andhra Pradesh Pollution Control Board V. M V Nayudu.[39] While emphasizing the role of National Environmental Appellate Authority the Court said:

"Of paramount importance in the establishment of environmental courts, authorities and tribunals is the need for providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the executive (emphasis mine). There is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also technical personnel well versed in environmental laws…."

Notably the above approach of the Supreme Court of not leaving complicated disputes to officers drawn only from the executive is in sharp contrast to the courts general stand of non-interference in infrastructure projects on the ground that these involve complex and

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38 Thus, for example, in the famous Doon Valley case the Supreme Court appointed several committees consisting of experts to examine whether indiscriminate mining in the Doon Valley had any adverse impact on the ecology. See Rural Litigation and Entitlement Kendra and others vs State of UP and others, AIR 1988 SC 2187) Besides, in most cases filed by the well known environmental lawyer M C Mehta on pollution prevention, the court have repeatedly appointed committees to ascertain disputed facts, to suggest remedial measures and to oversee implementation of its orders. In case against mining activities in a protected area the court appointed a committee to find out the limits of the protected area, the fact as to whether mining was carried on within that area, the possible alternative sites for mining and finally to oversee compliance of notifications and the court's orders: See Tarun Bharat Sangh Alwar vs Union of India and others, AIR 1992, SC 514. Another illustration is the well known T N Godavarman case on protection of forest resources all over the country where the Supreme Court appointed high powered committee to oversee strict and faithful implementation of its orders. Committees and later a Central Empowered Committee to hear all possible forest related matters from across the country. See various orders in W.P No 202/95.

39 See Air 1999 SC 812. In this case the Supreme Court referred the dispute relating to the possibility of water pollution caused by an industry to the National Environmental Appellate Authority (NEEA) having felt that the practice adopted by the higher courts thus far of resolving dispute matters by help of commissions may not be sustainable over a long term. The court thought that the NEEA, which combines judicial and technical expertise, is the appropriate authority to go into the questions in the case.

intricate questions best left to the executive.[40] Thus there are two clear different positions of the Supreme Court on Infrastructure Projects and on Environment matters. Repeatedly and consistently it has been held that in case of conflicting claims relating to the need and the utility of any development project the conflict has to be resolved by the executive and not by the courts. However, when it comes to environmental protection, this stand has not prevented the court from undertaking, what a High Court referred to as the "tiresome task of the court in reconciling the force of sustainable development and environmental degradation."[41]

Reconciling conflicting Judicial Positions: 'Selective Consequence Consciousness'

How do we juxtapose the arguments of the Courts in environmental cases with the ones where the policy questions have precipitated judicial hands off approach? The Nayudu mentioned above is a useful starting point. The judges in that case felt that a 'super-deferential attitude of courts in judicial review' on environmental matters should be avoided. Specifically, the court felt that a detached application of Wednesbury rule - that limits judicial review to only where administrative action is basically unreasonable or malafide - was not appropriate in environmental matters. It has also been argued elsewhere that a judicial hands-off policy on environmental questions is fraught with danger. Unlike general administrative decisions, a wrong decision on an ecologically significant matter might be disastrous.[42] There is a perceptible shift in judicial concern from merely seeing that decisions are taken correctly to ensuring that correct decisions are made.

The need to arrive at 'correct decisions' enables the court to look at the effects of a decision without being obsessed alone with the decision-making processes per se. While this is an approach the Supreme Court could take with ease in environment policy matters it has found it extremely difficult to adopt the same approach on matters purportedly falling in economic policy domain. The Courts' reluctance to intervene comes out clearly in all cases 'where the process of liberalization and

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40 See Upadhyay Videh, Changing Judicial Power: Courts on Infrastructure Projects and Environment, EPW, October 28, 2000

41 The words of the Kerela High Court in Nature Lovers Movement vs State of Kerala 2000 AIHC 1784.

42 See P LeelaKrishnan, Environmental Law in India, Lexis Nexis Butterworths, 1999

resultant privatizations was challenged not as a policy but an improper implementation mechanism.' Thus when the grant of stage carriage permits to private operators pursuant of the liberalization policy was challenged on the ground that it violated Art. 19(1)(g) and Article 14 of the Constitution, the Supreme Court while holding the grant to be constitutional said that " when the State has chosen not to impose any restriction under Article 19 (6)… there can be no cause for complaints by the existing operators".[43] While upholding the privatization of the Road Transport the Court also added that the increase in competition will enhance the quality of transport. In another case the Supreme Court upheld the privatization of a state cement corporation while rejecting the petition of the workers of the same corporation against such privatization.[44]

The above point can be put down in clear terms. While the Supreme Court has been conscious of the consequences of judicial non-interference in environmental and pollution control matters this consciousness of consequences is missing in cases falling under the so-called economic policy domain and on infrastructure projects. In other words the Apex Court has shown a tendency of 'selective consequence consciousnesses' in adjudicating matters before it.

Failing to cover the full Ground of Judicial Review: Legality-Yes, Impropriety-No!

The point on 'consequence consciousness' above also suggests that judicial review of consequence of policy decisions should not be seen as encroachment on a policy matter. While it is right to be conscious of the scheme of separation of powers and limits of judicial review, there is a risk in overemphasising the point especially when a public interest litigation is aimed at correcting executive administration or an improper legislative action. Arguably in a good number of cases in the apparent economic policy domain the Court has mistaken itself to be engaged in policy making thus ending up with hands off approach to an issue. The omnipresent argument of economic policy being outside the judicial purview has this critical caveat that can be easily lost sight of. In light of the argument above a closer look at the law on judicial review is in order here. The Supreme Court has repeatedly affirmed that "the

[43] *Mithelesh Garg v. Union of India, AIR 1992 SC 443*
[44] *Dalmia Industries v. State of UP, AIR 1994 SC 2117*

grounds upon which an administrative action is subject to control by judicial review can be classified as under (i) Illegality (ii) Irrationality and (iii) Procedural Impropriety."[45] Earlier in the paper it is argued that cases supposedly in economic policy domain has a grey area from the standpoint of judicial review. One may add here that determination of what constitutes 'Procedural Impropriety' and 'Irrationality' squarely fall in this grey area. Thus even if the Courts have been obviously conscious of the illegality involved, a crucial question is whether it been alive to the second and the third grounds of judicial review mentioned above especially on cases relating to economic policy, challenges to large infrastructure projects and those invoking corporate liability? To the present author specific public interest litigation on cases challenging disinvestment cases invoking financial irregularities in award of contracts for projects and here most significantly the challenge of grant of Panna-Mukta Oil fields to a Reliance -Enron Consortium and the litigation on the Cogentrix Power Project clearly shows a bias towards only legality being the decisive factor in judicial review..[46]

Change in 'Framing of Disputes' in the Globalization era?

One of the reasons behind the inconsistencies in judicial approaches in the globalization era highlighted above has to do with the way the Supreme Court has been 'framing' issues before it. A little explanation on framing is useful here. It is axiomatic that the manner in which you frame a dispute is decisive in deciding its resolution. Thus if a legal dispute is framed with the focus on parties in dispute who have capacities to freely contact the Courts would generally see merit in non-interference. On the other hand, the more extensive is the array of parties that could potentially be affected by a dispute the Court may find the logic in intervening. This throws up obvious questions: Whether the Court have been sufficiently conscious of the larger social and public interest dimensions while adjudicating on specific issues and whether under the globalisation era there are signs that this capacity of the court to frame a dispute in the larger context is being affected? Can distinctive shifts from a *sociological* jurisprudence to a more *positivistic*

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45 Centre for Public Interest Litigation and Another Versus Union of India and Others AIR 2001 SC 80

46 These cases point to sets of strange and suspicious circumstances and were strong on suggesting 'irrationality' and 'procedural impropriety' involved but these mattered little with the Court. The analyses of these cases are not presented here in the interest of keeping the paper to a manageable size.

jurisprudence be seen over the last fifteen years? Perhaps a most telling example of such 'distinctive shift' is the obvious change in approach of the Supreme Court against the slum-dwellers and the urban poor in the last two decades. In mid eighties the judicial approach towards them was put simply in terms of constitutional phraseology thus: The eviction of slum dwellers and "unauthorized" occupants will lead to deprivation of their livelihood and consequently to the deprivation of life. Thus in a well known case dealing with the pavement dwellers of Bombay the Supreme Court declared that the Right to livelihood was part of the fundamental right to life. Recognizing slums as a reflection of structural social inequality in the country and seeing them as the 'hell on earth', the Court added 'Human compassion must soften the rough edges of justice in all situations' and this on the principle that 'Humbler the dwelling, greater the suffering and more intense the loss'.[47] Around the same time in another case the Supreme court directed the authorities to provide alternative accommodation to the slum dwellers in Madras adding that the Government should continue evincing dynamic interest in improving slums, and where not possible providing alternative accommodation.[48] However fifteen years following Olga Tellis the Supreme Court in early 2000 had a completely different view on 'encroachment' by slum dwellers. Bemoaning the fact that instead of 'slum clearance' there is 'slum creation' in Delhi and simplistically dubbing slum dwellers as encroachers it said that 'Rewarding an encroacher on Public land with free alternate sites is like giving a reward to a pickpocket'.[49] The compassionate Apex Court of mid eighties has given way to an unmistakable judicial aggression against the urban poor two decades later. In these two different periods while the laws have remained the same it is the interpretation by the Court that has taken a new turn.

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[47] See Olga Tellis V. Bombay Municipal Corporation AIR 1986 SC 180

[48] See 1985 (2) SCALE 3(31)]. Other Supreme Court judgments followed the spirit of the words used in Olga Tellis in subsequent years.

[49] Almitra Patel V. Union of India. This observation made in the Almitra case was in the nature of what is technically called obiter i.e observations not material in deciding the case. However, ever since that ruling those observations have become decisive in subsequent judgments on slums particularly in the High Courts of the country. For more useful comments on this shift in stance of the Court see Upadhyay Videh, Further to the margins - by Law, www.indiatogether.org, May 2003.

IV

CONCLUSIVE REMARKS: SEARCHING ANCHORS FOR A 'NON-ALIGNED' AND RESPONSIVE LEGAL ORDER

The above analysis shows that with the coming of liberalization and privatization there has been distinct changes in the both the manner of making laws and in judicial behaviour as evidenced from the court verdicts. The rub lies in the fact that these changes have led to a hardening of stance of the judiciary against the poor. Thus for the legal fraternity including both the members of the Bar and the Bench a real challenge lies in exploring techniques for affording the protection of law to the poor. in India's increasingly globalizing economy. Taking this challenge head on is critical in an era of economic globalization that 'envisages global economy growth and stability as independent variables, politics and law as dependent variables.'

A UN Secretary General has said "the engagement with globalization….must yield to human rights imperatives rather than the reverse."[50] One feels that in the increasingly hybrid systems of market and regulation in the country today perhaps we now need a 'non-aligned' legal order.[51] Such an order is based on the premise that there should be no reason for the judiciary to favor markets over regulation or vice-versa. However, a call for the non-alignment of the legal system is not a call for its isolation. In a world where increasingly the dividing line between economic policy and human rights protection is vanishing, the courts and the law-makers can not escape determining the boundaries of judicial review and defining the standards for protection of law, especially for the poor. When it comes to law-making, as it is a legislative function, it is the legislatures who may need to take fresh guards. UNDP has in the recent past explored this area with a view to enhance the contribution that legislators, parliaments and parliamentary processes make towards realizing human rights. It has also developed a primer that suggests elements for assessing the human rights capacities of parliaments and examines how several

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50 As said by Secretary General Kofi Annan in UN Doc.A/54/1(1999), para.275

51 In Germany, for example, the Bundesverfassungsgericht has explicitly ruled that that the Basic Law takes no side in matters of economic policy: it is 'wirtschaftpolitisch neutral'. Decisions concerning nationalization of means of production, or privatization of public enterprises, are left to the political institutions.

ongoing approaches to parliamentary development can be used to enhance parliament's contribution to human rights.[52] But as this paper has suggested earlier the role that legislators play has less to do with their lack of appreciation or understanding and more to do with their motivation, their willingness and the fact that they just cannot go beyond the party line. Much like the legislators one may argue that judges are also part of a system. Given the fact that one is talking about a change in judicial behaviour along with a system that has a stake in perpetuating this change, the path ahead is not even easy to identify let alone tread. Here again there could be a menu of options including for example rethinking Constitutional interpretation and particularly unraveling the tension between sociological and positivistic approaches, evaluating the use of general principles of law and those of natural justice and especially their relevance for a more inclusive development processes, strengthening the substantive due process with a view to ensuring fairness in executive action and liberating access to courts and in particular the lower judiciary through representative and class actions. In doing so even existing theories of judicial interpretation may need to be revisited. In fact historically the social duty of the law and the consequent rise of the court's role is also predicated upon the Utilitarian theories of statutory interpretation that urge that interpreter to construe the statute to yield the maximum social benefit. The theory permits such an interpretation even "overriding contrary authorial intent if necessary." [53] A jurist would argue that given the Indian Constitution - and the way it has been richly interpreted in the past - recourse to Constitutionalism is the most important technique for judicial protection in India especially in ensuring that the powers of the State are exercised not arbitrarily but in accordance with the law. One feels that there is enough in the Constitution and the laws to help find reliable anchors for establishing a 'non-aligned', yet responsive, legal order in a market economy. The challenge is to find the will to stand against the tide.

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[52] see United Nations Development Programme Primer on Parliaments and Human Rights available at http://www.undp.org/governance/docshurist/030610PracticeNote_Poverty.doc

[53] For a Classic work in this regard see Francois Geny's Methode d'interpretation, 1899

Institutions Involved

Centre for Youth and Social Development (CYSD) works with the deprived and the underprivileged towards the goal of people-centred development. Its participatory development action enables people to pursue their need fulfillment through their own institutional means. Its training and capacity building support to development organisations produced a cascade of effective learning at the grassroots and increasing professional efficiency in development action at all levels. By building up alliances with agencies of shared intent, it attempts to bring on a pro-poor agenda in the mainstream of development policies and practices.

National Centre for Advocacy Studies (NCAS) is a membership-based organisation that has been working on various people-centred advocacy initiatives across the country. NCAS has a decade-long history of training people on advocacy and undertaking people-centred advocacy initiatives. NCAS works on various socio-economic rights essentially from the perspective of the marginalised. NCAS is also involved in Media Advocacy initiative, Advocacy Learning and Praxis and Governance and Advocacy. The theme in NCAS work is bridging people and building ideas. NCAS sees the Social Watch Process as an essential component towards this end.

Samarthan Centre for Development Support promotes participatory governance and development. The organisation is committed to strengthen democratic processes building leadership of Women, Dalit, Tribals and other disadvantaged section. Civil society organisations have a critical role as social change agent, therefore promotion support and strengthening civil society institutions in development is also key endeavour of Samarthan. Samarthan also believes in building examples of participatory development and governance, therefore, is actively involved in field action at the grassroots to build people's institutions.

National Social Watch Coalition Partners

Madhya Pradesh: Samarthan, Bhopal and Madhya Pradesh Voluntary Action Network (MPVAN), Bhopal. Samarthan promotes participatory governance and development thus encouraging leadership of Women, Dalit, Tribals and other disadvantaged sections of the society.

Orissa: Centre for Youth and Social Development (CYSD), Bhubaneshwar works towards achieving people-centred development for the deprived and under privileged through direct intervention as well as building up alliances with agencies of shared intent.

Maharashtra: Youth for Voluntary Action (YUVA), Mumbai, implements its development agenda by engaging with local, community-based organizations strengthening existing organizations to respond effectively to local development issues.

Vikas Sahyog Pratisthan (VSP), Mumbai, is a group of voluntary organizations working for the upliftment of poor and deprived sections of society with its area of expertise being in nature farming, water conservation, promoting role of youth in village governance and co-operatives.

Karnataka: (Karnataka Social Watch) Rejuvenate India Movement (RIM), Bangalore, which is a conglomerate of 11 Non-Government Agencies. It works towards effecting positive changes by generating actions that are practically effective and morally compelling while upholding the principles of participative democracy, genuine volunteerism and self-empowerment.

Community Development Foundation (CDF), Bangalore believes in collective efforts to bring about meaningful change and sustainable development in adult literacy, children and human rights, gender issues, education and health aspects.

Tamilnadu: Tamilnadu Social Watch (TNSW), Chennai is a resource-cum-research centre involved in social public policy monitoring and lobbying at the State level. The major contributions have been Dalit budgeting and in budget awareness in civil society along with the Tamilnadu Social Development Report 2000.

Centre for Policy Studies (CPS), Gandhigram Rural University, Dindigul Distt., Tamilnadu People's Forum for Social Development (TNPFSD), Chennai.

Andhra Pradesh: Centre for World Solidarity (CWS), Hyderabad, is a support organization with partners in nearly five states working with a

rights-based development approach towards Panchayati Raj, Minorities, Tribal Rights, Education, Forestry, Alternative Agriculture and Natural Resource Management, Human Rights Issues and Women's Rights and Gender Mainstreaming.

Dalit Bahujan Shramik Union (DBSU), Hyderabad, working with Dalit organizations on dalit issues and rights.

Uttar Pradesh: Uttar Pradesh Voluntary Action Network (UPVAN), Lucknow, is a conglomerate of nearly 225 vibrant civil society organizations of UP. It operates through the advocacy resource centre, networking, alliance-building centre, gender resource and information resource centre and takes up issues for advocacy which affects the voluntary organizations and their struggle to ensure justice and equity for the marginalized.

Bihar: Vidyasagar Samajik Suraksha Seva Evam Shodh Sansthan, Asian Development Research Institute.

Chhattisgarh: Mayaram Surjan Foundation (MSF), Raipur runs a research & documentation centre and conducts programmes to build up grassroot democratic values and practices, promote value-based and development-oriented journalism and prepare youth to take lead in building and safeguarding a pluralistic society.

Gramin Yuva Abhikram (GYA), Raipur, works in the areas of community empowerment, campaign for people's right to water, campaign for accountable governance, media advocacy, women empowerment apart from networking with like-minded agencies and policy research.

Rajasthan: Centre for Community Economics and Development Consultants Society (CECOEDECON), Institute of Development Studies, Pratham.

Jharkhand: Currently coordinated by National Social Watch Coalition supported by SPAR, HOPE, Agragati.Lok Jagruti Kendra, Swaraj Foundation.

West Bengal: Institute for Motivating Self Employment (IMSE) along with Forum of Voluntary Organizations, West Bengal, Kolkata. The Forum is comprised of 98 Voluntary Organizations representing Christian Missionaries, Leftist Social Action Groups, Human Rights Groups. The Forum apart from supporting the achievement of food sovereignty of the people and their rights over land, water, forest and seed also opposes imperialist globalization.

Kerala: Representatives of Kerala Sastra Sahitya Parishad, Centre for

Development Studies, Indian Institute of Information Technology and Management, led by C. Gouridasan Nair, Special Correspondent, The Hindu, Thiruvananthapuram.

Himachal Pradesh: RTDC- Voluntary Action Group (RTDC- VAG), People's Campaign for Socio-Economic Equity in Himalayas (PCfSEEiH) and

SANSAD (South Asian Network for Social and Agricultural Development), aimed at making South Asia free from hunger and poverty and taking global and regional initiative for sustainable agricultural and rural development and human dignity aimed at putting collective pressure on policy making.

KABIR: Kabir is a communications organization dedicated to the increased awareness and use of the Right to Information (RTI) Act by all individuals and organizations across all segments of Indian society. It envisions a culture of transparency and accountability in government that allows for meaningful participation of citizens in their own governance.

PRS Legislative Research: PRS Legislative Research is an independent research initiative that aims to strengthen the legislative debate by making it better informed, more transparent and participatory. PRS is the first initiative of its kind in India.

Ekta Parishad: Ekta Parishad is a Gandhian organisation, it works towards community based governance (gram swaraj), local self-reliance (gram swawlamban) and responsible government (Jawabdehi Sarkar). It is a mass movement based on Gandhian principles of non-violence. It mobilizes people (especially the poor and deprived sections) on the issue of proper and just utilization of livelihood resources (i.e. primarily land, but also forest and water).

ADR: Association for Democratic Reforms aims to work towards improving and strengthening democracy and governance in India. The main objectives of ADR are Electoral Reforms, Right to Information and greater transparency of those in power, empowerment of the ordinary citizen and Reform of the government and bureaucracy.

Concern Worldwide (Bhubaneswar): Concern's core focus in India is on sustainable livelihood and disaster responses, mitigation and preparedness in ensuring concrete and tangible benefits to poor and marginalized communities in collaboration with international and local partners who share the vision to create just and democratic societies where the poor can exercise their fundamental right.

VIDEH UPADHYAY

Mr. Upadhyay has been part of the Social Watch process. He is a lawyer and independent legal consultant based in New Delhi with a practice focus on Development and Natural Resources law. He has advised Union Ministry of Environment and Forest, UNDP, World Meteorological Organization, DFID, ADB, University of Cambridge, University of Birmingham, NIRD, amongst others. He has also drafted legislations on specific aspects of water and irrigation laws for State Governments and provides regular legal advice to Civil Society Organizations. He has been a Visiting Fellow, Centre for Law and Governance, Jawaharlal University and an India Visiting Fellow at the Goldengate University, San Francisco and at University of California, Berkeley. He has authored five books including recently Public Interest Litigation in India: Concepts, Cases, Concerns published by Lexis Nexis-Butterworths (2007).The Author also wishes to thank National Foundation for India for supporting research for the present paper.

National Social Watch Coalition
N-13, Second Floor, Green Park Extension
New Delhi-110 016, India
Tel./Fax: +91-11-41644576
E-mail: info@socialwatchindia.net
Web: www.socialwatchindia.net