Polluting Environment, Polluted Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?

Shubhankar DAM (co-author), City University of Hong Kong
POLLUTING ENVIRONMENT, POLLUTING CONSTITUTION: IS A ‘POLLUTED’ CONSTITUTION WORSE THAN A POLLUTED ENVIRONMENT?

Shubhankar Dam* and Vivek Tewary**

1. Introduction

The workings of the Indian Supreme Court in the recent years have witnessed a ‘refreshing’ novelty that threatens to hold constitutional governance hostage to the indiscretion of India’s robed mavericks. The novelty has enriched constitutional discourses and challenged every existing conception of judicial adjudication. It has earned the Supreme Court many encomiums; some referred to it as ‘the world’s most powerful judiciary’,1 others as ‘the most active court’2 and some others as ‘one of the great courts of the world’.3 Whatever the truth in these appellations, the Indian Supreme Court has undoubtedly rewritten the rules of functional legitimacy in the realm of constitutional adjudication. It has skilfully reinvented itself as a constitutional alchemist, transforming all problems of life into problems of law—in fact into problems of constitutional law. With neither the legislature nor the executive in any mood for an ugly confrontation, the Supreme Court has quietly established itself as the ‘super-cop’ under the Indian Constitution.

This ‘life–law’ transformation was abetted by ‘social action litigation’ initiated in 19794 and institutionalised later in 1981.5 The years between 1978 and 1981 were defining moments in Indian constitutional history: four crucial events occurred that were to completely reinvent India’s judicial functioning. In 1978, the Court treated a postcard addressed to a Judge of the Supreme Court as a writ petition.6 In 1980, on

* BA, LLB (Hons), Felix Scholar Elect (Oxford); The National University of Juridical Sciences, India (shubhankardam@yahoo.com).

** The National University of Juridical Sciences, India.


3 See Lord Bingham of Cornhill, Law Day Lecture, 29–41 at 29 (Jour) 1 SCC (2000).

4 See U. Baxi, ‘The Supreme Court under Trial: Undertrials and the Supreme Court’ 35–51 (Jour) 1 SCC (1980).

5 S.P. Gupta v Union of India AIR 1982 SC 149.
a habeas corpus petition filed on the basis of a newspaper report on behalf of prisoners languishing in the remote jails of Bihar (a state in India), the Court delivered a judgment holding the right to speedy trial as part of Article 21. In the summer of the same year, the Supreme Court in *Minerva Mills v Union of India* held Part III and Part IV as ‘the core of social revolution’ under the Indian Constitution and added that ‘to give absolute primacy to one over the other [would be] to disturb the harmony of the Constitution’. Finally, in *S.P. Gupta v Union of India*, the Court widened the principle of *locus standi* under the Constitution, holding that *any* public-spirited individual can approach the Court for remedy when the victims are precluded from accessing the Court on specified grounds.

Two consequences of these events are worth mentioning. Firstly, Article 21 became the repository of all socioeconomic rights mentioned in Part IV, including rights not otherwise enumerated in the Indian Constitution. Secondly, public-spirited individuals had a new constitutional role. The two when combined formed a powerful coalition of a new rights’ order impacting Indian’s constitutional dynamics in many unknown ways. The floodgates opened. Social action litigation became the word of the town and the tool of the judiciary. The Supreme Court positioned itself as an institution of justice seeking to remedy constitutional ills; and public-spirited individuals and organisations were ever more willing to oblige the Court. From adjudication to conflict resolution, the Supreme Court has used the tool of social action litigation to increasingly don the role of a lawmaker, policymaker and, on occasion, executive. While the aspects of law that may have ‘benefited’ from this new process are many and varied, this article concentrates on the Supreme Court’s performance in environmental matters. While some regard the Court as a ‘saviour’, ‘champion’ or ‘pioneer’, more recently, there are references to its role as a ‘usurper’ in environmental matters. This environmental activism (or usurpation) may be studied

---

6 Sunil Batra *v* Delhi Administration (1978) 4 SCC 494.
7 *Hussainara Khatoon (I) v Home Secretary, State of Bihar* AIR 1979 SC 1369.
8 Ibid, para 5.
9 *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.
10 Part III contains the fundamental rights guaranteed by the Indian Constitution.
11 Part IV contains the ‘Directive Principles of State Policy’ which, though fundamental, were expressly made not enforceable in a court of law. The Constituent Assembly had meant the Directive Principles to act as guidelines in the governance of the state. *Minerva Mills* was revolutionary because the Supreme Court for the first time acknowledged that the unenforceable status of the Directive Principles as opposed to the enforceable fundamental rights did not mean that the former were inferior in the constitutional scheme.
12 Supra n 9, para 56.
13 Ibid.
14 AIR 1982 SC 149.
15 Ibid, para 17.
16 The text in full reads: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’.
17 Some of the areas wherein judicial activism has been particularly prominent include prisoners’ rights, children’s rights including child labour and child prostitution, rights of women, rights of workmen, jail reforms and transparency in public life under Article 21 of the Constitution.
in three indistinct phases. The first phase was remarkable for the creativity exhibited by the Court when it ventured to provide a new rights’ jurisprudence inspired by the social justice philosophy of the Indian Constitution.\(^{21}\) The second phase, beginning late 1980s, marked a period of judicial lawmaking when the Court strained legal principles, either to develop new jurisprudence or to incorporate principles into India’s existing environmental jurisprudence that until then was part of international law. The involvement of the Court in the third phase, however, has been the most controversial. Increasingly, the Court has begun to act as the executive in environmental matters, making policies and creating institutions for their implementation.

This article is a critique of the often-celebrated environmental activism of the Indian Supreme Court and argues that the much-hyped benefits of judicial involvement are far from real. The Court’s overenthusiasm in environmental matters has severely dented India’s institutional balance and has contributed to a polity that is becoming consistently reliant on the judiciary for remediating all its problems, of both life and law. The Supreme Court, I would argue, must withdraw itself from its alchemist role and allow institutions to develop the art of meaningful interaction with the state. That is the only way one may promote strong institutions of governance that are responsive to better administration.

2. Creative Phase: ‘It’s a New World of Rights’

The creative role of the judiciary in espousing the cause of environment has been significant from two perspectives: firstly in recognising the elevated status of the directive principles of state policy\(^{22}\) and secondly in creating an expansive meaning of right to life under Article 21. Based on the jurisprudence of ‘just, fair and reasonable’ law laid down by Bhagwati J in *Maneka Gandhi v Union of India*,\(^{23}\) the Supreme Court has redrafted constitutional jurisprudence in India, though not without glaring inconsistencies. The right to life under Article 21 has gradually become the repository of all rights not mentioned under Article 19\(^{24}\) but seemingly important for a meaningful life.\(^{25}\)

The origin of the creative phase may be traced to the Court’s appreciation of the relationship between directive principles in Part IV and fundamental rights in Part III as one of harmony and not conflict. In *Minerva Mills v Union of India*,\(^{26}\) the Court observed: ‘Part III and Part IV of the Constitution together constitute the commitment to social revolution and they together are the conscience of the Constitution…*

---


\(^{22}\) See n 11 above.


\(^{24}\) In *Maneka Gandhi*, the Supreme Court interpreted ‘procedure established by law’ to mean ‘just, fair and reasonable law’, importing, thereby into the Indian Constitution, ‘due process of law’—a theory that the Constituent Assembly had specifically rejected. The Supreme Court then the ‘due process’ interpretation to include within the scope of ‘right to life’ all other rights not specifically enumerated in Part III.

\(^{25}\) See *Francisco Coralie v Union Territory of Delhi* AIR 1981 SC 746. (per Bhagwati J, ‘The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.’)

\(^{26}\) AIR 1980 SC 1789.
paths are like the two wheels of a chariot, one no less important than the other’ (my italics). Drawing from this philosophy of the heightened importance of the directive principles, the Supreme Court began interpreting fundamental rights under Part III in the light of the provisions of Part IV. In M.C. Mehta v Kamal Nath,27 the Court held that ‘[a]ny disturbance of the basic environment elements, namely air, water and soil which are necessary for life would be regarded as hazardous for life within the meaning of Article 21 of the Constitution’.28 In Subash Kumar v State of Bihar,29 the Court said:

Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

The right to life and human dignity encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air, water and sanitation would which life cannot be enjoyed.30 In recognising the right to clean environment, the Court drew inspiration from Article 48-A31 enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under Article 51-A32 of the Constitution.33 This recognition of the right to clean environment and, consequently, the right to clean air34 and the right to clean water35 was a culmination of the series of judgments that recognised the duty of the state and the individuals to protect and preserve the environment.36

3. Lawmaking Phase: ‘When Judges turned Legislators…’

The ‘lawmaking’ phase of the judiciary began with the development of the principle of absolute liability as a principle of tort law in India. The phase was characterised by a ‘deep anguish’ on the part of the Court to provide a direction to environmental lawmaking in India. In M.C. Mehta v Union of India,37 the Court while rejecting the application of the principle settled in Rylands v Fletcher38 held that the ‘rule evolved in the 19th century at a time when all these developments of science and technology

---

28 Ibid, para 7.
29 (1991) 1 SCC 598.
31 The text in full reads: ‘The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country’.
32 The Indian Constitution also includes fundamental duties under Article 51A. Amongst others, it is the ‘duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures’.
33 M.C. Mehta v Union of India (1992) 2 SCC 256; see also Sachidananda Pandey v State of W.B. AIR 1987 SC 1109.
34 Subash Kumar v State of Bihar (1991) 1 SCC 598.
35 Ibid.
37 (1987) 1 SCC 393.
38 (1861–73) All ER 1.
POLLUTING ENVIRONMENT

had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. Justifying the need for newer principles of liability, the Supreme Court observed that ‘as new situations arise the law has to be evolved in order to meet the challenges of the new situations. Law cannot afford to remain static’. In the background of these observations, the Court suggested that ‘an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty (my italics) to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken’. This principle of liability, earlier unknown in India’s environmental jurisprudence, was explained on two grounds. Firstly, that if any enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising because of such hazardous or inherently dangerous activity. Secondly, that the enterprise alone has the resource to discover and guard against the hazards or dangers and to provide warning against potential hazards.

This ‘lawmaking’ adventure of the Court found new expressions in Indian Council for Enviro-Legal Action v Union of India wherein the Court regarded the ‘polluter pays’ principle as part of the law of the land. Explaining the principle, the Court held that it is not the role of the government to meet the cost either in the prevention of such damage or in carrying out remedial action, because the effect of this would be shifting the financial burden of the pollution incident to the tax payer. The ‘polluter pays’ principle demands that the financial costs of preventing or remediating the damage caused by pollution should lie with the undertakings that cause the pollution or produce the goods that cause the pollution. In S. Janannath v Union of India, applying the said principle, the Court held the aquaculture (shrimp culture) industry that had been functioning within the Coastal Regulatory Zone (CRZ) Notification as liable to pay the affected persons on the basis of the polluter pays’ principle. In Vellore Citizens Welfare Forum v Union of India, the Court went a step further and regarded both the precautionary principle and the ‘polluter pays’ principle as part of environmental law in India. The Court regarded the principles, until then part of international law, as part of domestic law on the premise that the said principles had acquired the status of customary international law. It is a well-settled law under the Indian Constitution that rules of customary international law

---

39 n 37 above 29–30.
40 Ibid, para 31.
41 Ibid.
42 Ibid.
43 Ibid.
44 (1996) 5 SCC 212.
49 Ibid, para 15.
not contrary to municipal law be deemed to be incorporated into the domestic law.\textsuperscript{50} And, therefore, once declared as customary international law, precautionary principle naturally became part of Indian municipal law.

The last of the important decisions of the Court in the lawmaking phase was in \textit{M.C. Mehta v Kamal Nath},\textsuperscript{51} wherein the Court upheld the ‘doctrine of public trust’ as being applicable to India. It explained the doctrine on the principle that certain resources such as air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership.\textsuperscript{52} Developed in the ancient Roman Empire, the legal theory of the ‘doctrine of public trust’ enjoined upon the state to ensure that the environment was being used for benign purposes and not for purposes inimical to public health. The Court reviewed judgments delivered on the same by different courts and, untroubled by the absence of any such precedent in India, concluded that India’s legal system based on the English common law includes the doctrine of public trust as part of its jurisprudence.

These lawmaking endeavours of the Court reflect a dual trend. While on some occasions it has laid down new standards (as in \textit{M.C. Mehta I}), on other occasions it has preferred to incorporate international standards into domestic law. Most of this ‘lawmaking’ was inspired by an insatiable desire to do justice to the matter that was \textit{sub judice}. The Court found it difficult to reconcile itself to a possibility that justice may not be done to the parties before it—‘justice’ as the Supreme Court understood it to be. It strained itself to innovate remedies by evolving new principles: it was inconceivable that a problem could not have a judicial remedy. Judges lulled themselves into believing—‘if there is a problem there \textit{must} be a judicial remedy to it’ (my italics). If remedying the problem required making law, they were unhesitant in expressing their desire to do so.

4. ‘Robed’ Bureaucracy: When the Court says, ‘Print Textbook, Take Classes, and Carry Out Campaigns…’

The third phase, beginning in the late 1990s, has been by far the most controversial. Rather than judicial interpretation, the Supreme Court has concentrated on matters that arguably are strictly within the dominion of policymaking. Rather than interpret laws, the Court increasingly acted as the executive, making environmental policies on behalf of the state and taking steps for their implementation. Professor Baxi describes this judicial takeover of ‘the direction of administration in a particular

\textsuperscript{50} See \textit{Gramophone Company of India Ltd v Birendra Bahadur Pandey AIR 1984 SC 667}. The ‘well-settled’ approach of the Court, however, raises many questions. For a critique of the ‘incorporation’ approach, see P.C. Rao, \textit{The Indian Constitution and International Law} (Taxmann, 1993) at 185. (‘Since the Constitution and other laws do not stipulate that international law is \textit{per se} part of the law of the land, there is no valid reason as to why customary international law should be deemed to be part of the Indian law or be placed on a favoured footing than conventional international law… A municipal court, being a tribunal of municipal law, cannot also be deemed to know what customary international law is. In the \textit{Buttes Gas} case, the House of Lords held that there are “no judicial or manageable standards” by which to judge issues of international law, that the English courts cannot examine “the validity, under international law, of some doctrine of public policy, of an act or acts operating in the area of transactions between states”, and that this principle is “not one of discretion, but is inherent in the nature of the very judicial process” ’.)

\textsuperscript{51} (1997) 1 SCC 388.

\textsuperscript{52} Ibid.
POLLUTING ENVIRONMENT

arena from the executive’ as ‘creeping jurisdiction’.53 Though the exercise (or rather the usurpation?) of administrative measures for the protection of the environment began in the 1980s, it was not before the late 1990s that the process was fully integrated into the process of judicial adjudication. The process that began with a series of M.C. Mehta cases, more popularly known as the Ganga Pollution cases, found newer manifestation of executive authority in the murky issue of European norms54 and more lately in the matter of introduction of compressed natural gas (CNG) fuel in New Delhi.55 The methodology adopted by the Court in Ganga Pollution cases has been vividly described by Shyam Divan in the following words:

Short of putting on their gum boots and wading into the murky waters of the Ganga to clean up the mess, a bench of the Supreme Court has been doing a whole lot and more to restore the health of the river . . .

...A new wisdom guides its approach. Dismayed at the persistent flouting of Parliament’s mandate to clean the rivers, by the polluters and pollution control board alike, the court is unwilling to sit idly by.

The rigor of the formal court procedures and statutory requirements are diluted in favour of a summary, result oriented approach. The main thrust is to substitute the ineffective administrative directives issued by the pollution control boards under the Water Act and the Environment (Protection) Act, with judicial orders, the disobedience of which invites contempt of court action and penalties.56

A consideration of the nature of orders in these cases would easily drive the point of ‘usurpation’ home. In Kanpur Tanneries case,57 the Court asked the Central Government to direct all the educational institutions throughout India to teach for one hour in a week lessons relating to the protection and improvement of the natural environment including forests, lakes, rivers and wildlife in the first ten classes.58 It ordered the Central Government to get textbooks written for the said purpose and distribute them to the educational institutions free of cost.59 Did the court mistake itself as the Ministry of Education of the Government of India? The Court, similarly, asked the Central Government to consider the desirability of holding ‘Keep the city clean’, ‘Keep the town clean’ and ‘Keep the village clean’ programmes at least once a year.60

The directions given in the Calcutta Tanneries case61 were more invasive of the executive authority. Amongst others, the Court set a deadline for the closure of polluting tanneries,62 imposed a deposit fee on the price of the land,63 ordered the State Government to set up a unified single agency consisting of all departments concerned to act as a nodal agency,64 directed the State Government to appoint an

54 M.C. Mehta v Union of India (1999) 6 SCC 12.
56 S. Divan, Cleaning the Ganga, 1557 EPW (1 July) (1995).
57 AIR 1988 SC 1031.
58 Ibid.
59 Ibid.
60 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
authority to assess the ecological loss to the region and asked the same to frame scheme in consultation with National Environmental Engineering Research Institute (NEERI) and the Central Pollution Control Board (CPCB) for reversing the ecological loss.65

These were orders passed nearly a decade after the Court had rebuked in the strongest possible words the Kanpur tanneries. For those who believed that the Court could effectively function as an administrative body exercising executive powers, the failures are too glaring to be overlooked. More important, is industrial relocation policy the province of the Court? Should the Court have shut down the violating units and issued time-bound direction to the State Government to frame and implement a suitable relocation scheme?

The administrative role of the Court reached new heights of controversy while introducing CNG as the alternative fuel in New Delhi. In M.C. Mehta v Union of India,66 noting the harmful consequences of vehicular pollution on the general health of people, the Court ordered the implementation of directions to restrict plying of commercial vehicles including taxis that were fifteen years old and restriction on plying of goods vehicles during the daytime.67 This was followed by a relentless spate of executive directives. The Court ordered the conversion of the city bus fleet in New Delhi to a single mode of CNG,68 directed all private vehicles to conform to the Euro-I and Euro-II norms69 and prohibited registration of diesel-driven vehicles after 4 January 2000, unless those conformed to Euro-II norms.70 Worse, in M.C. Mehta v Union of India, the Court laid down pointers that had to be part of the ‘Auto Policy’ of the Government of India.71

Most of these orders were passed in pursuance of the report of the Bhure Lal Committee set up under the Environmental Protection Agency (EPA). Even though inspired by the urge to protect public health against the carcinogenic effects of suspended particles in the air, implementation of such norms cannot be achieved without the active and willing participation of the executive. The failure of this activism of the judicial administration was evident when the Court observed in M.C. Mehta v Union of India that it was distressed by certain reports appearing in the print and electronic media, exhibiting a defiant attitude of the Delhi Administration to comply with the orders.72 That attitude, the Court noted, ‘if correct, was wholly objectionable and not correct in law’.73 It almost pleaded that its concern ‘in passing various orders since 1986 has been only one, namely to protect the health of the people…’ (my italics).74 To the plea of the Central Government that there was shortage of CNG to ensure a complete conversion of all vehicles, the Court responded with the following words:

If there is short supply of an essential commodity, then the priority must be of public health, as opposed to the health of the balance sheet of a private company. To enable industries to

---

65 Ibid.
67 Ibid, para 2.
68 Ibid, para 3.
69 M.C. Mehta v Union of India (1999) 6 SCC 12, para 3.
70 Ibid.
73 Ibid, para 11.
cut their losses, or to make more profit at the cost of public health, is not a sign of good governance, and this is contrary to the constitutional mandate.\textsuperscript{75}

While the same may be true, it does not necessarily follow that anything that affects public health is within the jurisdiction of the Court. It is unlikely that any of these decisions have sensitised the executive to act with greater alacrity in environmental matters. The only effect may have been to retard the possible evolution of responsible bureaucracy. The inefficiencies of these judicial ventures with laudable objectives are evident in the constant flouting of the orders passed in \textit{Murli Deora v Union of India}.\textsuperscript{76} Noting the adverse effects of passive smoking, the Court directed the prohibition of smoking in public places until statutory provisions were enacted and implemented in this regard.\textsuperscript{77} It is unlikely that the judgment by itself would have stopped the nuisance of smoking in public.

5. The Constitution Under Threat? The Supreme Court and Functional Disharmonies

While the judicial use of law for maintaining environmental standards has been appreciable, its scant regard for constitutionally conferred jurisdiction has raised doubts. It created new rights, incorporated legal principles and even attempted implementation. A large measure of its success is attributable to the insulated ambience in which the judiciary still functions in India. Within the peripheries of environmental concerns, structurally, judiciary is the only actor that has largely remained relatively insulated from the pressures of politics and the industrial lobby. Nor have many instances of corruption and illegal liaisons, especially in the higher judiciary, come to light. Unconcerned by the loss of ‘private profit’, the Court has shown commitment to public health and a clean environment.

While the creative phase was welcomed in most circles, the lawmaking and policymaking phases have found many critics. The judiciary’s use of law to import legal principles into our environmental jurisprudence without any precedent does not augur well for the stated objective of legal stability. If courts use their authority to interpret environmental statutes with principles that have had little or no history in India, certainty as the hallmark of law may well be replaced by cruel uncertainty. By indulging in policymaking, the Court has denied the bureaucracy its rightful place in the constitutional dynamics. The cases have become a crutch, preventing the growth of strong bureaucracy. In many instances, the administrative agencies have been reduced to preparing knee-jerk responses to judicial orders.\textsuperscript{78} Despite more than a decade of judicial activism, there is no indication of a better performance by the pollution control boards, municipalities and forest departments or that these entities are institutionally stronger or more capable of discharging their responsibilities today.\textsuperscript{79} It is more likely that the administrative agencies will revert to their old

\begin{itemize}
\item \textsuperscript{75} M.C. Mehta v Union of India (2002) 4 SCC 359, para 16.
\item \textsuperscript{76} Murli Deora v Union of India (2001) 8 SC 766.
\item \textsuperscript{77} Ibid, para 9.
\item \textsuperscript{78} See S. Divan, ‘A Mistake of Judgment’, \textit{Down to Earth} (30 April 2002) at 50.
\item \textsuperscript{79} Ibid.
\end{itemize}
ways the moment judicial oversight wanes. The future may not be as green as the Court may wish for.

Most decisions ‘legislative’ and ‘administrative’ came about at a time when the Court was overtaken by a constitutional frenzy to solve every riddle plaguing governance in particular and Indian democracy in general. There are hardly any cases during the 1980s and 1990s that raised important questions of public interest and the Supreme Court chose not to interfere in it. This approach, I would argue, has had two distinct effects. It emphasised that every matter involving a conflict of interest was a matter of law and, therefore, the Court had a role to perform. By innovating remedies every time it was compounded with a problem, it established itself as a Court that was willing to bend over backwards to resolve ‘conflicts’. In this sense, the Supreme Court’s functioning has been instrumental in instigating continuous litigation—public-spirited individuals and organisations found it a convenient forum to resolve issues rather than engaging themselves with authorities and striving for a responsive bureaucracy. A polity in a state of ‘continuous’ litigation is hardly peaceful and rarely constructive. By emphasising the willingness of the Court to take cognisance of every environmental issue, the Court has made itself the centre of administrative functioning and weakened the links between the organised citizens of the Indian polity and the ‘real’ institutions of governance.

This approach of the Court had another underlying presumption—the Court was willing to presume that every problem of life could be remedied by writs, orders and directions. On the contrary, most orders and directions are complied more in violation of than in accordance with law. If the orders were to hold any meaning, no person in India should have now been smoking in public places. Every problem of life is not a problem of law. Neither is the solution of every problem of law writs, orders and directions. This ‘life–law’ dichotomy is brilliantly illustrated by a ‘curb noise pollution campaign’ carried out by a few schools in the city of Kolkata (formerly Calcutta) in September 2004. Tired of noise pollution and the consequent difficulty in conducting classes at certain times of the day, few schools in Calcutta got together to carry out a campaign against the indiscriminate use of horns by motorists at certain places. Students and teachers holding placards and banners against noise pollution lined the prominent streets of the city, causing some annoyance to motorists. The campaign lasted for a few days. Three days later, The Times of India reported: ‘The on-going anti-honking campaign by schools students made an audible difference on Thursday with motorists responding to an appeal to stay silent in the school zone’. The report quoted the principal of Apeejay School, Rita Chatterjee, who spearheaded the campaign, as saying: ‘There’s been a palpable difference since the campaign took off on Monday. Today, everyone in the school was surprised at how much the noise levels have gone down during the morning rush hours. Suddenly, a motorist who honks stands out like a sore thumb’. D’Rozario, principal of Park English, had similar feelings to express. He was quoted as saying: ‘Everyone’s felt the difference and they feel happy to have contributed in improving the situation’.

But this campaign was not the only option open for the schools suffering from the scourge of noise pollution. They could have easily approached the Supreme Court of...
India seeking directions for curbing noise pollution. Strictly, there is no constitutional right to ‘noise-free’ education that students can claim and nor do motorists have a constitutional right to ‘quick’ movement in the streets. But most would agree that the Indian Supreme Court would have taken cognisance of the petition and proceeded to frame guidelines. The guidelines could have possibly included when and where motorists could blow horn and the decibel beyond which it would be impermissible to blow them. The guidelines would have been flouted daily as most Court guidelines are, and the schools and students would have continued to suffer the nuisance of noise pollution. Rather than take this worn-out path of writ petitions and judicial interference, the schools decided to directly engage themselves with conflicting interest holders. The matter, strictly speaking, did not involve a conflict of rights—if any, it was merely a conflict of interests. By engaging directly with the motorists, the schools sought to raise the level of sensitivity of the motorists using the roads in the ‘school zone’. The ‘palpable difference’ that most felt at the end of the three days can be directly attributable to the success of the students in highlighting the inconveniences caused to them because of noise pollution rather than have an external institution pass guidelines on how to blow horns while driving. Direct action was key to the positive response, a feature that is strikingly absent in instances of judicial interferences.

The limited scope of the campaign and its instant success need not be made the basis of questioning every judicial endeavour. The underlying point is, however, to emphasise that most ‘conflicts’ are best solved when they are solved without the interference of an external agency. By ‘judicialising’ problems of life into problems of law, the Supreme Court has undermined the strength of collective citizens to engage with institutions of the state. On the one hand, it has weakened citizens’ links with the state; on the other hand, it has reduced the bureaucracy to an organ of knee-jerk reaction when hauled up for contempt of Court’s direction. By taking cognisance of environmental issue, it has impressed upon citizens of being an ‘easy’ institution of remedy. Collective action against institutions of the state, on the other hand, is more time consuming, littered with many hurdles and with no assurance of success. But in the long run, it pays to have strong bonds between the polity of citizens and the bureaucracy. Judicial innovations to remedy ‘ills of constitutional governance’ have, in this sense, alienated one from the other. Citizens prefer to use social action litigation as the first method of remedy, and the bureaucracy prefers not to respond until the first orders of contempt notices are passed.

If the weakened institutional balance is to be saved from further depletion, the Supreme Court must withdraw itself from the alchemist role. All problems of life or conflicts of interests are not problems of law. The Court would do well to acknowledge that ‘ills of governance’ are best resolved when they are resolved by the conflicting interest holders themselves. And this as a natural corollary requires that the Court sparingly take cognisance of petitions filed in public interest. To begin with, the Supreme Court may insist that petitioners establish some engagement with the bureaucracy before seeking judicial intervention in the guise of social action litigation. If the Supreme Court prefers to continue with its indiscriminate exercise of discretion in petitions filed as ‘social action litigation’, it would have succeeded in polluting the institutional balance of the Indian Constitution. One may live in a polluted environment but not in a polity that has a ‘polluted’ Constitution. Is not a ‘polluted’ Constitution worse than a polluted environment?