

The distinctive character of legal adversarialism in India

In India, two venues for challenging government and bureaucratic corruption have come to dominate public discussions. One venue is the sphere of protest, appealing to the legacy of Mohandas Gandhi and the Indian independence movement. The technique is to appeal to public opinion and shame public officials into action. The highest profile recent example of this sort of challenge is represented by Anna Harvare's starvation plan.

The other venue is the Supreme Court of India. Here, the technique is one of legal adversarialism. Perhaps the highest-profile recent example of this sort of challenge to government corruption was the jailing of a government minister. In 2006, Maharashtra Transport Minister Swarup Singh Naik was jailed for contempt of court for one month. How and why has legal adversarialism evolved in India so that it can be used to challenge government and bureaucratic corruption in this way?

LEGAL ADVERSARIALISM AND PUBLIC-INTEREST LITIGATION

Legal adversarialism is ordinarily understood as a form of policy development that revolves around the uses of the courts. In Canada and the United States, legal adversarialism is a well-known, albeit controversial, policy path. In one of the known formulations in the United States, it is a "particular style of policy-making, policy implementation, and dispute resolution by means of lawyer-dominated litigation." Much of the controversy surrounding legal adversarialism in North America revolves around its inefficiencies and its counter-majoritarian character. The inefficiencies concern the high costs of litigation and the imprecise path by which policy is developed through litigation. The counter-majoritarian character of legal

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adversarialism reflects the fact that sometimes the courts are an alternative venue for minority interests or perspectives to be heard on a given policy issue, especially when they have been silenced in the legislature or the civil service.

In India, legal adversarialism has evolved in a very different direction compared with Canada and the United States. Rather than being centred on lawyers, legal adversarialism is centred on judges—in particular, Supreme Court judges. In India, legal adversarialism is a style of policy-making, policy implementation, and dispute resolution by means of Supreme Court, judge-dominated litigation. This sort of litigation originated three decades ago, driven by a concern with the public interest. It has allowed the Supreme Court of India to take on a leadership role in the formulation of policy where other major government institutions—most notably, the

legislatures and the public service—have failed to act.

The principal architect of this form of legal adversarialism in India, often called public-interest litigation or social action litigation, was Supreme Court Chief Justice P.N. Bhagwati. Bhagwati explains:

The primary focus is on state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements. The public-interest litigation model that we have evolved in India is directed towards "finding turn around situations" in the political economy for the disadvantaged and other vulnerable groups. It is concerned with the immediate as well as long-term resolution of problems of the disadvantaged. It also seeks to ensure that the activities of the state fulfill the obligations of the law under which they exist and function.

In broad objectives, there is little here that is exceptional about public-interest litigation. The difference, as suggested above, is that judges in India play a proactive role in public-interest litigation that is exceptional for a common-law legal system.

What differentiates public-interest litigation in India's Supreme Court from other jurisdictions? In India, the court has redefined the traditional, "adversarial" judicial process as embodied in the *Civil Procedure Code* and the rules of evidence. It has allowed for the departure in public-interest litigation from the traditional, adversarial procedure, where each party produces his own evidence, tested by cross-examination by the other side, with the judge as a neutral umpire deciding the case on the basis of materials

produced by both parties. Five distinct judicial innovations set it apart from the adversarial systems in other common law countries.

- *Changes to the Doctrine of Standing:* The Supreme Court of India began to allow that an action in the courts can be initiated by any group or member of the public on behalf of the underprivileged, not just the parties who were harmed.
- *Epistolary Jurisdiction:* The Supreme Court began to accept informal letters (epistles) to the Court as actionable statements of claims.
- *Court-Appointed Commissioners:* The Supreme Court began to appoint commissioners to investigate, gather evidence, and submit reports to them.
- *Diverse Remedies:* The Supreme Court began to allow for a multitude of unconventional remedies, although there has been an effort to respect the principle of judicial restraint and avoid exceeding limits on judicial powers in creating remedies.
- *Monitoring Mechanisms:* Ordinarily, courts do not assume a monitoring role with regard to their judgments. However, in India, the Supreme Court has developed a series of monitoring mechanisms that allow it to follow up on its earlier decisions.

These five innovative developments have enabled judges on the Supreme Court to engage in policy in a way that would be largely unimaginable in other common-law countries. In effect, they provide an account of how legal adversarialism can be used to challenge government and bureaucratic corruption.

LAW AS CONSTITUTIVE OF DEVELOPMENT IN INDIA

Why is it important for the Supreme Court of India to play the role of challenging government and bureaucratic corruption? In Canada and most other developed countries, corruption is dealt

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with through oversight officers of the legislature, such as the auditor general of Canada. These officers issue reports, which in turn can lead to the appointment of a public inquiry such as in the case of the Quebec sponsorship scandal. The courts do not play a proactive role. What is different in India?

The answer lies in appreciating a major shift in thinking about the relationship between law and development. This shift in thinking is evident in policies of the World Bank and other leading international organizations. Traditionally, law in a developing country has been viewed as instrumental and purposive—an agent of development policy. In other words, law is a means for realizing development. Recently, however, law has come to be viewed not just as an instrument for development but as a measure of and definitional to development. Law understood in different ways as human rights, courts, property rights, formalization of entitlements, the prosecution of corruption, and public order has come to define development in part. This is what is meant by the idea of law as constitutive of development. The rule of law is seen not simply as being necessary for economic markets to operate efficiently and attract foreign investment. Liberal constitutional orders are thus seen as an aspect of what it means to be developed, regardless of its impact on economic indicators.

In Canada and the United States, models of legal adversarialism rarely involve a great deal of reflection on how law should be viewed. The assumption is that law is part of the toolkit for making policy; as one of the tools in that kit, law

is merely an instrument for realizing policy objectives. Whatever criticisms might be pressed against legal adversarialism in North America, however, they do not include that law is appreciated only for its instrumental role.

India provides a very different context for legal adversarialism. Given the constitutive idea of law as being a measure of and definitional to development, it makes sense to have that idea reflected in the practice of legal adversarialism. A great deal of the attention given to public-interest litigation in India has treated law as a mere instrument for policy formulation and implementation. These accounts rightly emphasize the role of public-interest litigation in India advancing the interests of the disadvantaged in Indian society—law is instrumental. Our point is that the constitutive idea of law and development demands from the Supreme Court of India a responsibility to sustain and support rule-of-law practices. These practices include measures against graft and other forms of government corruption.

LEGAL ADVERSARIALISM AND GOVERNMENT CORRUPTION

How has legal adversarialism challenged government corruption? In 2006, the Supreme Court of India broke new ground in its efforts to challenge government corruption by sentencing an elected state legislator, Swarup Singh Naik, to prison. The Supreme Court in 1997 had directed the state government of Maharashtra not to renew sawmill licences in the forest near Tadoba. In 2004, state Transport Minister Singh Naik permitted six sawmills to operate in the forest in spite of the court order. In response, the Supreme Court sentenced the minister to one month in jail for contempt of court. The minister also resigned. In the same year, the Supreme Court similarly intervened to issue guidelines for police administration, which is ordinarily thought to be out of the Court's jurisdiction.

Since 2006, the Supreme Court has been inserting itself more and more into

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the process of investigating major government corruption scandals. Judgments of the Court have made increasing reference to corruption. In 2010, its decisions referenced more than 50 instances of government corruption. It took on the role of overseeing the investigation into the telecom licensing scandal, which is said to have cost the Indian government \$39 billion in lost revenue. It has also ordered the public distribution system to distribute free grain to the poor rather than leave the grain to rot and be eaten by rats. In March 2011, it forced the official appointed by Prime Minister Manmohan Singh to head the Central Vigilance Commission, which is mandated to lead India's fight against corruption, to resign because he was implicated in the telecom licensing scandal. Even more recently, the Supreme Court pressured the Central Bureau of Investigation to investigate allegations of corruption involving the Commonwealth Games.


Our point is that these aggressive responses of the Supreme Court to corruption operate in the realm of legal adversarialism and must be viewed as a reflection of the idea that law in India is

now viewed not just as an instrument for development but as a measure of India's development.

CONCLUSION

At present, it might be tempting to see the Supreme Court of India as a great saviour in the fight against corruption. Unfortunately, however, legal adversarialism as a technique for challenging government and bureaucratic corruption in India has its limitations. For in India, there are genuine concerns about corruption among the justices on the Supreme Court. Clearly, corruption of this sort poses a threat to claims about advances toward rule of law in the development of India. Legal adversarialism is not, however, capable of addressing corruption among the judiciary. The present government in India believes, and we concur, that what India ultimately needs is something like a judicial council to enforce ethical and best practices among its senior judges and punish judges for corruption. This sort of judicial council run by senior judges exists in most other common-law countries. However, it is not clear in the case of India

who would establish or operate such a professional body.

Ironically, if India does establish a judicial council with the objective of combatting corruption among the judiciary, such a council may also attempt to regulate the other behaviours of Supreme Court justices. As we noted above, the Supreme Court of India developed its unique model of public-interest litigation by adapting the adversarial system in ways that facilitate the technique of legal adversarialism as a way to challenge government and bureaucratic corruption. Judges on the Supreme Court were the authors of these distinctive features of Indian legal adversarialism. In many common-law countries, including Canada, it is likely that a judicial council would have viewed such innovations as unprofessional and a compromise on the impartial role that judges are required to assume in an adversarial legal system. Our point is that a judicial council may prevent the Supreme Court of India from continuing in its role of challenging corruption on the ground that fulfilling this role requires judges to act unprofessionally. 

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targets notwithstanding). India's negotiators too were also routinely castigated for caving into foreign pressure at the slightest hint of a conciliatory stance.


DEMOCRACY AS INDIA'S "SOFT-POWER"

India's recent diplomacy suggests that Delhi is sensitive to the value of democracy in developing ties that bind. India's partnership with Brazil and South Africa (IBSA) is being described as a "natural one" between leading, market-oriented democracies. India's democracy could indeed provide Delhi with a degree of soft power advantage in the Asia-Pacific region, which is nervous about new Chinese assertiveness, along side the continued strong role of the United States

in the region aiming to constrain Chinese influence. C. Raja Mohan notes that "a future balance of power in which democratic India constitutes a principal pole would better protect liberal values embodied by Indian society than a future order in which an authoritarian China enjoyed hegemony in Asia."

THE PATH TO GLOBAL POWER

India is well on its way to meeting the aspirations of its people to achieve global significance. It is not just a member of the G20 but, indeed, a leading one. Prime Minister Singh, even when his government has stumbled domestically, has been an effective spokesperson for his country internationally. Nevertheless, India needs to tend to its domestic secur-

ity challenges not only for internal reasons, but because too many insurgencies and terrorist incidents can only undermine its credibility internationally and slow its rise to meaningful global power status. As Prime Minister Manmohan Singh has recognized, some of the challenges relate more to failures in the country's economic development, and in the equitable distribution of its gains, than in essentially political grievances. 

Note

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