THE COURT AS A SOCIAL AUDITOR (I)

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I never had the privilege of meeting Dr. Amitabh Chowdhury but from all accounts he was "*a gem of purest ray serene*"[1], exceptionally gifted, generous, upright, compassionate and a sincere soul who had the love of admiration of all those he interacted with. It is only apt that one of the objectives of the Trust set up in his memory is to "mobilise support to all forms of humanitarian enterprise and infuse and enliven humanitarianism, institutionalise fellowship and practice humanity". The subject chosen for today "The court as a social auditor" is also essentially about a humanitarian enterprise.

The topic merits a book (probably one which would run into several volumes) and of necessity I have had to be extremely selective and brief addressing only the legal stand-point but the use of legalese has been minimized as much as possible. Nevertheless it is assumed that the audience has at least a broad acquaintance with the Constitution.

[1] Gray's Elegy Written in a Country Churchyard

I have chosen the word ‘court’ instead of ‘the judiciary’ to collectively signify not only judges, but also lawyers and most importantly litigants. Issues decided by court cover every facet of life. In fact the word “audit” is derived from Latin and meant “to hear” and in England it originally meant a judicial hearing. The word audit is now commonly understood as an examination of accounts. The use of the word in the context of “social audit” means public accountability in the political, economic and social fields. The court’s role as a social auditor is the enforcing of public accountability of the State and governmental authorities by the public through the judiciary. For today I have limited myself to the social perspective although the perspective cannot be sharply delineated from the others.

An audit in the limited sense of financial accounting of public expenditure is envisaged in the Constitution itself by expressly providing for a Controller & Auditor-General of India[2]. Whenever the Executive sets up various commissions of enquiry under the Commissions of Enquiry Act, 1952, the ostensible objective is also broadly the same viz. to ensure public accountability. But the similarity with a court audit ends there. The audit by the CAG is limited to financial accountability and is inquisitorial in nature. Commissions set up by the Executive

[2] Article 148

whether at the Central or State level have more often than not, acted for the public like the proverbial rocking chair-- movement without progress not because Reports are not dutifully submitted by the Commissions but because these Reports are normally shelved to gather dust in the corridors of power. In any case these bodies are limited to fact finding and while they can criticize or recommend, they lack the power of implementation.

A social audit by court is not so limited. The judicial system is used to supervise whether existing welfare measures are being implemented; if not and if necessary, to direct welfare measures for implementation and finally to supervise and enforce implementation by using where necessary the power of contempt. The objective is to reach Constitutional benefits to society for which alone namely the Legislative, the executive and the judicial limbs of Government exist. The process is neither inquisitorial nor adversarial but participatory in which public spirited individuals and organizations, the media, governments and lawyers play a part, with judges providing the cutting edge.

Let me illustrate this with a concrete example of how this works. In the winter of 2009- 2010 Delhi witnessed some of the coldest temperatures in the last decade and it appeared there was no law or executive order asking Governments to take the required steps to protect the people living on the streets from the extreme

weather. In this vacuum the matter was brought to the notice of the Supreme Court in January 2010 by People's Union for Civil Liberties (PUCL) an apolitical human rights organisation set up to defend civil liberties and human rights[3]. Notices were issued by the Supreme Court to the concerned authorities in Delhi asking for a status report. By 27th January the various departments of the Government together with a few Non-Governmental Organisations had taken steps for providing adequate night shelters, toilet facilities, basic amenities such as blankets and mattresses, potable drinking water, ration cards and medical check-ups. Subsequently directions were issued to all the states to provide permanent night shelters for the homeless. Implementation was monitored by asking States to file status reports and issuing directions to each State according to its individual needs. By November 2010 several states had complied with the Court's directives and were commended "for dealing with the human problem in its proper perspective". The States whose performances were unsatisfactory continued to be monitored by Court with NGOs and the PUCL being given the liberty to verify whether the claims made by the States in their affidavits were correct. News papers, the electronic media including Doordarshan were directed to give publicity to the night shelters so provided so that homeless persons could be aware

[3] People's Union for Civil Liberties v. Union of India, (2010) 5 SCC 423

and take the benefit of the shelters[4]. As far as I know the matter is still being monitored by the Court.

Directives issued by Court are not drawn out of a hat or the whim of a judge but upon material placed before the court by the petitioner, various experts (sometimes appointed by Court) and governmental authorities. Thus in the night shelters case statistics of the number of homeless, the number of night shelters and the lack even of basic facilities resulting in a number of deaths were provided by the petitioner. The Commissioner of Food and Civil Supplies, Government of Delhi, had already undertaken a massive survey of homeless families in many corners of the city with the help of civil society organisations. The Additional Solicitor General on instructions from the officials of the Delhi Administration had also assured the Court that all those who were without shelters would be provided shelters on priority basis and basic amenities would be provided, such as, blankets, water and mobile toilets.

Normally the Court is not called upon to act in such a legislative vacuum. In fact there is a surfeit of laws in this country.

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[4] See in this connection PUCL (Night Shelter Matters) v. Union of India, (2010) 14 SCC 245, and PUCL (Night Shelter Matters) v. Union of India, (2010) 14 SCC 604; People's Union for Civil Liberties (Night Shelter Matters) v. Union of India, (2011) 14 SCC 723; People's Union for Civil Liberties v. Union of India, (2011) 14 SCC 349; People's Union for Civil Liberties (Night Shelter Matters) v. Union of India, (2011) 14 SCC 721; People's Union for Civil Liberties (Night Shelter Matters) v. Union of India, (2011) 14 SCC 129; People's Union for Civil Liberties (Night Shelter Matters) v. Union of India, (2011) 14 SCC 552; PUCL (Night Shelter Matters) v. Union of India, (2012) 12 SCC 532; People's Union for Civil Liberties v. Union of India, (2011) 14 SCC 349; People's Union for Civil Liberties (Night Shelter Matters) v. Union of India, (2012) 11 SCC 728,

Thus in 1996 the Supreme Court counted at least 9 legislative enactments in force prohibiting employment of child labour in different occupations. Today we have 10 such statutory prohibitions. Child labour has however continued despite the statutory enactments and in 2011 according to the National Commission for Human Rights there were 12.6 million (governmental sources) to 100 million (unofficial sources) child labourers[5] . The problem is therefore not so much an absence of laws but of non-implementation of existing laws by an inert and corrupt Executive. As the Supreme Court observed "a social audit of the Executive's implementation (of a law) a year or two later will bring to light the gaping gap between verbal valour of the statute-book and the executive slumber of law-in-action"[6]. Consequently the scope of court audits continues to expand in what is now commonly known as Public Interest Litigation. I have had occasion to say elsewhere[7] that if the subjects dealt with by courts enforcing public accountability of Governments and government officials were classified alphabetically they would probably cover every alphabet of the English language several times over.

[5] Bachpan Bachao Andolan v. Union of India, (2011) 5 SCC 1, at page 11
[6] Bhim Singhji v. Union of India, (1981) 1 SCC 166, at page 186
[7] Judicial Oversight or Overreach:The Role Of The Judiciary In Contemporary India :Ruma Pal [Distinguished Lecture Series, Center for The Advanced Study Of India, University of Pennsylvania][2008]

The questions which then arise are: can the judicial system be used in this manner? Second, should it be so used? And finally how effective has this method of auditing been successful?

I will address each of these questions but in the reverse order and start with the issue of success. Success in matters which are singular as opposed to diffused has been high. An instance of this would be the setting aside of allotments of 15 petrol pumps made by a Minister of State to his relatives and acquaintances without following any procedure[8]. The matter was brought to the attention of the Court by Common Cause, an organisation dedicated to public causes for seeking redress for problems of the people on the basis of a newspaper report. The judges scrutinized each of the 15 allotments and quashed all of them as they were "wholly arbitrary, nepotistic and … motivated by extraneous considerations" and that the Minister had "betrayed the trust reposed in him by the people under the Constitution"[9]. The petrol pumps were auctioned and the Minister criminally prosecuted by the CBI. It is another matter that the prosecution ended with a closure report[10] because the Home Ministry refused sanction to prosecute and the Minister continues to be in active politics even today.

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[8] Common Cause, A Registered Society (Petrol pumps matter) v. Union of India, (1996) 6 SCC 530

[9] Common Cause, A Registered Society (Petrol pumps matter) v. Union of India, (1996) 6 SCC 530, at page 555

[10] The special judge for CBI cases, Pratibha Rani, discharged Sharma in November 2004, accepting a closure report filed by the CBI. The investigating agency had also produced a letter of the ministry dated September 27, 2004, by which it had refused sanction for the prosecution of the accused.[India Today: May 12, 2010]

Such a focused approach to accountability by court is not possible in cases where the problem is voluminous and widespread and "success" is not only difficult to assess but may in some cases be only marginal. Take the case of bonded labour. Apart from Article 23 of the Constitution which prohibits traffic in human beings and forced labour, Parliament had enacted five statutes [11] on the subject and had made the employers of bonded labour liable for punishment as early as in 1976. The "gaping gap between verbal valour of the statute-book and the executive slumber of law-in-action" became apparent when the "miserable plight of persons held in bondage over generations" was brought before the Supreme Court in 1984, eight years after the law was passed[12]. Various directions were issued from time to time by the court for the purpose of identifying and freeing bonded labourers and for their rehabilitation. In 1997 the court entrusted The National Human Rights Commission with the responsibility of monitoring and overseeing the implementation of the Court's directions as well as the statutory provisions. Yet as recently as October 15, 2012, "the tell-tale miseries of bonded labourers … their exploitation and the necessity of identifying and checking the practice of bonded labour in this country" have been brought to the notice of the Supreme

[11] The Bonded Labour System (Abolition) Act, 1976; the Minimum Wages Act, 1948; the Contract Labour (Regulation and Abolition) Act, 1970; the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; and the Mines Act, 1952

[12] Bandhua Mukti Morcha v. Union of India[1984] 3 SCC 161

Court[13] again. Although fresh directions have been issued to the States which hopefully will galvanize the executive into action, it is apparent that even judicial intervention has met not with the kind of success that was envisaged when bonded labour was statutorily abolished in 1976.

Should the judicial process be used to take Governments to task? I will assume for the time being that the courts have the legal power to be involved in matters which are essentially questions relating to good governance which should have been handled by the Executive and the Legislatures on their own. At the outset it must be noted that no authority has sought to overturn the beneficial impact of the orders passed by the Supreme Court. No legislature has sought to interfere with courts directives. Indeed in many cases judicial decisions relating to social issues have acted as a catalyst resulting in much needed legislative measures including, on occasion, Constitutional amendments. An example of such legislative affirmation is the passing of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 earlier this year following on the Supreme Court's guidelines and norms laid down in 1997 in Vishaka vs. State of Rajasthan[14]. Another is the introduction of Article 21A by Constitutional Amendment recognizing the right to education as a fundamental

[13] Public Union for Civil Liberties v. State of T.N., (2013) 1 SCC 585
[14] JT 1997 (7) SC 384

right in 2002[15] after the Supreme Court held that a child who is a citizen has a fundamental right to free education up to the age of 14 years[16] in 1993. As far as the Executive is concerned a distinction can at times be seen between the bureaucrats and their political masters. "Some ground-breaking judicial decisions may even be applauded behind the scenes by government officials and members of the administration"[17]. Politicians however often resent judicial intervention[18] particularly if it impinges on their self interest and party agenda. As for the common citizen, public interest litigation has become a powerful tool to demand accountability of those given the responsibility of governing this country and who are after all nothing more than public servants.

In my opinion a court audit is imperative for three reasons. The primary reason is the need to curb abuse of authority by those in power. Of late the country has witnessed struggles between various political parties more intent on thwarting each other than in implementing reforms. With corruption being rife amongst the bureaucracy and so many rags to riches stories among politicians, the common person has come to distrust and resent those in power and their ever increasing privileges. This coupled with a burgeoning sense of a right to social and economic equality has

[15] The Constitution (Eighty-sixth Amendment) Act, 2002
[16] Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645, at page 735
[17] Margit Cohn supra
[18] See for example "Beni Prasad Verma courts fresh controversy, takes on Supreme Court": Times of India: PTI | Nov 15, 2013

made for an explosive situation. A court audit acts as a safety valve.

The second reason is that social audits are rarely provided for statutorily although the Court has over the years emphasized the need for the law to provide a social audit to monitor the implementation of welfare measures[19]**.** More than three and a half decades ago Mr. Justice V.R. Krishna Iyer had commented that "Law reform, preceded by socio-legal research and social audit of the performance of welfare legislation, is unknown in this country on behalf of the poor"[20].

Finally, experience has shown that even when provided for in a statute, social audits have not worked because the executive corruption and inertia persists. Take the case of The Mahatma Gandhi National Rural Employment Guarantee Act, 2005(shortly called MNREGA) which provides statutorily for public accountability through social audit and Right to Information[21]. Despite such mandate, a survey over several years conducted by a reputed non-governmental research organisation[22], showed that funds of several hundred crore rupees allocated under the Act for

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[19] State of Punjab v. Geeta Iron & Brass Works Ltd., (1978) 1 SCC 68, at page 69; S.B. Noronah v. Prem Kumari Khanna, (1980) 1 SCC 52, at page 53; Bhim Singhji v. Union of India, (1981) 1 SCC 166, at page 186; Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd., (1990) 3 SCC 280, at page 284.

[20] Mr. Justice V.R. Krishna Iyer : THE JUDICIAL SYSTEM-HAS IT A FUNCTIONAL FUTURE IN OUR CONSTITUTIONAL ORDER: [1979] 3 SCC JOURNAL 1

[21] Section 15

[22] Centre for Environment & Food Security

the impoverished unemployed were being siphoned off by corrupt officials particularly in Orissa and "the statutory obligation under the provisions of the Act was being frustrated by the very functionaries who are responsible for proper and effective implementation of the Act"[23]. Incidentally, the Comptroller and Auditor General of India and the National Institute for Rural Development also reported irregularities in implementation of the provisions of the Act. No heed was paid to these reports by the Governments. Now the Supreme Court, acting at the instance of the research organization, after several hearings, has directed the Central Government to hand over the investigation into all incidences of irregularities and discrepancies where, ex facie, criminal offences are alleged to have been committed by government officials in Orissa to the CBI. This has been done by the Central Government with the concurrence of the State of Orissa. In the meanwhile the Court has set about monitoring the implementation of the Act in Madhya Pradesh and Uttar Pradesh[24]. The need for courts to exercise powers "as an inbuilt mechanism within the framework of the Constitution for purposes of social audit and to ensure compliance of the Rule of Law"[25] therefore persists.

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[23] Ibid at page 686

[24] Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 668

[25] M.L. Sachdev v. Union of India, (1991) 1 SCC 605, at page 610

Before dealing with the final aspect on the aspect of social audit by courts namely the constitutionality of the process, the provisions of the Constitution must be seen in their historical context. During the French Revolution the peasantry had fought to bridge the social, economic and political gap between themselves and a privileged aristocracy under the banner of liberty, equality and fraternity. Conscious of the need to preempt a similar situation in India, a country with similar great disparities, when they achieved independence Indians solemnly resolved in their Constitution not only to secure the same objectives but also to secure justice- social, economic and political. The content of this resolve has been guaranteed to some extent in the Chapter on Fundamental Rights in the Constitution. While the responsibilities to fulfill these guarantees have been broadly allocated between the Legislative bodies, the Executive and the Judiciary, Parliament has been expressly granted the power to make laws to punish acts in violation of the fundamental rights[26] and the Supreme Court under Article 32 has been conferred the power to **enforce** those rights directly[27]. This means that any citizen can approach the Supreme Court to assert and claim the benefit of these provisions. What citizens have been debarred from asserting until laws are enacted, are those principles described as “Directive” but which are

[26] Art 35 (a) (ii)
[27] Art 32

nevertheless described as “fundamental to the governance of the country”[28]. Thus although Article 38, a Directive Principle, imposes an obligation on the State to “strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social justice shall inform all the institutions of the national life” almost 70 years since the framing of the Constitution the response of Governments, particularly the Executive limb, has been euphemistically speaking, frighteningly inadequate and riddled with corruption. On the other hand the “social order” of this country was shaken to the core when the enforcement of fundamental rights including those conferred by Articles 14 (equality), 19 (1) (a) (freedom of speech and expression), 21(life and liberty) and 22(protection against arrest and detention) was suspended by Executive fiat in 1975. The growth of Public Interest Litigation is primarily relatable to the executive excesses during the period of the emergency between 1975 and 1977 and a reaction to the criticism of the Supreme Court’s failure to protect the citizen when the protection was most needed. The judiciary realized that if the Constitutional values were to be protected, it would have to find a way of ensuring social justice by redefining the parameters of the judicial process within the Constitutional framework. This was done primarily by

[28] Art. 37

construing the negative right not to be deprived of life under Article 21 as a positive right to life and by interpreting the word "life" to include the right to live with dignity, the rights to livelihood and shelter[29], education[30], privacy[31], legal aid[32], a clean and pollution free environment[33] and the right of women to freedom from sexual harassment at work[34] to name a few. The right to be treated equally under the Article 14 of the Constitution was interpreted not only to include the right to be treated on a rational basis but by a "right, just and fair" procedure[35]. The rules of standing and other procedural norms were relaxed in order to give easy access to the Courts[36]. Any public spirited individual or organization "acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration[37]" can now represent the victims of either a denial of fundamental rights or of misapplication of the law.

The main criticism is that the judiciary is intervening in matters which are within the exclusive domain of the legislative bodies and the Executive. The answer is that the Constitution does not

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[29] *Olga Tellis v. Bombay Municipal Corporation : (1985) 3 SCC 545*
[30] *Unni Krishnan v State of Andhra Pradesh: (1993) 1 SCC 645*
[31] *R. Rajagopal alias R.R. Gopal and Another Vs.State of Tamil Nadu and Others: (1994)6SCC632, [1994] Supp 4 SCR 353*
[32] *Sunil Batra v. Delhi Administration AIR 1978 SC 1675. 1724; Hussainara Khatoon AIR 1979 SC 1369; Sheela Barse v. State of Maharashtra AIR 1983 SC 378*
[33] *T.N.Godavarman Thirumalpad v. Ashok Khot: .(2006) 5 SCC 1*
[34] *Visakha v. State of Rajasthan : AIR 1997 SC 3011*
[35] *Maneka Gandhi v. Union of India (1978) 1 SCC 248*

[36] *Rural Litigation and Entitlement Kendra v. State of U.P. : (1985) 2 SCC 431*
[37] *S.P. Gupta v. Union of India, 1981 Supp SCC 87, at page 219*

envisage such an exclusive demarcation of responsibilities between the three limbs of government for making fundamental rights available. There is a functional overlap in the Constitution with the Legislatures sometimes exercising judicial powers[38], the Executive in certain situations exercising legislative powers[39] and the Judiciary exercising both powers in the sense of making law and implementing law if necessary[40].

Besides, the power of the judiciary to interpret Constitutional provisions and the judges' responsibility to enforce fundamental rights through such interpretation cannot be disputed. It also cannot be denied that judicial interpretation must be socially contextual. Most of the fundamental rights are "empty vessels", into which each generation pours its content by judicial interpretation in the light of its experience[41] . While we in India have borrowed to a large extent the framework of governance from the west the content of the framework must be fleshed out in the Indian context. To quote Chinnappa Reddy, J. "While we have learnt and borrowed a great deal from British jurisprudence, we have been drawing the line now and then, here and there, because their law, their jurisprudence suits their genius and ours must develop according to our genius. Our needs are different; our social,

[38] See for instance Article 124(5), Article 217;Article 194 (3)
[39] See for example Articles 73, 118 (3), 123,162, 213
[40] Articles 32 and 226
[41] *per Matthew, J: Kesavananda Bharati v. State of Kerala : AIR 1973 SC 1461*

political and economic bases are different; our aspirations are different; our systems are different; the stages of our development are different"[42]. If the judiciary has enabled the common person to use the judicial process to force the State to abide by its obligation of "securing and protecting as effectively as it may a social order in which social justice shall inform all the institutions of the national life" it has done its Constitutional duty. Critics use the phrase "judicial activism" as if the words were a term of abuse whereas the Dictionary defines "activism" as "a policy of vigorous action"[43]. That being so, judges should wear the term "activist" as a badge of honour.

In conclusion let me say that the prime mover in a court audit has always been the public represented by civil society organizations or public spirited individuals. They reflect a new stage of democratic evolution in the country. People are no longer content with participating in governance by merely exercising their right to vote to appoint a representative once every five years. They want to be heard by ensuring that their representatives duly discharge their responsibilities. They can of course take to the streets to enforce compliance as they did recently when the decision of the Supreme Court[44] debarring convicted politicians

[42] National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228, at page 262
[43] The New Shorter Oxford English Dictionary
[44] Lily Thomas v. Union of India,(2013) 7 SCC 653

from standing for elections. Or they can resort to the more peaceful and constitutional method of a court audit. The option lies with them.

THANK YOU!