

## NATIONAL AFFAIRS

## India

## The Delhi Pollution Case: Can the Supreme Court Manage the Environment?

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Judicial activism in the Indian Supreme Court has created major reforms in the protection of human rights and has put the Court in a unique position to intervene when it sees violations of these fundamental rights. But the Court's eagerness to right societal wrongs can lead it to take decisions that are within the province of executive agencies. By usurping the role of agencies and directing policies through its orders, the Court risks making decisions that may ultimately harm the nation.

In 1998, the Indian Supreme Court, embracing its activist role, made a controversial order mandating the conversion of the entire Delhi fleet of diesel-powered buses to compressed natural gas (CNG).<sup>1</sup> Steadfast resistance from the agencies responsible for enforcing the court order has raised serious questions about the wisdom of this decision. Many opponents have disputed the reliability and practicality of CNG, arguing that the technology is still in development, making the conversion both risky and costly. Others, especially civil society groups, argue that CNG is an optimum low polluting fuel, and a shift to CNG should take place at once.

By disregarding the pleas of the Delhi government and insisting on the implementation of its orders, the Court seems to be usurping the authority of the existing pollution control structures and their capacity to fulfil their duties. This raises both institutional and constitutional questions, as the Court wrestles with the question of which branch of government is best suited to handle pollution control matters. An examination of the environmental legislation and bureaucracy in India makes clear that the infrastructure is already in place for effective environmental management. While the Court evidently intended to protect the health of the citizens of Delhi, it may in fact be impeding the development of more effective environmental controls in the country.

### History of the Case

The Supreme Court's involvement in Delhi's air pollution problem originated over concerns that the city's pol-

luted air was slowly poisoning its citizens.<sup>2</sup> A widely cited study conducted in Delhi estimated that 10,000 people die every year due to complications from air pollution, a staggering total of one person every hour.<sup>3</sup> Alarmed by this unchecked pollution and its health impacts on the Delhi population, Supreme Court environmental advocate M.C. Mehta filed a Public Interest Litigation (PIL) suit in the Supreme Court against the Union of India in 1985, charging that existing environmental laws obligated the government to take steps to reduce air pollution in Delhi in the interests of public health.<sup>4</sup>

For several years following the initial appeal, the Court did little more than set up fact-finding commissions to determine the status of air in Delhi. In 1990, based on the opinion of the Ministry of Environment and Forests (MoEF), the Court acknowledged that heavy vehicles including trucks, buses and defence vehicles were the main contributors to the air pollution problem.<sup>5</sup> In 1996, the Court ruled that all government vehicles in the city be converted to compressed natural gas (CNG).<sup>6</sup> The case took on its current significance in 1998 when the Court mandated that all buses in the city must be converted from diesel fuel to CNG by 31 March 2001.<sup>7</sup> Subsequently, auto-rickshaws were brought under the same rule. Since there is no adequate infrastructure to deliver CNG to vehicles, some rickshaw drivers have had to wait up to five hours to fill their gas tanks at the handful of CNG stations in Delhi.<sup>8</sup>

### Resistance from Governmental Agencies

While the conversion to CNG requires the determined cooperation of all branches of government, the history of the case reveals that executive branch officials have consistently tried to prevent the conversion to CNG. In 1998, in an attempt to quell public concern for the air pollution problem, the Delhi health minister, Dr Harsh Vardhan, was quoted as saying that air pollution does not increase the risk of heart and lung disease.<sup>9</sup> Parvez Hashmi, the Delhi transport minister, recently tried to attack the reliability of CNG as a fuel source, claiming that the government will be "blindly spending public money on an unproven technology. We don't want CNG..."<sup>10</sup>

### Bhure Lal Committee

The Environmental (Protection) Act of 1986 gave the federal government the authority to act in the interests of

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“protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.”<sup>11</sup> Exercising this authority regarding air pollution in Delhi, the MoEF in 1998 established the Environment Pollution (Prevention and Control) Authority (commonly referred to as the Bhure Lal Committee).<sup>12</sup> This five-member committee was originally composed of a representative from the Central Pollution Control Board, the Automobile Manufacturers Association of India, the Centre for Science and Environment (an environmental NGO), the Transport Department, and the “Central Vigilance Commission”.<sup>13</sup> Because of its legal authority and equal representation, the Supreme Court has consistently looked to this committee as its fact-finding commission and has relied almost exclusively on its findings when making its decisions in the Delhi air pollution case.

### Supreme Court’s Order of 5 April 2002

In its order of 5 April 2002, the Supreme Court reaffirmed its commitment to CNG conversion and voiced its frustration with the implementing agencies. It scolded the Delhi government for its defiance of the Court’s orders to implement the CNG conversion and discredited claims that CNG was not technically or economically feasible.<sup>14</sup> It pointed out that India does not currently import any CNG and its domestic supply is more than adequate for both the country’s and Delhi’s transport needs.<sup>15</sup> After consulting bus manufacturers, the Court concluded that diesel bus replacement was proceeding at an unacceptably slow rate due to an “imaginary shortage in the availability of (CNG)”.<sup>16</sup> The Court sought to further establish itself as a protector of public health, standing up against corporate greed to ensure the rights of citizens and especially children, whose “sound is not heard” by the government otherwise.<sup>17</sup>

The Court’s orders reflected its frustration with the implementing agencies and attempted to discredit any existing concerns with the CNG implementation. To prevent the government from blaming the lack of implementation on a shortage of CNG buses, the Court, after consulting officials from Ashok Leyland and Tata Engineering Locomotive Company, the two main manufacturers of CNG-equipped buses, ordered the immediate installation of 1500 CNG buses and the replacement of 800 diesel buses each month beginning on 1 May 2002, until the entire fleet is converted.<sup>18</sup>

### Economic Analysis of the Decision

The conversion of the entire Delhi bus fleet from diesel to CNG will require a complete overhaul of the fuel supply structures within the city. In addition to the fact that all current diesel buses will either need to be replaced or upgraded to CNG, the Delhi government will need to figure out how to supply the city through existing or new pipelines, and will have to develop a distribution plan to allow fast and easy access to this fuel. Such reforms in the distribution infrastructure will require a considerable financial investment, one that many opponents to the conversion say is too large to justify. However, the Court has maintained that public health interests must supersede the financial interests of a private company and continues to

reject economic concerns in opposition to its orders.<sup>19</sup> Furthermore, based on the findings of the Bhure Lal Committee, the Court has scolded the Delhi government for exaggerating the economic hardships associated with the conversion, strengthening its resolve to stand up for the health of the citizens of Delhi.<sup>20</sup>

### The Decision’s Legal and Constitutional Antecedents

The Supreme Court’s decision to control air pollution in Delhi was consistent with precedent. Although many parties have challenged the Court’s position in this case, the history of environmental regulation in India has established the Court as a responsible and often effective instrument of environmental improvement. The Supreme Court’s determination to use its power to manage Delhi’s vehicular pollution may, however, have been a mistake in judgment.<sup>21</sup> Despite the fact that the Court’s ruling is environmentally friendly and has a realistic chance of successfully controlling air pollution in Delhi, it may be detrimental to the future of environmental management in India. While many environmental NGOs are delighted by the strong stance of the Supreme Court in the Delhi Pollution Case, this rise in judicial power might come at the expense of other environmental improvements, including much needed funding for the Pollution Control Boards (PCBs) and the MoEF, and the strengthening of inspection, monitoring and enforcement structures.

### The Need for Strengthening of Pollution Control Boards

One of the most serious problems with the Supreme Court’s decision to mandate a conversion of the Delhi bus fleet to CNG is that its effects will be limited to the city of Delhi. The Court’s decision will have no impact on vehicle regulations or emissions in other cities, and will do nothing to mitigate air and water pollution in other industries. The Water and Air Acts created Pollution Control Boards in each state as autonomous bodies under the MoEF to design and enforce effluent and emissions standards for polluting industries.<sup>22</sup> Accordingly, it is the responsibility of these PCBs, and not the Supreme Court, to devise solutions to Delhi’s pollution problem. Environmental advocate Shyam Divan has argued that “judicial activism has restricted the growth of a responsible and independent bureaucracy.”<sup>23</sup> Strengthening these monitoring and enforcement structures would seem to be the best way toward effective, long-term solutions.

Despite their apparent power, the PCBs have not yet fulfilled their potential as enforcement agencies. They have no power to impose fines, cannot threaten imprisonment for non-compliance, and are reliant on the courts to enforce their orders.<sup>24</sup> Their power to shut down polluting factories is often compromised by their reluctance to bring about unemployment and economic dislocation.<sup>25</sup> Despite whatever limited successes the PCBs may have had, air and water quality continue to be a serious issue in India.

The Indian government has already recognized the need to increase funding for agencies that enforce environmental regulations. In the “National Conservation Strat-

egy and Policy Statement on Environment and Development", developed in 1992, the Ministry of Environment and Forests recognized that in order to effectively implement any environmental laws, it must strengthen the requisite enforcement machinery.<sup>26</sup> Therefore, for any environmental regulations to be effective in India, Parliament must appropriate money to the MoEF to strengthen the enforcement capabilities of the Pollution Control Boards.

In addition to Parliamentary funding, the Boards must be given power to impose and collect fines from polluting industries in amounts proportional to their emissions levels. If appropriately levied, these taxes would establish pollution as an economic liability and could encourage corporate investment in environmentally-friendly technology and research.<sup>27</sup>

### **Current Situation in Delhi Presents Unique Opportunity to Environmentalists**

The current air pollution problem in India provides environmental advocates with a unique opportunity to force the government to enact large-scale reforms in the regulation of air pollution. For environmentalists, the extreme situation in Delhi represents more than just a violation of human rights; it is an opportunity to effect lasting change. The pollution problem in Delhi is political capital that could be used to enact nationwide environmental reforms. These reforms could provide regulations and funding to address concerns beyond vehicular pollution. If such reforms aren't enacted in response to the air pollution problems in Delhi, it will be much more difficult to motivate the country to develop nationwide management reforms in response to the air pollution levels in another city whose air pollution problems are less egregious than those in Delhi.

### **The Supreme Court as Environmental Manager**

It seems imperative for the Prime Minister to act boldly to prevent the Indian Supreme Court from usurping the executive branch's constitutional obligation to protect the environment. By issuing its own orders in this case instead of mandating the government to act, the Supreme Court is establishing itself as the protector of the environment, enabling the executive to shed this unwelcome responsibility. Moreover, not wishing to alienate their corporate support in the diesel industry, many legislators may fail to demand rules implementing controversial environmental legislation, letting the Supreme Court justices handle these matters instead.

By attacking vehicular pollution in Delhi, environmentalists are focusing their case on motor vehicles in the country's most polluted city. Even if the Court is successful in reforming the bus system in Delhi, the ruling will affect only this case. It will not affect other industries or cities, which will argue that their emissions, or total pollution load, are not as severe as the pollution levels in Delhi.

The Supreme Court's ruling could also backfire for environmentalists if the Court can't get its orders enforced. If the enforcement agencies are successful in generating public opposition to the ruling and obstructing its implementation, it may appear that pollution controls are ex-

cessive. If the Court is unsuccessful in regulating one of the worst polluters in the country, it is unlikely to have the legitimacy to attack less serious polluters. Environmentalists have little to gain and everything to lose – if they win, their decision applies to few, if any, other industries; if they lose, they threaten to inhibit any further environmental litigation by setting the precedent that even the worst polluter in the country – the Delhi bus management – is free from regulation.

Alexander Hamilton described the judiciary as the weakest branch of government because it lacks control over the purse or the sword.<sup>28</sup> Instead, it must derive its power from being the protector of the people. In the Delhi pollution case, there is a good chance that public opinion may fail to support the Supreme Court's CNG policy. To many Delhi residents living below the poverty line, environmental regulations are less important than people's access to basic necessities such as transportation. Should the Court's decision prove unpopular with the general public due to long queues and inefficient service, the Court risks losing some of the respect and credibility it needs in order to remain an effective instrument of change.

### **Recent Developments and the Need for Legislative Coordination**

The partial implementation of the Supreme Court's orders to convert Delhi buses to CNG suggests that there are practical limits to the exercise of judicial power in India. A recent spate of fires on CNG-powered buses has raised questions about the safety of CNG as a fuel source.<sup>29</sup> Long queues at refuelling stations have curtailed bus services by reducing the number of active buses in the already depleted fleet.<sup>30</sup> Public opinion seems to be moving away from CNG conversion and in favour of the recently opened Delhi subway system, where 62 miles of track will soon connect 90 stations throughout the city.<sup>31</sup>

Some of the roadblocks to CNG implementation could have been avoided, or at least minimized, had the conversion been originally mandated through the normal legislative process. In the haste to accommodate the Court's orders and convert existing buses to CNG, safety considerations seem to have been overlooked, resulting in frequent gas leaks and fires at refuelling stations, as mentioned earlier.<sup>32</sup> Legislative and executive intervention is now needed to establish safety protocols and manufacturing standards that will ensure a smooth and safe transition.<sup>33</sup>

Furthermore, the Court cannot coordinate the installation of dozens of CNG fuelling stations, a task that might have been accomplished had the conversion been originally planned and overseen by the Delhi Transport Corporation (DTC) in conjunction with Indraprastha Gas Limited (IGL).<sup>34</sup> While the DTC and IGL have finally begun to work together, the Court's pressing time frame has prevented them from converting to CNG cost-effectively and with minimum congestion at refuelling stations.<sup>35</sup>

The Supreme Court should also take notice of the opening of the Delhi subway system, reportedly one of the most advanced in the world. In contrast to the Delhi Pollution Case, which has resulted in a clumsy and partial conversion to CNG after 18 years of litigation, construction of

the multi-billion dollar Delhi subway system remains on schedule and on budget.<sup>36</sup> By subcontracting most of the work to private firms and relying heavily on bilateral (Japanese) aid money, major civil projects can apparently be completed efficiently.<sup>37</sup>

## Summary

In the end, the Supreme Court's ruling to mandate the conversion of the Delhi bus fleet to CNG was strongly backed by scientific research that proved not only the dangers of diesel air pollution, but also the economic potential and environmental safety of compressed natural gas.<sup>38</sup> Furthermore, the Court fulfilled its promise as the protector of the people by refusing to yield to the Delhi government's objections and by pressing the view that economic concerns must not outweigh the protection of fundamental rights. In this capacity, it has succeeded in raising awareness of the air pollution problem. On 22 October 2002, the Delhi government announced a plan to introduce 4000 CNG-powered buses, and to spend 25 per cent of its state budget, amounting to 54 billion rupees (US \$1.3 billion) on transport and related infrastructure over the next five years.<sup>39</sup>

But the Supreme Court's activism in the Delhi Pollution Case shows how difficult it is for a court – even the Supreme Court – to manage the environment for a nation of one billion people. Environmentalists can't help but praise the Court for its defence of the environment and human rights, but they must see the harmful institutional and constitutional consequences of the Court's ruling. In the Delhi Pollution Case, the Court's action seems likely to impede capacity building in the pollution control agencies, and thereby to compromise the development of sustained environmental management in India.

Since many developing countries look to India as a country whose human rights are championed by an independent judiciary, it would be enormously discouraging to see the Indian Supreme Court brought low. US President Andrew Jackson reportedly once observed, “[US Supreme Court Chief Justice] John Marshall has made his decision. Now let him enforce it.”<sup>40</sup> If the other branches of the Indian government withdraw their support, and if people refuse to obey the Court's orders, the Supreme Court of India would be severely weakened. Indian civil society groups must recognize what is at stake here. They cannot afford to win this case at the cost of a discredited Supreme Court.

## Notes

<sup>1</sup> *M.C. Mehta v. Union of India*, Writ Petition (Civil) No. 13029 of 1985, order dated 28 July 1998 (hereafter Delhi Pollution Case 1998).

<sup>2</sup> Air quality is generally evaluated by measuring the levels of various pollutants in the air, including sulphur oxides, nitrogen oxides (NO<sub>x</sub>), greenhouse gases such as carbon dioxide, and particulate matter (PM), microscopic particles suspended in the air usually under 10 mm in length. Because of the proven health risks associated with air pollution, the US Environmental Protection Agency (US EPA) has mandated that annual average levels of PM 2.5 in the atmosphere, “fine” particulate matter smaller than 2.5 mm in length should not exceed 15 mg/cum. The national annual average levels of PM across India is approximately 60 mg/cum, while the average in Delhi ranges from 150–200 mg/cum, more than 10 times the standards set in the USA (see also *M.C. Mehta v. Union of India*, order dated 5 April 2002).

<sup>3</sup> Centre for Science and Environment *Press Release 18 July 2000*. Available at [www.cseindia.org/html/cmp/air/press\\_20000718.htm](http://www.cseindia.org/html/cmp/air/press_20000718.htm)

<sup>4</sup> *M.C. Mehta v. Union of India*, Writ Petition (Civil) No. 13029 of 1985.

<sup>5</sup> *M.C. Mehta v. Union of India*, order dated 14 November 1990. Nine years

later, an official study conducted by the Bhure Lal Committee, an advisory board to the government, determined that diesel emissions are responsible for 90 per cent of vehicular emissions of PM and NO<sub>x</sub> over the city (*M.C. Mehta v. Union of India*, order dated 16 April 1999).

<sup>6</sup> *M.C. Mehta v. Union of India*, order dated 26 April 1996.

<sup>7</sup> Delhi Pollution Case, *supra* n. 1 (1998).

<sup>8</sup> Mark Axelrod, Stanford Law School Student. E-mail communication with author dated 15 August 2001.

<sup>9</sup> Centre for Science and Environment *Press Release 17 June 1998*. Available at [http://www.cseindia.org/html/cmp/air/press\\_19980617.htm](http://www.cseindia.org/html/cmp/air/press_19980617.htm)

<sup>10</sup> Centre for Science and Environment *Press Release 14 December 2000*. Available at [http://www.cseindia.org/html/cmp/air/press\\_20001214.htm](http://www.cseindia.org/html/cmp/air/press_20001214.htm)

<sup>11</sup> *Environmental (Protection) Act*, Government of India (1986), section 3, art. 1.

<sup>12</sup> Ministry of Environment and Forests, Government of India, order dated 29 January 1998. Available at <http://envfor.nic.in/legis/ncr/ncrauthority.html>.

<sup>13</sup> *Ibid.*

<sup>14</sup> *M.C. Mehta v. Union of India*, order dated 5 April 2002, article 5.

<sup>15</sup> *Ibid.*, article 13.

<sup>16</sup> *Ibid.*, article 40.

<sup>17</sup> *Ibid.*, article 23.

<sup>18</sup> *Ibid.*, article 39.

<sup>19</sup> *Ibid.*, article 15.

<sup>20</sup> *Ibid.*, article 13.

<sup>21</sup> Divan, Shyam “A Mistake of Judgment,” *Down to Earth*, 30 April 2002.

<sup>22</sup> Government of India, *Water (Prevention and Control of Pollution) Act* (1974);

*Air (Prevention and Control of Pollution) Act* (1981).

<sup>23</sup> Divan, *supra* n. 21.

<sup>24</sup> Kuik, O.J. *et al.*, *Pollution Control in the South and North*, 1997, p. 87.

<sup>25</sup> See *Pravinbhai J. Patel v. State of Gujarat* 1995 (2) Guj. L. Rep. 1210, reprinted in Divan and Rosencranz, *supra* n. 1, p. 226: “Neither the industry, which causes pollution, nor the government nor the [Gujarat Pollution Control Board]...have paid more than lip service to the [e]nvironmental laws ... the continued violation of the law by the industrial units has become a habit, and condoning it by the governmental authorities, a practice. ... Since 1980, till today, not a single unit or person has been convicted of having violated any of the pollution laws. In fact not in a single case [have] the prosecution proceedings ... been completed. ... government has abetted or collaborated with the industry in breaking the law ...”

“Closure of some of the units would, undoubtedly, cause them a financial setback. ... [I]n these ... units, about 25,000 workers are employed...As against this, pollution ... caused by these units is adversely affecting nearly [one million] people.” *Ibid.*, pp. 227–228.

<sup>26</sup> Ministry of Environment and Forests, Government of India, *National Conservation Strategy and Policy Statement on Environment and Development* (June, 1992).

<sup>27</sup> Rosencranz, Armin *et al.* *Economic Approaches for A Green India* (1999), p. 57.

<sup>28</sup> Sathe, S.P. “Judicial Activism: The Indian Experience,” *Washington University Journal of Law and Policy* (2001), p. 40.

<sup>29</sup> Centre for Science and Environment, *Safety of CNG Buses in Delhi*, 9 August 2002. The majority of gas leaks and fires occurred during refuelling due to defective pressure seals.

<sup>30</sup> BBC News “Striking Delhi Drivers Cause Travel Chaos” BBC News, 10 August 2001. Out of frustration after waiting for several hours each day to refuel, thousands of Delhi taxi and rickshaw drivers went on strike in 2001.

<sup>31</sup> “Clean, Modern Subway, Efficiently Built. In India?” *New York Times*, 23 January 2003.

<sup>32</sup> Centre for Science and Environment, *supra* n. 29. Some petrol station attendants estimate the number of leaks at almost one per day. Furthermore, if not properly installed, a converted CNG bus can actually emit more harmful pollutants than a diesel-powered bus, making the CNG conversion costly and pointless.

<sup>33</sup> *Ibid.*

<sup>34</sup> Indraprastha Gas Limited (IGL) is the exclusive supplier of CNG to Delhi. By August of 2002, the CNG compression capacity of the city was 65,600 kg per day (Centre for Science and Environment, *supra* n. 29).

<sup>35</sup> As of 31 May 2002, 94 CNG fuelling stations had been installed throughout Delhi (Centre for Science and Environment, *supra* n. 29).

<sup>36</sup> “Clean, Modern Subway, Efficiently Built. In India?” *supra* n. 31.

<sup>37</sup> *Ibid.*

<sup>38</sup> On 22 October 2002, the Delhi government announced a plan to introduce 4000 CNG-powered buses and to spend 25 per cent of its state budget, amounting to 54 billion rupees (1.3 billion US dollars), on transport and related infrastructure over the next five years (Shubajit Roy, “Delhi Government's New Policy Focuses On Public Transport,” *Times of India*, 22 October 2002). Presumably the Supreme Court's 17 year involvement with this issue had some influence in shaping the Delhi government's new policy.

<sup>39</sup> Roy, Shubajit “Delhi Government's New Policy Focuses on Public Transport,” *Times of India*, 22 October 2002.

<sup>40</sup> Bailey, Thomas and David Kennedy, *The American Pageant: A History of the Republic*, 12th edition (2002), p. 267.

