

# ACCESS TO JUSTICE: JUDICIARY WATCH

VIDEH UPADHYAYA

The functioning of a democracy is dependent on the autonomy and efficacy of the three systems of the state, namely, parliament, executive and the judiciary. India in the last two decades has seen rapid erosion of the functioning of the parliament and the executive. In this scenario of failure of the state in ensuring its constitutional obligation and rights to the citizens and initiating social-economic transformation, the judiciary has often played a significant role in upholding the rule of law and thereby protecting the fundamentals of democracy in the country.

Nevertheless, it is important that the judiciary is not burdened with expectations of playing the role of the executive. It cannot directly carry out the tasks of effective governance. This is critical for the long-term health of Indian democracy because of two reasons. First, the judiciary has its role and organisational limitation and can not perform the role of day-to-day governance. Second, the fundamental principle of division of power needs to be respected and strengthened for making democracy work effectively.

The report presents two contrasting realities: The sheer number and the manner of intervention of both the Supreme Court and the high courts on the various aspects of the fundamental Rights to Food, Work, Education and Health drives home the point that the right based approaches in the context of the state of development of the country remain inescapable - despite its limitations. The biggest hurdle against the efficacy of rights has been that while it continues to give a very progressive legal regime in principle, such provision seldom get implemented. Indeed, a theme that kept recurring in cases with the higher judiciary related to the problem of securing compliance with court orders.

Some of the key highlights of the functioning of judiciary in year 2003-04 are following:

**Subversion of justice:** The Best Bakery case has brought home two critical aspects relating to subversion of the justice delivery system. One that judiciary - even the higher courts - are amenable to political and other influences. Secondly, the Supreme Court by its severe indictment of the High Courts role made clear that "it would not remain a silent spectator to deliberate defiance of principles governing the rule of law and due process."

**Striking at the Right to Strike:** The Supreme Court in August last year held that the government employees had no fundamental, statutory or equitable/moral right to strike. The decision invoked some strong sentiments including widespread criticism by the media. The logic of the Court in fact was on tenuous ground. The right to strike has been held to be an essential aspect of freedom of association under ILO Conventions 87 & 98.

**Gender crimes and problems of implementation:** The Supreme Court observed that "it is apparent that to a large extent, the Prenatal Diagnostic Techniques Act 1994 is not implemented by the Central Government or by the State Governments." The Supreme

Court in September 2003 gave separate directions to Central Government, Central Supervisory Board, State Governments and appropriate authorities to take all possible remedial action including creating public awareness against the practice of prenatal determination of sex and female foeticide through appropriate programmes in the media.

Economic policies - Pro liberalisation and Economic Reforms position: In a petition that generated lot of controversy, the decision of the government to sell its majority share in Hindustan Petroleum Corporation Ltd and Bharat Petroleum Corporation Ltd to private parties without Parliamentary approval was challenged as being contrary to the provisions of the Esso Act, Burma Shell Act and the Caltex Act. The Supreme Court briefly reviewed the position the world over on whether there is any need for a law regarding privatisation but felt that "there is no challenge before this court as to the policy of disinvestments. The only question raised before us is whether the method adopted by the government in exercising its executive power to disinvest HPCL & BPCL without repealing or amending the law is permissible or not. We find that on the language of the act such a course is not permissible at all". Conservation

Rulings - In favour of large infrastructural projects: Despite the diverse grounds on which the challenges have been made against large infrastructure projects, the general response of the Courts to such litigation has been conservative so much so that in no case so far has the Court ordered the scraping of any project or even any significant restructuring of a project in the face of such challenges. The Courts have largely taken the view that considerations of environmental impacts of a project, or economic and financial considerations raised technical issues and policy matters, which are best left with the expert authorities of the executive.

Financial difficulties - No grounds for violations of social and economic rights: In the context of the social and economic rights, it is important to note that the Supreme Court has made clear in 2003 that financial stringency may not be a ground for not issuing requisite directions when a question of violation of fundamental right arises. In fact the Supreme Court has been highlighting this aspect in the matters concerning fundamental rights and maintenance of ecology. In some other cases, the Apex Court has held the financial difficulties of the institutions can not be above fundamental rights of a citizen.

Supreme Court's censure of Governments ineffective role: In late November 2001 the Supreme Court had directed the state governments to implement Mid Day Meal Scheme (MDMS) by providing every child in every Government and Government assisted primary schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 gms protein each day of school for a minimum of 200 days. While noting that some states were implementing the directions of the court, it was also seen that some other states had not even made a beginning despite the fact that over 1½ years had elapsed between November 2001 till May 2003. Particular reference was made to the states of Bihar, Jharkhand and Uttar Pradesh and the Court noted that while the counsel for Uttar Pradesh and Jharkhand could not give any satisfactory reason for non-implementation and did not even file any affidavit in this regard, the affidavit filed by Bihar could not be more vague than what it is.

**Right to Work:** The Supreme Court has in recent past interpreted and included the right to work as one of the positive rights guaranteed under Article 21 of the Constitution of India. Specifically it has held that "income is the foundation of the many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental".

**Right to Health:** While deciding the controversial Tehri Dam case, the Supreme Court observed in a significant judgment in September 2003 that right to health is the fundamental right under Article 21. Protection of this is inextricably linked with the clean environment. Clean and healthy environment itself is a fundamental right."

**Pendency in courts:** The pendency in high courts has been showing an increasing trend. It has increased from 26.51 lakhs as on 31.12.1993 to 35.55 lakhs as on 31.10.01. Out of the total 36,01,186 pending cases in different high courts, approximately 17 per cent are more than 10 years old.

**Vacancy of Judges:** Out of the total approved strength of 655 judges in various high courts, there is a vacancy of approximately 24 per cent (156 posts) as on 1.12.2003 leading to mounting arrears in the High courts.

**Dysfunctional courts:** The records before the Supreme Court show that about 70 Courts in Karnataka, 10 Courts in Kerala, 42 Courts in Madhya Pradesh, 84 Courts in Maharashtra, 42 Courts in Orissa, 14 Courts in Punjab and 132 Courts in West Bengal are not functioning.

**Successful efforts of Supreme Court at reducing pendency of cases:** The Supreme Court in a short period of three years has brought down the number of pending cases from more than one lakh to just around 20,000 cases through systematic judicial measures based on the report

**Modernisation of Civil Justice System: Implementation Plan of the National Judicial Academy.** The current rate of disposal and fresh filing of cases, promises a zero pendency future for the Supreme Court.

The big challenge for the judiciary is to act to the realisation that there is little value in a progressive judicial will that despite being decisive is not prevailing. The object and focus of reforms must be the delivery of speedy and quick justice, high quality justice and affordable justice. The government, the judiciary, and vigilant citizens must take up the challenge and put in place a vigorous affordable high quality justice delivery system.

(The writer is a Supreme Court lawyer)