

## THE JUDICIARY: HOPES AND FEARS

By Prashant Bhushan

When one examines the hopes and fears that one has from judiciary, it is necessary to define the role that one expects the judiciary to play in the country. Apart from dispensing justice in individual disputes brought before it, the judiciary is expected to be the guardian of the Constitution and is supposed to protect the fundamental rights of the people and implement the rule of law. This in particular means that that the judiciary is expected to protect the civil rights under Articles 14 (equality), 19 (speech, movement, profession etc.) and 21 (life and liberty), not just in the narrow literal sense, but also in the liberal purposive sense in which the Supreme Court itself has interpreted these rights. Thus, the Judiciary is expected to protect the rights of the common people of the country to a free and dignified life where every citizen is guaranteed the means of securing the basic necessities of leading a dignified life, such as food, clothing, housing, healthcare and education etc. The judiciary is also expected to ensure that the executive and the legislature function within their powers and do not encroach on the fundamental rights of the people.

When one examines the performance of the judiciary on the above parameters, particularly its role in this year, one would be sorely disappointed. As an instrument of dispensation of justice in individual cases, the judiciary remains a largely non-functional institution, which is inaccessible and useless for the vast majority of the people. Not more than 2% people of the country can hope to get any meaningful justice through the existing judicial system. While the poor cannot access the system without lawyers whom they cannot afford, even those who can access it, remain stuck in courts for years, by which time the court's judgement is useless or meaningless to them. On top of all this is the considerable corruption of the judiciary, facilitated by the total lack of transparency and accountability of the judiciary. Thus justice through the present judicial system remains an expensive illusion for the vast majority of even those who have the means to access the system.

The repeated recommendations of the Law Commissions and even the directions of the Supreme Court to substantially increase the number of judges and courts have been ignored by the government with contempt. The Supreme Court has also not bothered to enforce their own orders about this. Both the government and the Higher Courts are equally culpable in not even filling the existing vacancies in the Courts. On an average, more than 20% vacancies exist in courts at all levels and at all

times. These vacancies have been steadily increasing during the past year. This is demonstrative of a callous neglect of the need for an effective instrument for the dispensation of justice, on the part of the government and the judiciary.

There is however a silver lining in the shape of the newly passed Gram Nyayalaya Act, which promises to put in, place many more courts at the block and tehsil level. These, because of their supposed simple and informal procedures, should make them accessible to common people without the mediation of lawyers. If properly implemented and actualized, these Gram Nyayalayas can make justice quick and accessible to the common people for at least small disputes and petty crimes, which constitute the majority of the disputes affecting ordinary citizens. These do offer a ray of hope to the people, but given the past record of the government in the lack of priority to the dispensation of justice, its implementation on the ground will require considerable public pressure.

On the other measure of acting as the guardian of the Constitution, the judiciary's performance has been equally disheartening. Barring a few honourable exceptions, we find that the judiciary has largely failed to protect the fundamental rights of the people and failed to step in when the executive and the legislature have made inroads into it. On Civil liberties, we find that the courts have upheld the validity of totally draconian laws like POTA and the Armed Forces Special Powers Act. They have allowed the victimization and prolonged incarceration of many totally peaceful, committed and selfless activists like Binayak Sen and others, under these draconian laws. Even when innocent persons are victimized for malafide considerations by fabricating evidence, oral or documentary, the judiciary has not taken steps to penalize the police officers responsible for the same. This has resulted in a culture of impunity in the police as a result of which they have been casually picking up and falsely charging human rights and other activists who are questioning the actions of the police and other institutions of the ruling establishment. This victimization, which effectively cripples an activist and ties him down to courts for years, is now taking place on a massive scale across the country. The courts, which are duty bound to stop this, have been turning a blind eye to this massive violation of the most basic rights of these activists. The message going out is that peaceful protest and resistance to establishment policies and actions is useless, forcing many activists to rethink their strategy of peaceful resistance. The past year has only seen the acceleration of this trend of passive acceptance by the courts of the massive and gross violation of the rights of activists. The Chief Justice of India recently in a conference on Terrorism, Human Rights and the rule

of law gave a very enlightened speech on these issues and on the obligation of the courts to ensure that Civil rights of alleged terrorists are respected even in the present climate of jingoism. One hopes that the Courts will imbibe the letter and spirit of the Chief Justice's speech in their rulings in cases involving the Civil liberties of all people, particularly activists.

Though the Supreme Court reopened the trial of the Best Bakery case of Gujarat and has ordered the review of many investigations by a special investigative team, the trials of the major cases of the Gujarat genocide of 2002 have been stayed by the Supreme Court for the last more than 3 years, and it has not found the time to hear it. The Gujarat genocide has been one of the most egregious examples of the violations of the rule of law. It is a crying shame that those exposed to have been responsible for the genocide are not only walking free but are comfortably ensconced in positions of power from where they have been preventing any proper investigations into the mass murders. As a result, Gujarat has been turned into a virtually fascist State where communal polarization is near total with no space for secular politics. Gujarat remains the biggest blot on the landscape for the rule of law in the country. Despite some halfhearted attempts, the failure of the Supreme Court to deal with a State, which has virtually seceded, from the Constitution must count as another blot on its record.

Unfortunately, the role of the courts in protecting the rights of the poor to a dignified life has been no more illuminating. The rapid appropriation of land and resources from the poor by the State for large Companies, domestic and multinational, for SEZs, mining and other forms of commercial development has accelerated during the past year. Far from stopping this blatant transfer of resources from the poor to the rich, the Courts have in fact abetted this loot, by giving permission to companies like POSCO and Sterlite/Vedanta to appropriate vast areas of forest land, being used by thousands of tribal families for their rapacious mining. This massive displacement of the poor and the appropriation of their land and resources coupled with the decimation of agriculture, due to government's policies, has forced many to commit suicide, and many to migrate to cities, where they have been forced to live in sub human conditions in Jhuggies built on government land. Far from ensuring that they get proper housing, which is their fundamental right, the courts have been treating them like "pickpockets", and have often ordered the demolition of their Jhuggies, without notice to them, in gross violation of Natural Justice and their fundamental rights. All this is leading to the buildup of massive anger among the poor directed at the government and

the courts. It should hardly be surprising that Naxalites are finding more recruits and are gradually increasing their sway in the country.

Part of the reason for this insensitivity of the judiciary towards the poor is the manner of selection and appointment of judges. This has been appropriated by the judiciary who has been making the appointments in an arbitrary, non-transparent and nepotistic manner. The higher judiciary has thus become a self-perpetuating oligarchy. Even when appointments have been shown to be made without even consulting the collegium of senior judges, which was declared to be mandatory, the Supreme Court has not set them aside. They have been stoutly resisting the formation of an independent Judicial Commission, which could select judges on some transparent and rational basis.

The past year has also seen the eruption of a large number of judicial scandals. The Justice Sabharwal case was followed by the Ghaziabad provident fund scam, involving more than 30 judges, including 10 from the higher Courts. Then came the Chandigarh case, where Rs. 15 lacs in cash were delivered by the clerk of the Additional Advocate General of Haryana to the residence of a High Court Judge. This was apparently meant for some other judge and was mistakenly delivered to another. The CBI is still investigating both these cases. Then there was the case of Justice Soumitra Sen of Calcutta who was found by a Committee of 3 judges to have misappropriated large sums of money, which he received as a court receiver. The Chief Justice has recommended his impeachment more than 6 months ago, but nothing has moved on that.

All these cases have highlighted the need for a Constitutional Judicial Complaints commission to investigate allegations against judges and take action against them. This is again being stoutly resisted by the Judiciary which only wants an “in-house body of sitting judges” alone to examine complaints against judges. Bowing to the pressure from the judiciary, the government has introduced the Judges Inquiry Amendment Bill to provide for an in house judicial council to deal with complaints against judges of the higher judiciary. Even if such a bill were passed, it would be a non-starter with virtually no one daring to make complaints before such an in-house body.

The silver lining however is, that the media has finally shed its fear of contempt, and is now gleefully reporting these cases of judicial corruption. Sometimes however, they go overboard by reporting allegations, which may defame innocent judges before their version is

heard, and the truth determined. However, the media glare and the attendant public campaign on judicial accountability has certainly succeeded in bringing this issue to the fore and has put pressure on the government and the judiciary to urgently address this issue. I do not think that they can resist this pressure much longer and the day is not far when an independent Judicial Complaints Commission is set up to examine complaints against judges and take action against them.