

RECLAIMING THE JUDICIAL SYSTEM IN INDIA

(Background paper for the National Convention
on restructuring the judicial system)

While the corporate media often lionises the judicial system as the only working wing of the State and projects it as the only institution which stands in the way of a government controlled by criminals, the vast majority of the country do not see the judicial system as capable of providing any modicum of justice to them. The system is totally inaccessible to the poor of the country, being so formal and procedurally complex that it can only be accessed with the help of lawyers, whom the poor cannot afford. Even those who can access it cannot hope to get their disputes adjudicated within a reasonable time. The majority of undertrials spend more time during trials than the maximum sentence that can be imposed upon them. Even if they are out of jail during this time, the agony of defending themselves during this long trial is more painful and taxing than serving the sentence that could be imposed. In fact, the agony of a trial through the judicial system has become the easiest way for the police and powerful persons who can have the police at their beck and call, to harass, intimidate and silence inconvenient persons, especially political activists who are trying to change the oppressive and exploitative system of the country.

Even if one can get one's case decided by the court, the course of justice is often perverted by corruption within the judiciary and indeed within the entire system of administration of justice. The corruption within the judicial system is no less than that of any other institution of the State, and is well known to those who have had to deal with it. It is less visible because of the lack of any system of accountability of the judiciary, and because the media is unwilling to talk about it, due to the fear of contempt. The corruption within the judiciary is exacerbated by the total lack of accountability of the judiciary in the present system. Not only is there no system for disciplining corrupt judges (other than an unworkable system of impeachment), the Supreme Court has by a self serving judgment removed judges even from the ambit of criminal investigation. Thus one cannot even register an FIR against a judge taking bribes openly without the prior permission of the Chief Justice of India, which has never been given. The judiciary protects its own very zealously.

On top of all this immunity to the judiciary is the power of contempt of Court, which can be and has been used by the judiciary to stifle public criticism, or even an honest evaluation of the judiciary. This threat of contempt has prevented a frank discussion of the judiciary by the media, which is partly the reason why there hasn't been any serious public debate about the state of the judiciary. And now the

judiciary is even seeking to remove itself from the purview of the Right to Information Act. After having loudly pronounced that the citizens have a right to know everything that goes on in every public institution, the Supreme Court asks the government to effectively exempt it from the purview of the Act by removing the jurisdiction of the independent appellate authority, the Central Information Commission over the Registrar of the Court. It was also recommended that the Chief Justice should be the final word in deciding whether any information about the Court should be given out or not. Most High Courts have not even appointed a public information officer under the Act, and the Delhi High Court has framed rules which prohibit the release of non-judicial information about the court, such as purchases and appointments. All this has ensured that the judiciary becomes a law unto itself, totally non-transparent, and accountable to none.

It is this complete insulation from all accountability, which has led to a situation where it can easily transgress its jurisdiction by interfering in matters of the formation and implementation of executive policy. Under the cover of its expansive interpretation of Article 21 (which by itself is not objectionable), particularly the right to environment, the judiciary has been ordering the removal of slums from the Yamuna Pushta, hawkers and rickshaw pullers from the streets of Delhi, and has even directed the government to take up the highly controversial project of interlinking of rivers. Sometimes these arbitrary powers are being exercised against the wishes of the executive, but often in connivance with the executive, allowing the executive to do what a democratically accountable government dare not do, such as demolish the Yamuna Pushta slums of Delhi or take up the project of interlinking of rivers.

The recent orders regarding the sealing of commercial establishments running in residential areas in Delhi is another example of judicial high-handedness. Though it was well within the powers of the judiciary to stop the violation of the Master Plan, it could have ordered the government to consider altering the Master Plan just as they were ordering the sealing of commercial users. Moreover, it was totally beyond the jurisdiction of the Courts to order the sealing of properties even after the Master Plan had been amended to allow commercial user in some areas, merely because they had been made to give affidavits earlier that they would stop the commercial user by a certain date.

It is this lack of accountability which has allowed the judiciary to take decisions which are against their declared creed regarding the rights of the poor and trample upon their rights with such impunity. Thus, after having declared that the Constitution guarantees every citizen the right to shelter and livelihood, the courts have nonetheless ordered the homes of hundreds of thousands of slum dwellers of Delhi

and Bombay to be ruthlessly bulldozed, without providing them with any alternative dwelling. They have also ordered hundreds of thousands of hawkers and rickshaw pullers to be driven off the streets of Delhi and Mumbai, thus depriving them of their livelihood, without making any alternative arrangement for them. While this is partly due to the elitist background of the judges and the impact of the new economic policies on their thinking, where human rights have also been left to market forces, such wanton disregard for basic constitutional values is also facilitated by the impunity engendered by this total lack of accountability of the judiciary. For the poor therefore, the judiciary like the police has become an instrument of oppression rather than an institution for the protection of their rights. They have come to fear and hate the judiciary almost as much as they fear and hate the police.

The ruling establishment, particularly successive law commissions have devoted considerable thought to some of the problems which afflict the judiciary, particularly to that of the lethargy of the system. However, not much thought has been devoted to some of the other problems such as access of the poor to the system or the elitist sensitivities and bias of the judges, or even to the issue of judicial accountability. And the law commissions, manned as they have been, largely by retired judges, have displayed their own establishmentarian and elitist biases in their reports. They have therefore suggested patchwork solutions rather than the radical restructuring of the judiciary that is required.

Though a radical recommendation of a five fold increase in the number of judges had been made to deal with the problem of delays, adequate thought has not been devoted to simplifying the judicial procedures. Hardly any thought has been given to reforming the system of appointing judges so as to make it more transparent, fair and sensitive to the poor. The solution suggested for judicial accountability has been a feeble in house system where sitting judges are supposed to hold their own brothers to account. And in the unlikely event that they hold their brother guilty, they again send the matter to Parliament for considering the impeachment of the judge. This is one of those recommendations of the Law Commission which is acceptable to both the government and the judiciary, keeping the feeble accountability introduced within the judicial family. The Judicial Council bill cleared by the Cabinet recently, seeks to give statutory status to the "In house procedure" for inquiring into complaints against judges which was adopted by a Chief Justices conference almost 10 years ago, but which has hardly ever been used.

However the Law Commission's recommendations made 20 years ago about a 5 fold increase in the number of judges have been gathering dust as are most of its even somewhat radical recommendations. Neither the government nor the judiciary has made any effort to have

those adopted. The record of both the executive and the judiciary regarding judicial reforms does not inspire any confidence that they are serious about making the judicial system work. It appears that both are content with the present non functional and unaccountable judicial system. And for good reason too. The judges are happy with the total lack of accountability and impunity that they have in the system and the government is happy with the non functioning of an institution which could hold them to account. The media hyped skirmishes that we see between the judiciary and the executive mask a much bigger partnership between the institutions, where they have teamed up together to do what they want with impunity but also appropriate land and other resources from the poor and give them away to large vested commercial interests.

It appears clear that unless there is a people's movement and a popular campaign for judicial reforms in general and judicial accountability in particular, which puts pressure on the ruling establishment, they are not going to take any serious steps to change the state of affairs. Unfortunately, so far, such a campaign hasn't taken shape, partly because the people and the media have shied away from a critical examination of the judicial system, partly also because of the fear of contempt.

However, with the judiciary becoming more and more powerful and increasingly arbitrary and anti poor, allowing the administration of justice to remain in the hands of the elitist ruling establishment would be suicidal for the common people of the country. Time is running out for all of us. The people need to take charge and drive this campaign to reclaim the judicial system. Every citizen of the country has a vital stake in the proper functioning of the judicial system. Ignoring it will not only intensify the judiciary's assault on the poor, it is the path to anarchy. The rule of law cannot survive in the absence of a properly functioning system for the administration of justice. The people need to reclaim the judiciary by having it restructured in accordance with the needs of the common people.

These considerations and concerns have prompted us to take this first step of calling this National Convention on Judicial reforms. All people's movements, consumer organizations, and indeed all organizations and individuals working on any issue of public interest are invited to attend this 2 day convention. We hope to initiate the discussion on all the above issues relating to the functioning of the judicial system. We hope that this convention will kickstart the process of forming a national campaign organization and begin a national campaign on this issue.