THE JUDICIARY AND THE POOR

(Background paper for the Second National Convention to be held on 23rd and 24th February 2008 at Indian Society for the International Law, 9 Bhagwan Dass Road, New Delhi)

If one were to ask the question: What percentage of people have a realistic access to the judicial system in this country?, the answer would invariably be, "Less than half". The reason for this is, that the judicial system in this country was designed and set up for the British in colonial times. It was not created as an instrument to provide justice to the common people of this country, but to aid the empire in its quest to keep the native population in subjugation. This is why the system was made so procedurally complex and to work in the English language, that it is impossible for common people to access it without the help of lawyers. The code of dress itself was made so formal so as to create awe of the system in the minds of the common people. If one considers the fate of a common person who is accused of a crime, one can see that it is impossible for him to defend himself, and he is totally at the mercy of the police and the judiciary. This is because, he would not even understand the language, let alone the procedure of the court. And he cannot afford lawyers. The hard reality is that the judicial system of this country exists only on paper for the vast majority of the country's people. It is not functioning as an instrument to provide justice to them.

When Public Interest Litigation was envisaged and created in the late seventies by Justices Bhagwati Krishna Iyer, *et.al,* it was thought that a new instrument had been fashioned whereby the superior courts could be activated by citizens concerned about the rights and livelihood of the poor, and the courts would then proactively act on behalf of the general public to protect the rights of the poor. Simultaneously, the Supreme Court at that time gave an expansive interpretation of fundamental rights, particularly the right to life guaranteed under Article 21 of the Constitution. Art. 21 was interpreted to include the right to live with dignity and, therefore, to have all the basic requirements for leading a dignified life, such as food, shelter, education, health, etc.

In the eighties, therefore, there were a series of path-breaking judgments to this effect, whereby courts made positive directions for the liberation of bonded labour, for paying minimum wages to workers, for protecting the rights of under trials and detenues, for the conditions of inmates of mental homes, for the rights of pavement dwellers, etc. However, as Public Interest Litigation

evolved through the nineties, in the era of liberalization, the attitude of the higher courts towards the poor could be seen to undergo a slow but clearly perceptible change. Today, one finds that the Courts are refusing to direct the Government and the authorities to ensure the means of livelihood, shelter and even civil liberties of detenues, under trials, etc. Thus, it is refusing to implement its own earlier judgments when cases have been brought before it regarding the non-provision of shelter, food, water, health and education for the poor.

Today, with the poor facing the brunt of the onslaught of neoliberal economic policies in which the land, water and means of livelihood of the poor is being appropriated by the State for large corporations for mining, SEZs and other infrastructure projects for the wealthy, the courts should have come to the aid of the poor oustees whose rights are being violated. But, we find that even when some public spirited organizations or individuals have taken these issues to court, their response has been dismal.

Lately, an even more disturbing trend has become visible, whereby the courts acting purportedly in public interest cases filed by the middle class and upper middle class, have passed orders which have effectively taken away the shelter, occupations, livelihoods and even the liberty of the poor. In many cases, this has been seen to be done by the courts without even issuing notice to poor persons whose homes were being demolished on their orders, who were being deprived of their livelihood and whose occupation was being destroyed on the express orders of the courts. This is sometimes being done to purportedly uphold the “rule of law” and thus prevent the poor people from occupying tenements built on government land and sometimes to protect the rights of the wealthy to have a clean and congenial environment (such as removal of jhuggis from the vicinity of the upper middle class residential colonies and removal of hawkers from the streets of Delhi and Bombay). On other occasions, it was being done to provide space on the Delhi roads for middle class and upper middle class commuters who travel in cars (removal of cycle rickshaw pullers from the streets of Delhi).

It appears that some of these orders of the court are being issued at the behest of the Government which wanted to clear the slums of Delhi on the Yamuna Pushta to make way for five star hotels and shopping malls, etc. However, the Government did not have the political courage to remove these slums themselves, being conscious of the fact that it has to face the electorate every five years. It, therefore, found a convenient instrument in the judiciary, which has no democratic, or other accountability, and which could easily pass such orders, especially when it suited its class interests. Another example of

this apparent collusion between the government and the judiciary is the manner in which the Supreme Court has, over the last few years, systematically dismantled legislation for the protection of the workers and labourers, which was so painstakingly enacted in the fifties, sixties and seventies. As economic policies were being liberalised and foreign companies being invited to set up shop in India, there was a determined attempt by the industry to get labour protection laws diluted. They said that the country needs a new generation of reforms called "labour reforms" which would effectively do away with all the protection given to labour and leave them at the mercy of their employers and open to hire and fire. Successive governments, however, found it difficult to legislatively repeal labour laws because of their dependence on Left parties or their fear of electoral backlash from workers and the poor. Again a convenient instrument was found in the judiciary, which has begun the process of systematically dismantling labour protection legislation, by "creatively" reinterpreting it in a manner so as to effectively allow hire and fire. The Contract Labour Act has almost become a dead letter as the courts are refusing to enforce it in case after case. The Supreme Court has even gone so far as to explicitly state that the courts are to interpret the labour legislation in line with of the government's economic policy. In a similar vein, another Bench of the Supreme Court while upholding a government decree to allow post box companies registered in Mauritius to enjoy the benefit of the Indo-Mauritius Double Taxation Avoidance Agreement and thus avoid paying any tax in India (A route now conveniently employed by all foreign companies operating in India) went on to say that the government can effectively give tax holidays to companies by executive orders, thus making nonsense of the well settled principle that tax holidays or concessions could only be legislated upon by the Parliament through the Finance Act.

Even in matters of civil liberties, one is now witnessing the totally illiberal and almost fascist attitude of the courts when it comes to the rights and liberties of persons accused by the State of being Naxalites, Maoists or even persons who are accused of being human rights activists working for the human rights of Left Wing activists or Naxalites. The manner in which the Supreme Court has dealt with the appeals of persons accused by the State of being Maoists or Naxalites, and the manner in which they have denied bail to Dr. Vinayak Sen, one of the finest human rights activists to have emerged in this country in recent times, is indicative of an almost fascist mindset of several of its judges.

Thus it is becoming clear now that the judiciary in this country has become an instrument which is being used to harass, intimidate and deprive the poor of their rights. It has become part of the draconian institutions of the

State such as the police and the bureaucracy which are today serving as agents of large corporations and the affluent.

The reasons for this anti-people attitude of the judiciary in the country, lies in its structure, its class representation and the manner of its selection and perpetuation of its members. The overwhelming majority of judges of the higher judiciary belong to the upper castes and the upper middle class. They have, by and large, very little empathy for the poor. The process of selection of judges is opaque and non-transparent, arbitrary and nepotistic and virtually rules out the selection of any persons not in tune with the prevailing ideology and lack of sensitivity of the ruling classes in this country. In 1993, by a creative interpretation of the Constitution, the Judiciary took over the process of appointment of judges from the Executive. This was ostensibly done to ensure the independence to the Judiciary from the Executive. However, in its actual working practice, this has neither increased the independence of the judiciary from the Executive nor improved the quality of appointments in terms of either integrity of the appointees, competence or sensitivity towards the poor.

The time has therefore come for the people of this country to take stock of the present state of the judicial system and in particular the manner in which the judiciary has become an instrument of harassing the poor rather than an instrument for protecting their rights and giving them justice.

It is in this spirit and to discuss all these aspects and what needs to be done, that this Convention on “the Judiciary and the poor” is being organized. In this Convention, we will examine in some detail the structure, the functioning, the actions and the attitude of the judiciary of this country, particularly towards the poor and try to find some answers to the structural changes that are required to fundamentally change the working of the judiciary so that it becomes an instrument for enforcing the rights of the poor and the common people of this country. We also need to deliberate upon a campaign and a political strategy to force the authorities to bring about such changes.

It is hoped that representatives of a large number of people’s movements, grass root organizations and other individuals who are concerned about the state of the judiciary in this country would participate in this Convention.

***