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The Judiciary and the Empowerment of the People

I

Third world countries like India have one unique characteristic which is often not recognized, namely that the political empowerment of the people, at least the kind of empowerment which comes from having a parliamentary democracy based on universal adult suffrage where the people most enthusiastically exercise their voting rights, occurred in these countries before bourgeois rule had consolidated itself. This is a fact of enormous significance which is missed both by those who debunk parliamentary democracy in India as being just a “façade”, a “fig-leaf” or a “fraud”, and by those who deny the very concept of a “ruling class” and see the polity only in terms of a set of claims, counterclaims, compromises and alliances carried out within a parliamentary democratic framework, i.e. see parliamentary democracy itself in entirely empirical terms. Neither of these positions is correct in my view, and both lead to a glossing over of some of the crucial contradictions manifesting themselves at present.

In Britain the introduction of universal adult franchise occurred only in 1928 when the difference in the minimum age for eligibility to vote between men and women was removed. This is nearly 75 years after the climacteric marking the consolidation of bourgeois rule, which many perceptive observers have dated to the mid-nineteenth century. In France universal adult franchise came only after the second world war, which again is nearly 75 years after the collapse of the Paris Commune which marks the process of consolidation of bourgeois rule. In short, in the advanced capitalist world, the introduction of modern democratic structures post-dated the consolidation of bourgeois rule: the bourgeoisie, having consolidated its power and fashioned its own State, allowed the population at large a voice in government formation, confident in the belief that such a voice would not upset the crystallized structure of the bourgeois State.

In our country, by contrast, the coming to power of the bourgeoisie and the introduction of modern democratic structures were contemporaneous phenomena. Since the consolidation of bourgeois rule necessarily entails a process of political “marginalization” of the people (even when the degree of this “marginalization” is subsequently somewhat lessened through the introduction of democratic structures within a consolidated bourgeois order), in countries like ours *such consolidation requires an attenuation or a “rolling back” of democracy, a reduction in the rights of the people compared to what*

they already enjoy, in short a counter-revolution against the prevailing democratic institutions.

There are two further considerations that buttress the tendency towards such a counter-revolution. The first is the desire of the feudal and semi-feudal elements to retain their power, whose basis lies not only in the fact of concentrated land ownership, but also in the perpetuation of a highly unequal, hierarchical, and socially oppressive caste order, the essence of which is the belief that all men are *not* equal. Democracy with universal adult franchise is fundamentally opposed to this belief and hence undermines the logic of the caste-system. The feudal and semi-feudal elements therefore have waged a relentless struggle for subverting democratic institutions from the very beginning, the most obvious manifestation of which is the forcible prevention of “lower castes” from exercising their right to vote. Any attenuation of democracy, any political disempowerment of the people, therefore receives their enthusiastic support.

There is a second factor working towards this end, and that is the so-called process of “globalization”. The anti-colonial struggle, though led by the bourgeoisie, had drawn into its fold the urban and rural workers and the peasant masses. Indeed the very introduction of modern democratic institutions including universal adult franchise was not a “gift” of the bourgeoisie to the people; much less was it a “gift” of some enlightened individual leaders like Jawaharlal Nehru, to the people, as is often made out. It was in fact the realization of an implicit social contract (which was even given a certain explicit form in the Karachi Congress Resolution in 1931) on the basis of which the people participated in the freedom struggle in such large numbers.

For some time after independence, the bourgeoisie, even while enriching itself at the expense of the people through a process of “primary accumulation of capital”, not only expressed its adherence to this implicit social contract, but even implemented that part of it which visualized a relatively autonomous process of “national” development. True, even this implementation was marked by vacillations. And the fact that it was only partial implementation at best, since other parts of the programme such as breaking land concentration were never carried out, gave rise to contradictions that were to prove insurmountable for this development trajectory itself. Nonetheless the immediate post-independence period, or the period of *dirigiste* development, was marked by a degree of autonomy from imperialism. But the contradictions of this development path, which were just referred to, in the context of significant changes in the international conjuncture, entailing *inter alia*, the emergence to a position of dominance of international finance capital in a new incarnation, pushed the bourgeoisie into adopting the neo-liberal policies advocated by the IMF and the World Bank, the chief agencies working on behalf of this international finance capital. And the adoption of neo-liberal policies, which invariably bring great suffering to the masses, in the name of accepting an inevitable “globalization”, meant a betrayal of the implicit social contract of the freedom struggle, and hence became incompatible with the level of democratic rights that the people had enjoyed.

In short, the adoption of neo-liberal policies, symptomatic of the bourgeoisie's adopting a more collaborationist role visavis imperialism and an explicitly hostile role visavis the people, in a clear reversal of the situation prevailing during the years of anti-colonial struggle and post-colonial "national" development, necessitate even more urgently than before an attenuation of the democratic rights of the people. The interests of international finance capital being opposed to those of the people, the adoption of policies in favour of the former is incompatible with the continuation, with the same vigour as before, of the democratic interventions by the people. Hence attempts at an attenuation of democracy, which have always been there, gather a new momentum.

The legislative organ, however, has intrinsic limitations in spearheading such attempts, because this organ is precisely where the strength of the people is reflected. Since the legislature is elected and therefore, notwithstanding all the limitations of our polity, accountable to the people in a certain sense, it is not easy for it to take any initiative to curb the people's rights. Consequently, it is typically one of the other organs of the State which takes the initiative in the matter.

The executive has done so in the past, without much success. The Emergency of 1975-77 was one such effort on the part of the executive. The NDA government's plans of "reviewing" the Constitution with a view to amending it is another such attempt. A whole lot of suggestions, such as a Presidential form of government, a fixed term for the legislature, a denial of the legislators' right to move a "no-confidence" motion unless an alternative government is already available, a denial of representation to a political Party unless it gets a minimum percentage of the total votes in the country, all of which emanated during NDA rule, would have certainly worked towards attenuating the democratic rights of the people. But all these attempts failed. *And now, after the failure of all these attempts, it is apparently the turn of the judiciary to take the lead in restricting the democratic space enjoyed by the people.*

II

The judiciary's doing so however must necessarily be reflected not just in the fact of its delivering a series of verdicts which restrict the democratic space of the people; it must, logically, arrogate to itself a superior role compared to the other organs of the State. *Indeed implicit in its role as the leading organ in restricting the democratic space of the people is the assumption that it is the leading organ of the State.* And this is precisely what has been happening of late. Not only has the judiciary systematically handed down a series of verdicts which impinge adversely on the democratic rights of the people and which are informed by a social philosophy that is nothing more than the typical bourgeois prejudices that are so commonly observable in any average upper middle class person in the country (the "yuppie" if you like); but, through the voice of none other than the Chief Justice of the Supreme Court himself, it has also explicitly claimed for itself a constitutional status that is superior to that of the other organs of the State. And not content with this, it has even started making openly ideological appeals to build up a social

support base for its increasing assertiveness. Let us look at each of these *seriatim*.

There are at least five clearly discernible tendencies which emerge when we look at a number of verdicts handed down by the higher courts, including the Supreme Court, in the last few years. The first is a tendency to restrict the rights of the working people. The Supreme Court's verdict in the case of the Tamilnadu government employees, denying their right to go on strike, the Kerala High Court's judgment against *bandhs*, and the Calcutta High Court's ban on public demonstrations (and that too because one judge's car got held up owing to a demonstration) are examples of such encroachments. These no doubt are *particular* verdicts, but unless the particularity of the particular is emphasized, what is decreed in one case is open for extension to all cases. In short, the Kerala High Court's order, or the Calcutta High Court's order, or the Supreme Court's order in the case of government employees, is open for more general replication.

Of course, a *bandh*, a strike, or a demonstration do cause inconvenience for a large number of people, but that is precisely why they are effective weapons in the hands of workers. They never adopt such measures lightly. To believe otherwise is precisely to fall prey to upper class prejudices, as the judiciary has been doing. And if the avoidance of inconvenience to others were the over-riding objective, then a directive to the government to avoid situations that call forth such actions would not have been inapposite. No such directive however accompanied the verdicts. Instead, the right to strike enjoyed by the working class all over the world, and obtained after long years of struggle; the right to call *bandhs* which were a part of India's freedom struggle and cannot suddenly be termed illegitimate; and the right to hold demonstrations which is an accepted part of any democratic society, and widely used all over the world, including recently in the metropolitan centers of the advanced countries against the invasion of Iraq by their own governments; were all taken away at one stroke of a whimsical pen.

In the same category incidentally is a whole set of judgements, including by the Supreme Court, sanctioning the dismissal of an employee for misbehaving with the management. In a case relating to the dismissal of two Bennett Coleman (BCCL) workmen for fighting with their officers, the Supreme Court ruled that not only could the employee be dismissed, but even his gratuity could be forfeited. Likewise, upholding an order dismissing an employee of the Madhya Pradesh Electricity Board (MPEB) who had fought with an officer, a Supreme Court bench sternly pronounced that discipline is the "sine qua non for the efficient working of the organisation" and that "obedience to authority in a workplace is not slavery". In another case, the Supreme Court upheld the dismissal of an employee by Bharat Forge who had fallen asleep. The bench made the sweeping statement that falling asleep at work amounted to a level of misconduct that could justify dismissal. It also upheld, on an appeal filed by Mahindra and Mahindra, the company's decision to dismiss an employee for using "filthy" language against his boss 11 years earlier. According to the judgement, using abusive language against a superior at the workplace is reason enough for dismissal.

It is nobody's argument of course that misbehaviour should be condoned, but as any Primary School teacher knows, what appears as misbehaviour on

the part of one could well have been provoked by the actions of the other, so that deciding culpability is not easy. To give management *carte blanche* under these circumstances is tantamount to encroaching on the rights of the workers, to abetting the victimization of workers by management.

The second tendency is to “roll back” affirmative action. The most obvious example is the recent verdict that “reservations” in admissions need not be adhered to in the case of educational institutions which receive no funding from the State. This verdict not only is against affirmative action but also arbitrarily restricts the domain of State intervention. It is equivalent to saying that the State has no right to levy income taxes on employees outside the public sector. The proposition that the State is an overarching entity whose domain of intervention covers the entire universe of civil society and is not confined to only that part which is financed by it, is accepted in every modern society; and yet the Supreme Court has chosen to jettison it for reasons having little to do with any *serious* social philosophy and with consequences that are far-reaching and dangerous.

The third tendency is an encroachment on people’s livelihoods and rights of domicile in the name of improving the environment. The classic case of this was the shutting down of factories in Delhi for the sake of reducing pollution, and the throwing out of work of thousands of workers. More recently, pronouncements from the Supreme Court bench that “Delhi should not be allowed to go the way of Mumbai”, meaning that restrictions must be placed on the people’s right to domicile in the metropolis in order to avoid undue strains on civic amenities, suggest a judicial endorsement of an attack on the livelihood of the metropolitan poor and on a basic right which they have enjoyed for long. To be sure, strains on civic amenities should be avoided, and polluting industries should be shut down. But these are issues whose settlement requires proper redressal for those adversely affected. The *modus operandi* of such settlement moreover is through discussion and the emergence of a social consensus. To attempt to “solve” them through judicial *diktats* is not just ham-handed; it is profoundly anti-people and betrays typical upper class prejudice.

The fourth tendency is the encroachment on the lives of the people in the name of preventing illegal immigration. The worst example of this is the recent striking down of the IMDT Act by the Supreme Court. Illegal migration is a bogey raised by the Right. While the perniciousness of this bogey comes home to us when it is used as a means to harass Indians in metropolitan countries (the most obnoxious instance of such harassment being the so-called “virginity tests” that used to be carried out in Britain), the use of the same bogey at home as a means of harassing the poor, especially those belonging to the minority community, in the name of preventing Bangladeshi immigration, scarcely arouses anger. And the judiciary, in yielding to this bogey, echoes the prejudices of the Right which in turn reflect upper class prejudices.

The fifth tendency is a general endorsement by the judiciary of the neo-liberal outlook. This is manifest in innumerable judgements, notably on the BALCO privatization issue, the Orissa Bauxite case, and the Rajasthan mining issue. It is also manifest in the rather sympathetic treatment meted out by the Supreme Court to Union Carbide on the Bhopal Gas Tragedy issue, which

was very much in keeping with the neo-liberal spirit of bending over backwards to accommodate multinational corporations.

The foregoing discussion is far from exhaustive, both in the listing of tendencies and in the listing of cases. I have not included in my review the *socially* reactionary judgements handed down by the judiciary, such as the recent infamous judgement of the Delhi High Court allowing child marriage (of a girl as young as 15 years). I have focussed here only on those cases which impinge on the rights of the *oppressed classes* and have done so only through a few illustrative cases. A more detailed, though again by no means exhaustive, list of cases where the judiciary has given important verdicts against the common people in recent years can be found in the Appendix to this paper.

Three caveats are in order here. First, to say that the judiciary has shown an anti-people attitude in important verdicts in recent years, does not mean that its record is uniformly dismal. There have no doubt been other instances where it has shown concern for the poor, a notable example being the Supreme Court's directive for the distribution of foodgrains to the BPL population. Much no doubt depends upon the individual judges. Such concern for the poor on the part of the judiciary, however, has been on the whole the exception rather than the rule.

The second caveat is that notwithstanding its open espousal of current bourgeois attitudes, or of the social philosophy of what someone has aptly called "muscular liberalism", in cases relating to the denial of basic rights to *individuals*, the judiciary has been more sympathetic. But that is entirely in keeping with the bourgeois outlook. An attenuation of the rights of the people as a whole can go very well with, and indeed does go very well with, a scrupulousness in safeguarding of the rights of individuals *qua* individuals. What is more, this scrupulousness also tends to obscure the larger picture of the judiciary's playing the leading role in attenuating the democratic rights of the people as a whole.

The third caveat is that this role of the judiciary should not be attributed to any malevolence on its part. It is as much subject to the neo-liberal barrage unleashed by the media, and by imperialist agencies generally, as anybody else, and it imbibes these ideas and prejudices. But precisely because it is in the position of being an arbiter on people's lives, without facing the constraints that other organs of the State face, its attitudes and prejudices have a far more profound impact in restricting people's democratic space than those of any other organ of the State. In short its acquiring a leading role in essaying a "thermidor" in the Indian context has to be located within specific historical circumstances rather than in any individual or collective malevolence on the part of the judicial luminaries. And an inevitable fall-out of these circumstances is the judiciary's thrusting itself forward as superior to the other two organs of the State. Let us turn to this aspect now.

III

The judiciary's appropriating a superior role compared to the other organs of the State is a process that has been going on for some time. This in itself is a

dangerous and anti-democratic process since unlike the legislature the judiciary is not elected through universal adult franchise; its acquisition of a superior role visavis the legislature in matters that do not strictly pertain to the interpretation of law is therefore an attenuation of democracy. No doubt the legislative bodies are riddled with rampant corruption and are even peopled by criminal elements. But to see judicial activism as a solution to this, and correspondingly to see the judiciary as a custodian of political morality, is, *even when such activism is beneficial in the short-run (which it is not)*, tantamount to preferring a benevolent dictatorship to a democratic form of government. It is to the credit of Comrade Somnath Chatterji the new Speaker of the Lok Sabha that he has raised this issue of the judiciary overriding the privileges of the legislature.

But matters have gone much further. No less a person than the Chief Justice of the Supreme Court has explicitly announced that the role of the judiciary is to oversee the functioning of the other organs, so that they do not transgress their proper domains. This openly elevates the judiciary to a higher position than the other organs of the State. The question that Justice Lahoti needs to answer is this: if the judiciary is the organ to prevent transgression by the other organs, then who is to prevent transgressions by the judiciary?

The unquestioning acceptance of judicial verdicts, which is a typical feature of a modern democratic society, stems from a perception of the judiciary as an interpreter of the existing laws, *not as a custodian of the nation's morality*. The enforcement of "morality" is a task that in a democracy rests only upon the people, not upon a "select few" who, not being elected, are not answerable to anybody. To assert otherwise is to implicitly endorse the equivalent of a theocratic system, such as prevails in Iran where "the supreme leader" is the anointed custodian of morality, or such as the RSS conception of a *Hindu Rashtra* entails, in the form of a *Guru Sabha* where *sants* and such like who are not answerable to the people become arbiters of morality. In other words instead of seeing the people as the ultimate source of power, Justice Lahoti's conception sees a "chosen few" as the ultimate source of power. Of course Justice Lahoti has merely expressed an opinion and one must not exaggerate the significance of that remark. At the same time however it should be clear that this particular opinion, no matter how innocuous, contains within itself the seeds of a *coup d'etat* against our democratic constitution.

Not content with proclaiming the superiority of the judiciary to other organs of the State, members of the judiciary have even started echoing the typical upper class contempt for the actual political process of the country through a debunking of "political Parties". Thus a three-judge bench consisting of Justice Y.K.sabharwal, Justice C.K.Thakker and Justice R.V.Raveendran stated on September 16, 2005 (see *The Hindu*, Sept.17) that "Political parties were holding society to ransom" by organizing *bandhs*. The remark was made in the context of the BJP-Shiva Sena appeal against a Bombay High Court verdict imposing a fine of Rs.20 lakhs on each Party for jointly organizing a *bandh* in 2003. Now, as already mentioned, whether *bandhs* should be organized or not, and if so under what conditions, is not a matter for the courts to decide: it is an established right of the people and

any tampering with it can be done only with their consent (or at the very least by the legislatures which are accountable to the people). But in the present instance the Supreme Court not only expressed itself against *bandhs*, it not only criticized the BJP and the Shiva Sena which organized the particular *bandh* it was considering; it launched an attack on “Political Parties” in general, thereby contributing to the general cynicism with the political process which threatens democracy and which is so common among the upper classes, *though not among the ordinary people*. (An index of this is the fact that voting percentage among the former is exceedingly low while that among the latter is much higher: the South Delhi constituency dominated by the rich, for instance, witnesses one of the lowest voter turn-outs in the country). In short, the “yuppie” attitudes and the “yuppie” outlook which cannot gain ascendancy through the legislatures, are now managing to get imposed through the judiciary, which, quite gratuitously and irresponsibly, also debunks the legislatures.

IV

What is even more ironic however is this: while the judiciary cannot be taken to task for using such intemperate and derogatory language against that organ of the State which is elected by the people, language moreover that has a potentially anti-democratic thrust, any protest against the use of such language by the judiciary would promptly invite “contempt of court” proceedings. For the rule of law, there must be a final authority whose interpretation of the law has to be binding on all. “Contempt of court” is a means of making the verdict of the courts binding on all. The legitimacy of the “contempt” provision therefore derives from the role of the judiciary as *interpreters of the law*. But when the judiciary arrogates to itself the role of making derogatory remarks about the other organs of the State, or when the judiciary expounds its own social philosophy, to make the “contempt” provision applicable in these cases too is sheer authoritarianism. And yet this is what the courts have been doing. Comrade Biman Basu at this moment is facing “contempt” proceedings for having said what he thought of the Calcutta High Court judge’s order about holding demonstrations. “Contempt” proceedings in short are being used as a means to ram bourgeois attitudes, and bourgeois-approved measures against popular action, down the throats of the people.

All this is not to say that our political life and political institutions are free from ills. On the contrary, as every one knows, they are afflicted by rot. But this rot can be removed only through the intervention of the people, no matter how delayed, protracted and halting such intervention may be. To believe that this rot should be set right by members of the judiciary who can play the role of some latter-day “knights on white chargers” is to invite authoritarianism. But the fact that this belief is being propagated by the bourgeois media, and is shared by the judiciary itself, is because it serves to curb the people’s democratic rights, which is a historical necessity for the bourgeoisie in the present conjuncture for reasons mentioned earlier. The judiciary must realize that if it continues to be complicit in the project of

unleashing a bourgeois counter-revolution, then sooner or later it too will have to face the wrath of the people.

APPENDIX

List of judgements affecting the the people's lives and rights

1. Electricity Privatization in New Delhi.
2. Factory Relocation outside Delhi.
3. Slums - Delhi.
4. Yamuna Pollution Issue - Delhi.
5. Waste Management - Delhi.
6. Encroachment & Evictions issue in Forests.
7. Interlinking of rivers
8. Jindal Case.
9. Narmada Issue.
10. Bhopal Gas Tragedy.
11. Mumbai Slum Issue.
12. Tamil Nadu Workers issue and right to strike.
13. Niyogi Judgment.
14. Rajasthan Mining issue.
15. West Bengal bandhs issue
16. Dehra dun quarrying issue.
17. Orissa Bauxite Mining Case.
18. Uttranchal Hydel Projects.
19. Wayanad Tribals evictions issue.
20. Textile - Mumbai & Kanpur.
21. Supreme Court on NCF.
22. Fishermen.
23. CMM Labour Cases.
24. Two-child norm.
25. POTA Cases.
26. GMO's & Bio-technology.
27. Sugar Mills issue - Chhattisgarh.
28. BALCO Privatization Issue.
29. Bombay High Court Fining Political Parties for Calling *bandhs*.