Frontline (Fortnightly)
Chennai, 5 August 2016

Justice for all?

The Supreme Court's decisions over the past two decades display a shift in its approach to socio-economic issues. The impact of neoliberalism is evident in the limited access to justice and other aspects of justice delivery. BY **V. VENKATESAN**

HEARING A CASE BEFORE HIM ON APRIL 29, this is what Chief Justice of India (CJI) T.S. Thakur told the counsel for a rich client who was on an appeal before the Supreme Court: "Litigation should become expensive for your big clients. The Attorney General suggested this to us as one of the steps which can be adopted to reduce pendency and discourage litigation. This is a beginning. Only those big clients who can pay deposit shall file cases here."

The bench led by the Chief Justice directed that the Supreme Court would not start hearing the case until the petitioner and the two respondents jointly deposited Rs.50 lakh each in court within four weeks. The order made available in the public domain subsequently in this case says that the amount so deposited shall be invested by the Registry in a short-term deposit, initially for a period of six months, to be awarded to the successful party towards costs during the final disposal of the appeals.

According to observers, even if the deposits were to be spent as costs to be awarded to the successful party, the fact that the litigation was fast-tracked on this ground—it is to be heard on July 19 whereas in the normal course it would come up for hearing only after two years —epitomised the transformation of the Supreme Court over the past two decades. With this "fast-tracking for a price" message, the Supreme Court has only reinforced the growing impression that poor litigants who have no means of advancing the listing date by making huge deposits like the corporates will have no option but to rue their situation.

R.V. MOORTHY

THE SUPREME COURT of India. Judicial institutions appear to be inclined to assist the state in its neoliberal project.

Earlier, in a prelude to the CJI's unveiling of the deposit route to corporates, his colleague in the Supreme Court, Justice J. Chelameswar, had introduced a similar version of this concept, in his judgment in *Messer Holdings Ltd vs Shyam Madanmohan Ruia and Others*, delivered on April 19, along with Justice Abhay Manohar Sapre. In this case, the J. Chelameswar-Sapre bench imposed a fine of Rs.20 lakh on each of the three parties to the case, with the following observation:

"This case should also serve as proof of the abuse of the discretionary jurisdiction of this court under Article 136 by the rich and powerful in the name of a 'fight for justice' at each and every interlocutory step of a suit. Enormous amount of judicial time of this court and two High Courts (before it came to Supreme Court on an appeal) was spent on this litigation. Most of it is avoidable and could have been well spent on more deserving cases."

Little did the bench realise that its imposition of a huge fine on the rich litigants was unlikely to deter them from abusing the discretionary jurisdiction of the Supreme Court under Article 136. Those litigants who cannot afford to pay such a huge fine will, therefore, have to suffer discrimination, which will ultimately lead them to avoiding litigation and suffering injustice as a consequence.

According to observers, the Rs.50 lakh deposit or Rs.20 lakh

fine is a small amount for corporates who pay their lawyers Rs.6 to 11 lakh (which can go up to Rs.15 lakh for some senior counsel) for a single appearance in the Supreme Court.

IMPACT OF NEOLIBERALISM

These two instances underline how inaccessible the judiciary has become to the common people.

The impact of neoliberalism is not just evident in the limited access to justice but many other aspects of the justice delivery system where it has assumed new dimensions.

Environmental protection is one such area where the impact of neoliberalism is being felt. When environmental protection comes into conflict with the socio-economic rights of the poor and the marginalised, the rights of the poor generally are ignored.

When environmental protection comes into conflict with powerful vested commercial and corporate interests, it is interpreted by the court to be "development" and the value of environmental protection is considered less important.

Scholars of the Supreme Court are inclined to treat the post-1990 period of its history as distinct from the earlier ones. If during the Emergency between 1975 and 1977, the judges of the Supreme Court completely buckled under pressure from the then Central government, they used the post-1977 period to make amends by taking people's suffering seriously through the innovative public interest litigation (PIL). It was innovative because, for the first time, the court encouraged public-spirited litigants to represent the voiceless poor and the marginalised, who would otherwise have no access to the court.

'CONCEPTUAL PERIOD'

It is not as if the beginning of liberalisation in 1991 influenced the Supreme Court's attitude to PIL petitions and people's sufferings drastically or that it was a watershed year to mark the transformation of the court from an institution that showed remarkable empathy to people's concerns to one that went back on its commitments. The change in the court's reasoning and philosophy took place gradually over the years. A scholar described the 1990s as a "conceptual period" that revealed its transition.

Thus, one finds that if the court in the 1980s expressed its outrage over discrimination of and injustice to contract labour, in 2001 it declared that contract labourers had no right to demand regular employment. In *Steel Authority of India Limited vs National Union Water Front Workers and Others*, the Constitution Bench reversed an earlier judgment in the Air India Statutory Corporation (1997) case, ruling out automatic absorption of contract labour working in the establishment concerned.

Another contrast noticeable in the court's orders was its attitude to the homeless. In *Olga Tellis vs Bombay Municipal Corporation* (1986), the court held that pavement dwellers could not be summarily evicted. In *Almitra Patel vs Union of India*, however, the court's transformation was complete. Justice B.N. Kirpal wrote in that judgment as follows: "Rewarding an encroacher on public land with an alternative free site is like giving a reward to a pickpocket." Although Almitra Patel was a case about garbage disposal, it was dexterously turned into a case about slum clearance by the court, says the legal commentator Usha Ramanathan.

The scholar Upendra Baxi has noted that demolitions, which were seen as excesses perpetrated during the Emergency, now come to be seen as badges of good governance.

The Shifting Scales of Justice: The Supreme Court in Neo-liberal India, edited by Mayur Suresh and Siddharth Narrain (Orient Blackswan, 2014), brings out these and other instances from the court's jurisprudence in the 1990s and 2000s in order to drive home the point that the court's progressive outlook suffered serious erosion because of the influence of the neoliberal policies followed by the government in the economic sphere.

In *Delhi Janwadi Adhikar Manch* (1997), the Supreme Court permitted industrial relocation in Delhi to ensure a pollution-free environment, unmindful of the impact it would have on workers, economically, socially and culturally. According to a study, it made the majority of workers jobless, declined their bargaining capacity, forced them to work in a more exploitative market economy and brought with it isolation, frustration and social tension for them and their families. The same study pointed out that the issue of workers' safety, health and working conditions did not find a place in the whole process of industrial relocation. In contrast, the workers paid a disproportionately high price for a clean Delhi, the study found. (See Prakash Chand, "Implications of Industrial Relocation on Workers in Delhi", *Social Change*, March 2012.)

IN HYDERABAD in February 2004, during a 24-hour nationwide general strike called by the Central trade unions in protest against a Supreme Court ruling to ban strikes.

In *T.K. Rangarajan vs Government of Tamil Nadu* (2003), the Supreme Court held that government employees had no fundamental right to go on strike. In *Secretary, State of Karnataka vs Uma Devi and others* (2006), the Supreme Court held that contract workers, even if employed for periods up to 10 years, had no right to be regularised. In holding so, the five-judge Constitution Bench of the court overruled previous decisions after observing that their predecessors had laboured under the misapprehension that India was a socialist republic.

The Supreme Court introspected its own deviation from the constitutional vision in the interpretation of social welfare legislation in *Harinder Singh vs Punjab Warehousing Corporation* (2010). The court observed: "The attractive mantras of globalisation and liberalisation are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganised workers. In a large number of cases like the present one, relief has been denied to the employees falling under the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this court in three decades" (as cited in Mayur Suresh and Siddharth Narrain, *The Shifting Scales of Justice*, 2014).

EMPIRICAL CONFIRMATION

The empirical confirmation for the shift in the Supreme Court's priorities between the 1980s and the present is provided by the scholar Varun Gauri, who has painstakingly analysed the data on litigants before the Supreme Court, in *The Shifting Scales of Justice*. According to Gauri, until the late 1980s the average annual win-rate for claimants from advantaged classes was below the win-rate of claimants who were not from advantaged classes. Now, the claimants from advantaged classes have higher win-rates than claimants from disadvantaged classes, he has found.

Another inconsistent approach of the judiciary can be seen from the Supreme Court's invocation of the right to water and development in order to justify the eviction of people from the banks of the Narmada and the Yamuna. Of course, the court grants the right to relief and rehabilitation of the oustees, which is honoured more in the breach than in observance by the state, especially in the case of the Narmada. Whenever cases of inadequate relief and rehabilitation of oustees are brought before the Supreme Court, its role in monitoring the progress of the state in ensuring that leaves much to be desired.

In contrast to this, the National Green Tribunal's go-ahead to the Art of Living's (AoL) World Culture Festival on the banks of the Yamuna in March despite serious concerns over damage to the environment, and the AoL's disinclination to pay monetary compensation as directed, makes one wonder whether regulatory bodies such as the NGT are helpless when it comes to ensuring compliance and accountability from rich parties even while coming down heavily on the poor ones seen as contributing to pollution. Perhaps the shift in the Supreme Court's approach to such issues over the years has influenced the NGT too.

The Supreme Court's reluctance to provide timely relief to taxi operators in Himachal Pradesh, who are before it in an ongoing appeal, aggrieved by the NGT's decision to limit the plying of diesel-run taxis in Rohtang Pass without ensuring the availability of alternative fuel in the form of adequate CNG stations, is another instance of the perceived livelihood-environment conflict on which the approach of the Supreme Court and the NGT has been inconsistent.

To conclude, the contribution of the Supreme Court and other judicial institutions to the neoliberal project of the state has been largely one-sided and inconsistent, with most judges appearing to be inclined to assist the state in cementing it, although judicial expressions of dissent can be heard from time to time over this general trend. □