

SACRIFICING HUMAN RIGHTS AND ENVIRONMENTAL RIGHTS AT THE ALTAR OF “DEVELOPMENT”

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Those familiar with India are aware of the country’s remarkable paradoxes characterized by obscene wealth in the hands of a few billionaires, including four of the ten richest men in the world, existing side by side with appalling poverty where more than 78 percent of the population lives on less than twenty rupees (or forty-five cents) per day. The paradox of a “Shining India” consists of the largest force of information technology and financial services professionals in a country aspiring to make India an economic superpower, living alongside the largest slum population in the world who live amidst unimaginable filth without electricity, running water, or sanitation. More than 100,000 farmers have committed suicide in the country in the last ten years. India ranks lower than many countries of Sub-Saharan Africa in the Human Development Index.

In 1991, India adopted the World Bank-IMF model of “Structural Adjustment,” popularly known as the LPG program, characterized by Liberalization, Privatization, and Globalization. Since then, the rate of Gross Domestic Product (GDP) growth has increased substantially, from 3 or 4 percent to reach 9 percent in 2007-2008. During this period, the number of millionaires (in U.S. dollars) increased manifold, as did the average income of the top 10 percent of the population. The number of persons living in acute poverty during the same period, however, continued to grow. The Arjun Sengupta report shows that 77 percent of the Indian population (836 million people) now lives on less than twenty rupees (or forty-five cents) per day.¹ The average availability of nutrition to people also declined during the same period, most clearly indicating that this spurt in growth, far from being inclusive, was achieved at the expense of the poor and marginalized sec-

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1. NAT’L COMM’N FOR ENTERS. IN THE UNORGANISED SECTOR, REPORT ON CONDITIONS OF WORK AND PROMOTION OF LIVELIHOODS IN THE UNORGANISED SECTOR 1 (2007).

tions of society. One of India's leading economists, Utsa Patnaik, explained as follows:

Expenditure data from the National Sample Survey Organisation's 61st Round (2004-05) show that rural and urban per capita cloth consumption, real food expenditure, and calorie intake have all declined from their already low levels since 1993-94. This country remains a Republic of Hunger with a larger proportion of ordinary people being relentlessly pushed down to worse nutritional status. As the tables show, the proportion of rural population unable to access 2,400 calories daily climbed from 75 per cent in 1993-94 to a record high of 87 per cent by 2004-05. . . . The corresponding percentages for urban India, where the nutrition norm is lower at 2,100 calories, are 57% and 64.5%.²

That was unsurprising since a lot of this "growth" was achieved by acquiring the traditional lands of poor farmers, particularly tribals, for mining companies, real estate companies, and "Special Economic Zones" promoted by private companies. As the rich/poor divide increased during this period, the strength of left-wing Maoist insurgencies, which have come to control a significant part of the country, also increased.

The majority of India's impoverished people are unable even to access the country's judicial system. In an attempt to deal with this lack of access to the judicial system, an activist Supreme Court of India created a new jurisdiction now known as "Public Interest Litigation" (PIL) thirty years ago. The basis of this jurisdiction was the creative and expansive interpretation of Article 21 of the Constitution of India, which guarantees every individual the right to life and liberty. The court declared that the fundamental right to life did not merely guarantee citizens the right to an animal existence, or merely protection from being put to arbitrary and unreasonable bodily harm by the state, but the right to live a life of dignity. This meant that citizens had the right to food, water, shelter, education, health, and so forth, which were all progressively declared by the Supreme Court to be part of Article 21. In a further innovation, the court declared that Article 21 also encompasses the right to live in a clean and decent environment. The court declared these rights to be enforceable and, by a series of judgments, mainly during the 1980s, it directed the executive to provide these basic amenities in various ways.³ Thus, the Supreme Court declared that

2. Utsa Patnaik, *Neoliberal Roots*, FRONTLINE, Mar. 28, 2008, at 17, 20.

3. See, e.g., *People's Union for Civil Liberties v. India*, A.I.R. 1997 S.C. 1203, ¶¶ 6, 8-9; *Vellore Citizen Welfare Forum v. India*, A.I.R. 1996 S.C. 2715, ¶ 27; *Consumer Educ. &*

it had the constitutional right and the duty to direct the government to provide these amenities if citizens were deprived of them. Not only this, but the court also liberalized the concept of *locus standi* by declaring that in a country like India, where the majority of citizens are too poor and without the resources to approach the courts themselves, anyone could approach the courts on their behalf, pro bono. The PIL revolution, as it came to be known, initially generated great hope that the courts would force the executive to adhere to the constitutional mandate of fashioning India as a “Socialist, Secular, Democratic, Republic.” During the 1980s, several path breaking judgments from the courts kept this hope alive.

Several judgments liberalized civil liberties. Courts held that the handcuffing of prisoners and under-trials (those awaiting trial or those whose trials were pending and in which no judgment had been passed) were inhumane and violated Article 21.⁴ In Maneka Gandhi’s case, the Supreme Court held that a person could not be deprived of her passport without notice and a hearing.⁵ In several cases, the court laid down extensive guidelines about the treatment of prisoners and under-trials, particularly women.⁶ Yet, in the infamous habeas corpus case during the emergency of 1975-1977, when fundamental rights had been suspended, the Supreme Court held that a writ of habeas corpus did not lie during an emergency, even against illegal detention.⁷

More recently, in the 1990s, the Supreme Court laid down extensive salutary guidelines about the manner in which the police could deal with people while carrying out arrests.⁸ It also held that in a case of torture in police custody, the courts exercising writ jurisdiction could directly award compensation to the victim or his family and also order the offender’s prosecution.⁹

From the mid-1990s on, however, the Supreme Court has often sacrificed civil liberties on the ground of “state security.” This is apparent in the manner in which the court has upheld the constitutional validity of several highly draconian legislations such as the Armed Forces Special Powers Act, The Terrorist and Disruptive

Research Ctr. v. India, (1995) 1 S.C.R. 626, ¶¶ 20, 30; Khurana v. Delhi Admin., 1987 S.C.A.L.E. 321, ¶¶ 1-4; Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180, ¶ 57.

4. Shukla v. Delhi Admin., (1978) 2 S.C.R. 621, ¶ 24.

5. Gandhi v. India, (1978) 2 S.C.R. 621, 683-85.

6. See, e.g., Barse v. Maharashtra, (1983) 2 S.C.R. 337, ¶ 5.

7. See Additional Dist. Magistrate, Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, ¶ 135.

8. See Basu v. West Bengal, A.I.R. 1997 S.C. 610, ¶¶ 35-36.

9. See Behera v. Orissa, (1993) 2 S.C.R. 581, ¶¶ 19, 27.

Activities Act (TADA), and the Prevention of Terrorism Act (POTA).¹⁰ The impunity afforded to security forces under the Armed Forces Special Powers Act has enabled them to torture, rape, and kill thousands of people in Kashmir and the North East, where the Act is in force, without any accountability. TADA and POTA both contained provisions making confessions made in police custody admissible and made it virtually impossible for anyone accused under either TADA or POTA to get bail. Though TADA and POTA have since been repealed, similar provisions have been engrafted in the Unlawful Activities Prevention Act (UAPA) (without, however, the admissibility of police confessions). Under the cover of the Maoist insurgency, the police have increasingly resorted to targeting human rights activists under these draconian laws. One of the cases that illustrates the increasingly illiberal attitude of the Supreme Court towards civil liberties is the much-publicized case of Dr. Binayak Sen.

Dr. Sen is an internationally celebrated medical practitioner from the premier medical college of the country, who has spent his life setting up community health clinics in some of the most backward tribal areas of India, where no other public health facilities exist. Among his many awards is the prestigious Jonathan Mann award for public health services. While working in the tribal areas, he came across many cases of gross human rights abuses of the tribals at the hands of the police and a private mercenary army called Salwa Judum, which is funded and armed by the state. He also started working with the People's Union for Civil Liberties as the general secretary for the state of Chhattisgarh. In May 2007, he was arrested under the UAPA and the Chhattisgarh Public Security Act and charged with carrying two letters from a Maoist in jail to his comrade outside. Dr. Sen was meeting with the prisoner in connection with his medical condition, as well as his complaints of human rights violations in jail. None of these letters are alleged to contain any subversive material. Yet, Dr. Sen is charged with having assisted a member of a banned organization. For twenty-two months, Dr. Sen was denied bail, even by the Supreme Court, while his trial goes on and on. Though more than twenty-two Nobel Laureates from around the world had appealed for his release, the court did not even deem it fit to give a reason for refusing bail and

10. See *People's Union for Civil Liberties v. India*, A.I.R. 2004 S.C. 456, ¶¶ 21, 27, 38, 41, 48, 52, 60, 63, 69 (upholding POTA); *Singh v. Punjab*, (1994) 2 S.C.R. 375, ¶ 78 (upholding TADA).

did so by a one word order: “Dismissed.”¹¹ This case strikingly illustrates the illiberal attitude of the apex court towards the civil liberties of the poor and underprivileged, including those who work for them.

This illiberal attitude is also apparent in a recent judgment of the Supreme Court in which it struck down the constitutional validity of the Illegal Migrants (Determination by Tribunals) Act (IMDT Act). The IMDT Act was enacted to provide for a judicial tribunal to determine any dispute regarding the nationality of a person. Prior to that, the police used the draconian “Foreigners Act” to harass and deport anyone (particularly poor Bengali Muslims) that they accused of being foreigners, without affording any recourse for a judicial determination of nationality. Those challenging the IMDT Act alleged that the protracted proceedings before a judicial tribunal interfered with the summary deportation of persons accused by the police of being foreigners.¹²

Being conscious that an act of parliament could only be struck down if parliament lacked legislative competence to enact it or if it violated a specific provision of the constitution, the Supreme Court opined that the IMDT Act violated Article 355 of the constitution, which mandates that the central government protect the states against external aggression and internal disturbance! The court went on to say that the onerous provisions of the IMDT Act make it virtually impossible to expel foreigners, and therefore, the IMDT Act encourages infiltration of illegal migrants from Bangladesh, which amounts to external aggression against India!

The Supreme Court also ruled that the applicability of the IMDT Act only to the state of Assam made it discriminatory and violative of Article 14 since other states did not have to adhere to the more stringent provisions of the IMDT Act before pushing out persons designated as foreigners. In reaching this conclusion, the court completely overlooked the fact that the IMDT Act was applicable throughout India. The government, however, had not notified it for parts of the country other than Assam. That was but an executive lapse, and the other pending petitions sought precisely the direction from the Supreme Court—that the government be directed to notify the IMDT Act for other parts of the country. If the tribunals under the IMDT Act were not acting expeditiously

11. The Supreme Court granted Dr. Sen bail in June 2009. The case against him, however, lingers on.

12. See *Sonowal v. India*, W.P. (C) No. 131/2000, ¶ 2, available at http://www.unhcr.org/refworld/publisher,IND_SC,,,46b1c2eb2,0.html.

(which courts hardly ever do), they could have directed the government to take whatever steps were required to remedy that.

One would have expected the Supreme Court, which is constitutionally mandated to protect the fundamental rights of citizens, to have declared the Foreigners Act unconstitutional, insofar as it allows the authorities to throw out citizens alleged to be foreigners, without a judicial determination. Instead, the court stated as follows:

A deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25th March, 1971 rather than to identify and deport them.¹³

This judgment reflects an authoritarian and fascist mindset that the police must have the authority to throw out anyone they want without the impediment of independent judicial scrutiny. This judgment, coming from the Supreme Court, fully informed about the high handed and inhuman manner in which the authorities had been treating citizens under the Foreigners Act, is atrocious. The court's attitude completely justifies the observation contained in the report of the Citizens' Campaign for Preserving Democracy, where it said, "[r]ight from round-up and arrest, to the supposed 'hearing' and deportation, no lawful procedure is being followed by the authorities. The entire process contributes to and manifests the criminalisation and communalisation of the state and the corruption of its legal and juridical institutions."¹⁴

Another clearly noticeable trend is that while the Supreme Court has often made grand, liberal pronouncements about rights, it is often slow to implement them. In many cases, the actions of the court betray an ambiguity about the seriousness of its beliefs in those rights. D. K. Basu's judgment,¹⁵ for example, about the rights of arrestees and detainees, has been wantonly flouted by the authorities, but rarely has the court applied the principles of *Nilabati Behera*¹⁶ in awarding compensation to the victims or ordering the punishment of offending police officers. The court's judgments on socioeconomic and environmental rights illustrate the

13. *Id.* ¶ 28.

14. CITIZENS' CAMPAIGN FOR PRESERVING DEMOCRACY, DEMOCRACY, CITIZENS, AND MIGRANTS: NATIONALISM IN THE ERA OF GLOBALISATION 2 (2005), available at <http://www.sabrang.com/cc/archive/2005/feb05/hrights.html>.

15. *See* Basu v. West Bengal, A.I.R. 1997 S.C. 610, ¶¶ 35-36.

16. *See* Behera v. Orissa, (1993) 2 S.C.R. 581, ¶¶ 19, 27.

wide gap between the rights declared by the court and their actual implementation.

In case after case, the Supreme Court, while liberally construing Article 21, has held that it included the right to shelter,¹⁷ the right to food,¹⁸ the right to education,¹⁹ the right to health care,²⁰ and the right of street vendors to earn a livelihood by hawking on the streets.²¹

In *Olga Tellis*, the Supreme Court held that pavement dwellers residing on the public pavements of Mumbai had a right to a hearing before being sought for eviction by the municipal authorities, and if evicted, had a right of resettlement.²² In *Bandhua Mukti Morcha*, the court held that workers cannot be held in bondage because of loans that they or their ancestors had taken from their employers.²³ The court has gone on to hold that international covenants that India signed could be read into municipal law for invoking socioeconomic rights from Article 21. Thus in *Vishaka*, the court issued various binding guidelines to prevent the sexual harassment of women.²⁴

Where the Supreme Court has been most inventive, however, is in using Article 21 to create the right to environmental protection. In a series of judgments, it held that Article 21 also encompasses the right to a clean and healthy environment. In doing so, individual benches of the court used their own subjective understanding of what was needed for a healthy and clean environment. Some important principles also evolved, such as the precautionary principle. The precautionary principle was stated as follows:

The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution or major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.²⁵

17. See *Singh v. Uttar Pradesh*, A.I.R. 1996 S.C. 1051, ¶ 17.

18. See *Legal Action: Interim Orders in the 'Right to Food' Case*, RIGHT TO FOOD CAMPAIGN, www.righttofoodindia.org/orders/interimorders.html (last updated Feb. 5, 2010) (providing electronic access to the resulting orders from 2001-2008). See generally *People's Union for Civil Liberties v. India*, W.P. (C) No. 196/2001.

19. See *Krishnan v. Andhra Pradesh*, (1993) 1 S.C.R. 594, ¶ 80(1).

20. See *Consumer Educ. & Research Ctr. v. India*, (1995) 1 S.C.R. 626, ¶¶ 20, 30.

21. See *Singh v. New Delhi Mun. Comm.*, (1989) 3 S.C.R. 1038, ¶ 16.

22. *Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180, ¶¶ 51, 57.

23. See *Morcha v. India*, (1984) 2 S.C.R. 67, ¶ 2.

24. *Vishaka v. Rajasthan*, 1997 S.C.A.L.E. 453, ¶ 16.

25. *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 S.C.C. 647, ¶ 735.

It is also explained that if the environmental risks being run by regulatory inaction are in some way “‘uncertain but non-negligible,’” then regulatory action is justified. This will lead to the question as to what is the “‘non-negligible risk.’” In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a “‘reasonable ecological or medical concern.’” That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favor of environmental protection.²⁶

In several judgments, the Supreme Court ordered the stoppage of polluting effluents into various rivers, the closing down of polluting industries near the Taj, the closing down of polluting industries in and around Delhi, the forcible conversion of all commercial vehicles plying in Delhi to Compressed Natural Gas fuel, the clearing of the ridge in Delhi of all structures, and so forth. There is a long running case regarding deforestation (*T. N. Godavarman Thirumulpad*)²⁷ in which a permanent bench that sits almost every week has been created, consisting of a Chief Justice and two other judges. This bench made a series of orders to stop non-forest activities in forest areas and to close down saw mills in and around forest areas in the country. It even passed an order declaring that non-forest activity could not be carried out in a forest area without the permission of the government.²⁸ The Forest Conservation Act of 1980 required the permission of the central government for such non-forest activity in forest areas. In this case, the court, by judicial fiat, mandated the permission of the court for permitting such activity in any forest area of the country. Thus, each case must come to the Supreme Court for permission. Before the Supreme Court examines a case, however, the court directs an expert committee set up by the court to examine the case. The court normally follows the advice of an expert committee, known as the Centrally Empowered Committee. The court's action in such matters has often been whimsical, however, with poor tribals getting short shrift while powerful corporations get favorable treatment.

26. Andhra Pradesh Pollution Control Bd. v. Nayudu, (1999) 1 S.C.R. 235, ¶¶ 37-38.

27. *Thirumulpad v. India (The Godavarman Case)*, W. P. (C) No. 202/1995; see also *What is the Godavarman Case?*, FOREST CASE UPDATE, <http://www.forestcaseindia.org//f2/> (last visited Sept. 25, 2010) (providing electronic access to the resulting orders from 1996 to 2008).

28. *Thirumulpad v. India*, A.I.R. 1999 S.C. 2420 (India).

If one examines the recent record of the Supreme Court in its environmental activism, two trends are immediately clear: (1) when environmental protection comes into conflict with socioeconomic rights of the poor and the marginalized, the poor usually get short shrift; and (2) when environmental protection comes into conflict with powerful vested commercial and corporate interests, or what is perceived by the court to be “development,” environmental protection usually gets short shrift.

As the Supreme Court’s powers increased with the widening use of PIL, the executive also began to view PIL as a handy method for the government to do what it wants under the cover of the court, without being democratically accountable for its acts. Thus, if the government desired the removal of the poor slum dwellers to make way for fancy apartments, shopping malls, or five-star hotels, the courts were seen as a convenient tool. The government was hesitant to take responsibility for such decisions because of the fear of democratic backlash in the next election (fortunately the rich and poor have equal votes). The courts were ever willing to clothe such “unpopular decisions” with the authority of law, since they are not accountable, democratically or otherwise. Howard Zinn, author of “A People’s History of the United States,” puts it beautifully:

The rule of law does not do away with the unequal distribution of wealth and power, but reinforces that inequality with the authority of law. It allocates wealth and poverty . . . in such complicated and indirect ways as to leave the victim bewildered.²⁹

In the last few years, the High Courts of Delhi and Mumbai evicted tens of thousands of slum dwellers living in Delhi and Mumbai, mainly on the ground that they were polluting the environment. In Delhi, the Delhi High Court ordered the demolition of more than 40,000 temporary slum dwellings on the banks of the Yamuna on the presumed ground that they were polluting the river, even though no such evidence was presented before that court. The Delhi High Court ordered the homes demolished without notice to the slum dwellers and without providing them with any alternative housing. These actions deprived them of shelter and thus violated their Article 21 rights as declared by the Supreme Court in Chameli Singh’s case.³⁰ The Supreme Court refused to stop the demolitions, which effectively threw the slum dwellers out on the streets in the searing heat of the summer. Yet, when the same land from which these persons had been evicted was thereaf-

29. HOWARD ZINN, *PASSIONATE DECLARATIONS: ESSAYS ON WAR AND JUSTICE* 111 (2003).

30. See *Singh v. Uttar Pradesh*, A.I.R. 1996 S.C. 1051, ¶¶ 17-18.

ter sought for the construction of fancy apartment complexes and shopping malls (ostensibly for the Commonwealth Games), the Supreme Court did not deem itself fit to stop the construction even though such construction was in complete violation of the norms of the Environmental Protection Agency, which stated that no permanent structures could be built on the river banks. In fact, the Supreme Court stayed the order of the Delhi High Court which had ordered further investigation into the matter by another expert committee.

The Delhi ridge case³¹ demonstrated the same double standards where the Supreme Court ordered the ridge cleared of all structures, including temporary shanties housing poor people, on the ground that it was ecologically very sensitive (*M. C. Mehta*) and part of the lungs of Delhi. Yet, when five-star hotels and shopping malls were constructed on the same ridge without any environmental clearance, which was required by the law, the Supreme Court did not think it fit to stop the construction and allowed construction of these buildings on the same land where even small temporary dwelling units of the poor were not allowed. In its judgment, a 2006 order in the *Godavarman* case, the Supreme Court went on to say the following:

Had such parties [an] inkling of an idea that such clearances were not obtained by DDA, they would not have invested such huge sums of money. The stand that wherever constructions have been made unauthorisedly demolition is the only option cannot apply to the present cases, more particularly, when they unlike, where some private individuals or private limited companies or firms being allotted to have made contraventions, are corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise.³²

The recent attitude of the Supreme Court towards slum dwellers is summarized by the observation of Justice B. N. Kirpal in *Almitra Patel's* case in which he said in the context of giving alternative land to evicted slum dwellers, “[r]ewarding an encroacher on public land with free alternate site is like giving a reward to a pick-pocket.”³³ So in the eyes of the court, large corporations cannot indulge in malpractice and slum dwellers are pickpockets!

India has a large tribal population that has traditionally lived within forests and whose rights have not been recognized or

31. *MC Mehta v. Union of India*, (2004) 6 S.C.C. 588.

32. *Thirumulpad v. India*, (2006) 10 S.C.C. 490, ¶ 8.

33. *Patel v. India*, (2000) 1 S.C.R. 841, ¶ 14.

declared for more than one hundred years. As a result, many of the tribal members continue to live in forests, which have been declared Reserve or Protected forests, without any declaration of their rights in them. Recently, parliament passed the Forest Rights Act giving rights to forest dwellers over the land on which they have resided for more than a certain number of years. Several High Courts have stayed the act on the ground that it will lead to the destruction of forests even though the best preservation of the forests occurred mostly in the areas where forest dwelling tribes reside. The Supreme Court, however, has been very solicitous towards large corporations like Posco and Vedanta in allowing them mining leases in large tracts of forest land. The court allowed this despite the fact that these mining leases in forestlands would displace thousands of tribal families and that the Supreme Court's own expert committee had strongly recommended against giving these leases on environmental grounds.³⁴

In the *Narmada Bachao Andolan* case, despite the strong dissenting opinion of Justice Bharucha, who pointed out that the Sardar Sarovar Dam project was proceeding without a comprehensive environmental appraisal and without the necessary environmental impact studies being done, the majority of the Supreme Court still went on to approve the project.³⁵ The majority even allowed the project to go on without any comprehensive environmental impact assessment even though such assessment was necessary according to the government's own rules and notifications.³⁶ The majority opinion also makes clear the underlying reasons and ideology behind the subordination of the environment to "development."³⁷ Several passages in the majority judgment extol the virtues of the kind of development brought in by large dams. The judgment even goes on to gratuitously emphasize the myth that the Bhakra dam was responsible for the green revolution in the country despite the fact that the court had specifically restrained Petitioner Andolan from making any submissions on the pros and cons of large dams. The court also made disparaging remarks against the Narmada Bachao Andolan as being an anti-development organization.

The same subordination of environmental interests to "development" is evident in the Supreme Court's judgment in the Tehri

34. See, e.g., *Thirumulpad v. India*, (2008) 9 S.C.C. 711.

35. *Narmada Bachao Andolan v. India*, A.I.R. 2000 S.C. 3751, ¶¶ 250, 271.

36. See *id.* ¶¶ 249-79.

37. See *id.* ¶¶ 269, 271.

Dam case, where the government's own expert committee gave an elaborate report pointing out a series of violations of the conditions on which the Ministry of Environment gave environmental clearance to the project.³⁸ The committee pointed out that a number of studies necessary to evaluate the environmental impact of the project had not been conducted and recommended that these studies be conducted immediately. Justice Dharmadhikari held that in order to ensure compliance with the conditions of environmental clearance, it was necessary to constitute an independent expert committee that would monitor compliance with these conditions, and further construction of the dam could only proceed after the green light of this expert committee. The majority, however, did not even bother to ensure compliance with the conditions of environmental clearance of the project. Again, the judgment also makes remarks extolling the virtues of development projects like such large dams.

This attitude of the Supreme Court favoring "development" over the rights of oustees or the environment is evident in the manner in which the court has sought to push the mega-project called "Interlinking of rivers." Consider the circumstances. On Independence Day in 2003, a paragraph was added in the then-President Dr. A. P. J. Abdul Kalam's speech to the effect that the problems of floods and drought could perhaps be solved by interlinking the rivers. This paragraph was enough for a lawyer appointed by the Supreme Court as *amicus curiae* (to assist the court) in the Yamuna pollution case to file a short application praying that the court direct the government to take up this project. As if on cue, the bench, headed by the then-Chief Justice B. N. Kripal, issued notices to all the states and to the central government. On the next day of hearing, which was the day before the retirement of the then-Chief Justice, the court passed an order which is now effectively being treated by the government as a direction by the court to undertake this project and complete it within the shortest possible time. The order noted that only the Union of India and the state of Tamil Nadu had filed responses to the notice issued by the court. It stated that the Union of India pointed out that the project would cost Rs. 5,600,000 crores, would take forty-three years to complete, and would need the consent of the states. The state of Tamil Nadu filed an innocuous affidavit, virtually saying nothing. The Supreme Court noted that no other state had filed any affidavit and therefore it could be assumed that none had any objection

38. See *Jayal v. India*, (2004) 9 S.C.C. 362, ¶ 32.

to the implementation of this project! After orally noting that funds could not be any constraint on the government for a project in national interest, the court observed in its order that the project should be completed within ten years! It also went on to advise the government that in case consent was not forthcoming from the states, the government should consider passing legislation to obviate consent of the states for this project.

All this was for a project that would displace hundreds of thousands of persons, cause unprecedented environmental consequences, and require funds equal to the total irrigation budget of the country for the next forty-four years. And this was all without hearing from any interested party, not even the states, without any discussion or debate whatsoever, without completing even feasibility studies, leave aside the question of social, environmental, economic, or optimality assessments!

In *TATA Housing Development Co. v. Goa Foundation*, the Supreme Court again went against the report of its own expert committee in allowing the construction of a housing colony on land that the committee held to be forest land.³⁹ The court held that the committee deviated from its own norms and wrongly classified this land as forestland.⁴⁰ The court also relied on the reports of some other private experts filed by the TATA Housing Development Company.⁴¹ Without entering into an elaborate discussion of the merits of this judgment, it is of interest that such microscopic examination of a report of the Supreme Court's own expert committee has never been done at the insistence of a poor or weak petitioner. For example, the court did not critically examine or interfere with the report and recommendations of the centrally empowered committee appointed by the court regarding fishing by poor local fishermen in the Jambudvip islands even though the court's orders based on the committee's report effectively deprived hundreds of poor fishermen using the Jambudvip islands of their livelihood.

The right to environmental protection has thus been whimsically applied by individual judges according to their own subjective preferences usually without clear principles guiding them about the circumstances in which the Supreme Court could issue a mandamus for environmental protection.

The trend of recent cases, therefore, suggests that: (1) the Supreme Court has often subordinated civil liberties to the per-

39. See *TATA Hous. Dev. Co. v. Goa Found.*, A.I.R. 2003 S.C. 4238, ¶ 18.

40. See *id.* ¶ 16.

41. See *id.* ¶¶ 15-19.

ceived imperative of state security, particularly in the context of the recent "war on terror;" (2) the courts' liberal and expansive pronouncements on socioeconomic rights under Article 21 have not been matched by a determination to implement those rights; (3) the Supreme Court's rhetoric on socioeconomic rights has been weakening since the Indian economy's liberalization; (4) the Supreme Court itself has very often ordered the violation of those rights, violating in the process even the principles of natural justice; (5) the Supreme Court has usually subordinated the socioeconomic rights of the poor to environmental protection whenever those rights come into conflict with each other; and (6) environmental protection is usually subordinated at the altar of what the Supreme Court perceives to be "development" or such powerful vested interests whenever environmental protection comes into conflict with those interests. There are, of course, exceptional judgments that defy these trends, particularly from high courts.

All of the above seriously calls into question the Indian courts' commitment to the rights of the poor and to the constitutional imperative of creating an egalitarian socialist republic. There can be little doubt that the Indian courts have failed to protect the socioeconomic rights of the common people of India who constitute the vast majority of the Indian population. Part of the reason for this lies in the class structure of the Indian judiciary. The higher judiciary in India almost invariably comes from the elite section of the society and has become a self-appointing and self-perpetuating oligarchy. The Indian judges appoint themselves with the help of a remarkably self-serving judgment by which the power of appointment was appropriated from the government by the judiciary. In the absence of any transparency or even any method or system in the manner of appointments, the process lends itself to large-scale arbitrariness and nepotism. No criteria have been established for choosing and selecting judges. The understanding of, or the sensitivity towards the problems and concerns of, the poor is certainly not a consideration in the selection of the judges. On top of this, there is no accountability of the higher judiciary in India. There is no performance audit by which judges are made accountable for their conduct. Even public criticism of judges has often been held to constitute contempt of court. Judges have also virtually insulated themselves from the Right to Information Act. It is, therefore, unsurprising that the common people of India do not regard the judiciary as an institution that offers them the hope of

justice. Many have indeed come to regard it as the last bastion of an entrenched oligarchy that rules the country.

Since this talk was delivered in March of 2009, there have been some signs of a change in the attitude of some courts to the socio-economic rights of the poor. In particular, Justice A.P. Shah, then-Chief Justice of the Delhi High Court, delivered several judgments underlining the importance of these rights in the Indian Constitution. In *Manushi Sangathan v. Government of Delhi and others* (W.P. (Civil) No. 4572/07), a full bench of the Delhi High Court headed by Justice Shah ruled on February 10, 2010, that the planning of the city's roads must take into account the needs of cycle rickshaws that were being progressively outlawed from the roads by the authorities. The court quashed the cap imposed on the number of rickshaws in Delhi, eliminated the rule requiring the owner to be the puller, and stopped the impounding and scrapping of cycle rickshaws. Though this order was challenged by the authorities in the Supreme Court, the court expressly refused to stay the Delhi High Court order.

In *Sudama Singh and others v. Government of Delhi and others* (W.P. (Civil) No. 7317/09), the Delhi High Court on February 11, 2010, directed the authorities to rehabilitate the slum dwellers (even those who were on land slated for roads) by providing them with alternative space in colonies with proper infrastructure prior to their removal.

A Supreme Court bench headed by Justice Aftab Alam has also recently, on July 19, 2010, come down heavily on the compulsory acquisition of the land of poor tribals and farmers for industrial purposes. The Supreme Court has said this is one of the main reasons for the armed tribal revolt, called the Maoist movement, being witnessed in large parts of the country.⁴² On January 5, 2010, a bench of Justice G.S. Singhvi and A.K. Ganguly observed that the courts had tilted in favor of the employers and against the workers in the era of liberalization and globalization, and that this trend needs to be reversed.⁴³

There have been a few other judgments that exemplify this recent trend. Yet, it is still too early to say whether these judgments are just straws in the wind, or the beginning of a process of again giving primacy to the socioeconomic rights of the poor over what the establishment considers "development."

42. See *Mahanadi Coal Fields Limited and Anr. v. Mathias Oram and Ors*, SLP Civil No. 6933/07.

43. See *Harjinder Singh v. Punjab State Warehousing Corp.*, (2010) 1 S.C.R. 591.

