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Abolish Death Penalty

Pushkar Raj

Death penalty debate continues in the country amidst several convicts on death row for several years now. The debate has also assumed political and regional dimensions lately threatening divide and disharmony in society. Given the fact that the practice under debate has no place in a civilised society, the government would do best to abolish the death penalty all together from our statute books.

We are in an advanced stage of civilisation where violence in any form is rejected. As we have climbed ladder of civilisation violence has reduced in world society. Outlawing `legal killing', as the capital punishment would qualify, would be a significant symbolic statement. It might encourage abhorrence of violence in other areas of society too.

A large number of countries have moved towards abolishing capital punishment. While Belarus is the only European country to have the death penalty, USA is the only country to have it in the whole of Americas. At present, about 135 countries have abolished executions as a form of punishment in law and practice. Death penalty has also been omitted from Rome Statute of the International Criminal Court, despite the fact that the Court has jurisdiction over extremely grave crimes; crimes against humanity , genocide and war crimes.

In India the practice of awarding death penalty has been as one former Chief Justices of India put it `arbitrary and capricious.' Amnesty- PUCL research report that studied over 700 death penalty cases (between 1950-2006) before the Supreme Court has found that in over 100 cases people were acquitted by the Supreme Court where at least one of the lower court had sentenced them to death. This means that grave mistakes are being made on the question of life and death of the people and many innocent people are sentenced to death.

In India the judicial error factor is compounded by the reality of shoddy investigations into the cases, tampering or planting of evidence, reliance on oral evidence and lack of use of scientific methods and forensic evidence. At many times the state apparatus does everything to frame innocent people to wriggle out of a major incident which has political fallouts. Recently death sentence handed out to one of the cultural activists in Jharkhand seemingly falls into this category.

Moreover, it is an acknowledged fact that the poor are more likely to be sent to gallows as courts cost large amount of money while free legal aid remains a feeble and handicapped reality. `` For one person to receive

the death sentence, where a similarly placed person does not, in my assessment of values'', said Justice Ackermann in famous South African constitutional judgement outlawing capital punishment, ``is cruel to the person receiving it. To allow a chance, in this way, to determine the life or death of a person, is to reduce the person to a cipher in a sophisticated judicial lottery. This is to treat the sentenced person as inhuman.''

It is important to note that the government has not instituted any study on the death penalty for decades in the country. Last study was done by the Law Commission in 1967 recommending its retention. The Supreme Court upholding its constitutional validity in (Bachan singh vs. state of Punjab, 1980) opined that it falls in the domain of legislature to abolish it. In the raging debate even steady silence of the NHRC is inexplicable.

Meanwhile people on the death row continue to hang between life and death for years as their mercy petitions stand in queue to be disposed off. Such wait is what Dostoevsky called ``an outrage on the soul that's what it is.'' As in the cases of awarding death sentence, the court has also been inconsistent in dealing with petitions of commutation of death sentence into life on the basis of delay. In Vivian Rodrick v. the State of West Bengal in 1971 a five judge bench of the Supreme Court commuted the sentence as the accused had been ``under the fear of sentence of death'' for over six years. However in Balak Ram v. state of UP (1977) the delay of approximately six years since the death sentence was awarded by the trial court, was not considered sufficient for commutation. in Smt Triveniben v. State of Gujarat (1988) the constitutional bench ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the court. But Dhananjay Chatterjee was executed in 2004 after being on death row for over ten years. Question of long delay in disposition of capital punishment cases will again come before the Supreme Court shortly. One hopes the Court sets new standards for respect and dignity of human life and paves way for spreading the culture of preservation of human life than otherwise. ❑

Invite for the Rescheduled Meeting with Representatives of the PUCL and Other Organisations

Repeal the sedition law: Planning strategies to intensify the nationwide campaign on 16th December 2011 (Friday) from 11 am to 4 pm; at Gandhi Peace Foundation, Deen Dayal Upadhayay Marg, Delhi

Dear Colleague,

A Convention organized by *People's Union of Civil Liberties* (PUCL) with participation from Human Rights activists and organizations across the country heard accounts of widespread and systematic misuse of theseditionlaw acrossIndia. The Convention resolved to launch a nation-wide signature campaign to collect at least a million signatures to present it to Parliament demanding the immediate repeal of Sedition Law, i.e., Sec. 124 (A) IPC. It is imperative that we review the progress made so for and formulate future strategies in order to intensify the campaign and build pressure on the Government to repeal the law. For this purpose we would like to invite all of you on **16 December 2011 (Friday) at Gandhi Peace Foundation, 223 Deen Dayal Upadhyaya Marg, New Delhi from 11 AM to 4 PM**. We may consider forming a coordination committee in the meeting with representatives of different organizations so that we can reach a cross section of society and also show our collective strength on this issue.

We hope you will urgently send us a line in acknowledgement so that we can plan the meeting accordingly. Kindly find with this letter "**An appeal to the Parliament to repeal the Sedition Law**", for signature campaign.

Thanking you.

Pushkar Raj, General Secretary ❑

Press Release: 24th October 2011

The Mystery of Disappearances and Discovery of Mass Graves in Kashmir

PUCL and PUDR organised a meeting on 22 Oct, 2011 on "Enforced Disappearances and Discovery of Mass Graves in Kashmir". Speakers included Khurram Parvez of International People's Tribunal on Kashmir (IPTK) and JKCCS, Paramjeet Kaur Khalra of the Khalra Mission from Punjab, and Supreme Court lawyer Nitya Ramakrishnan, and the meeting was presided over by law researcher Usha Ramanatham. Interventions were made by Justice Rajindar Sachar, Vrinda Grover, Pushkar Raj and Gautam Navlakha among others. The purpose of the meeting was to discuss the issues of disappearances, unidentified and mass graves in Kashmir earlier brought to light by the IPTK and recently corroborated by the findings of the Jammu and Kashmir State Human Rights Commission, so as

to decide the lines of intervention that Indian rights groups could follow to take the issues forward. The attempt was to share and learn from the Punjab experience of the mass unidentified cremations discovered by Jaswant Singh Khalra and the subsequent struggle for justice being waged by Paramjeet Kaur and the Mission.

The positive role played by the Kashmir SHRC was acknowledged. It was pointed out that in the Punjab case the role of the NHRC had remained limited to identifying the dead and providing monetary reparation. The circumstances in which the killings and surreptitious disposal of bodies occurred, identifying the political reasons behind these and providing safeguards against future occurrence and punishing the guilty had not been addressed in Punjab. The meeting sounded a cautionary note that the same should not occur in Kashmir. An impassioned plea was made by Paramjeet Kaur of the need to not forget Punjab where justice was still awaited by the families of the victims. The issues emphasised by the speakers were:

1. The need to establish culpability and punish the guilty. In the last two decades no offending security personnel has been prosecuted in Kashmir e.g. prosecution of Major Avtar Singh accused in the Jalil Andrabi case still awaits sanction from the Defence Ministry despite his being declared a proclaimed offender by Interpol. It is a glaring legal lacuna that enforced disappearances are not a crime under Indian law. But the obvious inference to be drawn from killings and surreptitious burials on such a large scale, with the identities of both the killed and the killers being destroyed, is being perpetrated by the state and its agents. It was pointed out that the circumstances following the disappearance and leading up to the killing - i.e. wrongful detention, torture, non-production before a magistrate etc. all are crimes in themselves inviting investigation and prosecution.
2. The identification of the dead by tallying the identities of those reported missing against the bodies identified, or through DNA testing. This is an essential step so as to end the uncertainty of families, allow them to mourn their dead and perform the funeral rites with due love and respect. Usha Ramanatham pointed out the absence of a protocol to be followed for DNA testing given that people were being asked to give their DNA to a state that they did not trust, whose agencies were in fact the accused. Apprehensions were expressed about the misuse of the DNA of family members for purposes other than corroboration of identity, for creating secret databases as had been known to happen in the USA.
3. The assertion of the Indian government and the mainstream media that those buried in the unidentified graves were not civilians but militants and foreign militants, as if this mitigated the enormity of the discovery. It was emphasised that the existence of so many unidentified bodies in unmarked graves itself merited an investigation to establish the circumstances of the deaths and affix responsibility, irrespective of the identities of those buried.
4. The claim that there were no mass graves but only unidentified bodies is patently wrong since mass graves had presence of more than one body in a single cadaver with multiple such cadavers present in a graveyard or burial ground.
5. Reparation -Monetary compensation cannot supplant justice. Moreover reparation should extend beyond monetary compensation to social, emotional and psychological reparation.
6. Speakers reiterated that such enforced disappearances, targeted and mass killings, and secret disposal of bodies by security forces were not limited to Punjab and Kashmir, but also extended to Assam, Nagaland, Manipur, and could possibly be the future of Operation Greenhunt areas if due measures were not taken.
7. It was reiterated that the memory of the dead and the lessons of history not be forgotten. That the work of Jaswant Singh Khalra needs to be taken forward even as we awaken to the grim reality of Kashmir.

The following areas of intervention emerged at the end of the meeting:

i) That investigations be ordered into the enforced disappearances and unidentified graves in Kashmir (and cremations in Punjab), and the guilty punished
ii) That India ratify the UN Convention on Enforced Disappearances to which it is a signatory.
iii) That India stop acting in derogation of the Convention on Enforced Disappearances (to which it is bound as a signatory) by providing complete legal and political impunity to security personnel under laws such as the AFSPA, thus violating various provisions of the Convention such as Article 6 which provides for the responsibility of the superior officer in enforced disappearances.
iv) That the Indian government amend the Prevention of Torture Bill of 2010, in keeping with the recommendations of the Rajya Sabha's Select Committee e.g.

regarding time bound sanction by the government for prosecuting govt officials together with reasons for refusal of sanction, and in keeping with the articles of the UN Convention on Torture to which too India is a signatory.

v) That we work in cooperation with the group/s in Kashmir who are engaged in this process before the SHRC in order that the ongoing SHRC process itself is strengthened.

Paramjeet Singh, Harish Dhawan, Secretaries PUDR ❑

Kashmir, Ultra Nationalists and Path to Peaceful Solution

Ram Puniyani

The condemnable attack on Supreme Court Lawyer and 'team Anna' member Prashant Bhushan on 12th October 2011, threw up many a questions. To begin with the attackers were congratulated by 'ultra Nationalists' like Bal Thackeray of Shiv Sena, showing the gross intolerance around certain issues in our society, more particularly those related to Kashmir and other issues being raised by those who have been practicing the sectarian politics. It does reflect the growing intolerance in the society without doubt.

This attack took place in the aftermath of the statement of Prashant Bhushan regarding his opinion that the option of referendum as suggested by UN way back can be the way to solve the Kashmir problem. In the aftermath of this dastardly attack on him the cracks also surfaced in team Anna and most of the members of the team disowned his opinion to the extent that the move to expel Bhushan from team Anna has came up. Anna Hazare, displaying his 'mastery' on Nationalism and History asserted that Kashmir is an inseparable part of India from times immemorial. Some of those asserting 'Kashmir as an inseparable part of India' also resorted to saying that Bhushan should be treated as anti National as his opinion violated the position of Indian Constitution.

Historically and constitutionally the things are not as straightforward about Kashmir. One knows that Kashmir was acceded to India after Pakistan's army dressed as tribal invaded Kashmir. Kashimiri people did not want to merge with Pakistan. This attitude of Kashmiri people was reflected in the opinion of National Conference led by Sheikh Abdullah. It was at this juncture that Maharaja Hari Singh, the King of Kashmir, signed the treaty of accession with India. This treaty was subject to ratification by the people of Kashmir, for which as suggested later by UN; a referendum was to be held. So, the first point should be straight and clear that 'Kashmir has been part of India from all the times', is not true. It acceded with India in 1948. The treaty of accession gave a total autonomy to Kashmir, barring the issues related to defense, communication, external affairs and currency.

The problem began with the demand by communal forces in India, as articulated prominently by Shyama Prasad Mukherjee of Hindu Mahasabha, to forcibly merge Kashmir into India and make it like any other state. The impact of communal forces around this time was also witnessed in the form of murder of the Father of the Nation, Mahatma Gandhi. This continuous pressure from communal forces affected the attitude of the Indian Government. The Government gradually went on withdrawing the autonomy clauses, and kept on tampering with the process of elections in the state. This resulted in the process of alienation of the people of Kashmir. Sheikh Abdullah who was uncomfortable with the moves of the Government of India, tried to rethink his decision about accession to India, but he was soon imprisoned and languished in jail for 17 long years.

The alienated youth of Kashmir were assisted by the Pakistani establishment, which had its own vested interests. Pakistan was totally backed up by the United States, which pursued the policy of encouraging turmoil in the area, leading to the violence. US has so far been using Pakistan as its proxy in the region to dominate the oil rich area. This process got worsened with the entry of Al Qaeda and its clones in Kashmir in the decades of 1980s. Entry of Al Qaeda communalized the situation and undermined the spirit of Kashmiriyat, the major culture of Kashmir. Kashmiriyat is a synthesis of teachings of Buddha, Vedanta and the Sufi tradition of Islam. When militancy in Kashmir reached its peak, one of the tragic outcomes of this was mass exodus of Kashmiri Pundits. A large number of Muslim families as well also had to leave the valley.

Mostly the ruling party or coalitions at the Center tried to influence and rig the elections in Kashmir, undermining the democratic process for quite long. The Indian Government faced the situation by sending more and more armed forces in the valley and today there is a huge presence of military in the area. The presence of military has affected the civilian life to a great extent, due to which Kashmiris have been living in an intensely intimidating atmosphere. Military has committed large number of excesses in the area. Today the people of Kashmir are the victims of the local militancy, Al Qaeda-Pakistan promoted terrorism and the high-handed actions of the Indian army. The perception of the Kashmiris has also been shaped by this phenomenon. A discomforting mix! It is due to all this that the dissatisfaction of the people gets manifested in the 'stone throwing' incidents by the youth and actions like that.

In this context various 'solutions'

have been presented to ease out the situation. While the separatists want Azadi, The People's Democratic Party (PDP) of Mahbooba Mufti wants 'self-rule' and the National Conference (Farooq Abdulla) wants the autonomy to be restored in the valley. The solution of referendum has been one of the major demands all through. Today six decades down the line it is doubtful if this can be a realistic solution at all as Pakistan has also been playing its own games in the Pakistan occupied Kashmir, euphemistically called Azad Kashmir, where there is hardly any Azadi in the true sense of the word. The demand for referendum was surely a need in the decade of 1950s, as it was committed while signing the accession treaty. The commitment was that the accession would have to be ratified by the opinion of the Kashmiri people. Today, decades later, the social and political situations have so much changed that we will have to reconcile only to strengthening of the democratic process in Kashmir with its existing LOC to begin with. Referendum is neither realistic nor possible today.

It is in this context that the effort of the Government of India to appoint three interlocutors in the area has to be seen. In the report of the interlocutors, emphases is on the socio economic problems of the region, skirting the political issues involved. It correctly focuses on the need for employment generation schemes, education and other measures, which are the need of the state. While Bhushan's stand about plebiscite may be a bit of an over kill, still it has been the aspiration of many a Kashmiri group. The situation is to be viewed today in the context of the changing global equation between US-Pakistan, the evolution of democratic process in Kashmir and the perpetuation of the causes of genesis of the militancy in Kashmir. The major cause of militancy-alienation has been the attempt to forcibly merge the state with India, by demanding the abolition of Article 370 of the Indian Constitution. This incidentally has been a major demand of the communal forces in the country.

The likes of Hazare and Thackeray's have forgotten the recent history of the nation, if at all they knew it, and are blinded by their version of nationalism. The need is to ensure that the issue is seen in the proper historical and Constitutional context with the aim to ease the sufferings of the Kashmiri people. ❑

Sidney Pinto Is No More

Mr. Sidney Pinto died peacefully on October 25, 2011 at around 7.30 a.m. in a Mumbai hospital. He was our long-term colleague and Treasurer, National PUCL till October 2009 when he expressed his inability to continue as Treasurer due to ill health. The whole PUCL family pays its respects to him and convey their heartfelt condolences to the bereaved family and friends. - **General Secretary, PUCL**

Food Security Bill can't ensure Freedom from Hunger

A round table conference organized by the Andhra Pradesh unit of the People's Union for Civil Liberties (PUCL) in Hyderabad, in association with Association for Promoting Social Action (APSA), on October 9th, 2011, felt that the Food Security Bill 2011, proposed by the UPA Government is a hotchpotch and the Right to Food as a fundamental right cannot be ensured by a series of mere intentions. It stated that the Freedom from Hunger can't be ensured through a Bill like this, particularly that of the poor and more particularly, the rural poor.

Several speakers who participated in the meeting felt that this Bill is like dropping a coin in the Bay of Bengal and searching for it in the Indian Ocean. Several fundamental needs like water, sanitation, power are as much essential as mere food and without them the food security could turn out an insecure and half measure.

The meeting suggested that every State must have its own Bill for properly realizing the objectives of the Bill as the Center cannot expect homogeneity in the implementation of the provisions relating to the States with several diversities in size and distribution of the poor.

Participating as Chief Guest former secretary to Prime Minister and also formerly Special rapporteur to National Human Rights Commission K R Venugopal said that the World Food Summit (13-17 November 1996) defined FOOD SECURITY as: "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."

Although India could distance famines, he said it could not stall starvation deaths. Its lead in paddy and wheat production would seem to be at the cost of production in millets and other coarse cereals and pulses and oil seeds. Both calories and proteins remained below the recommended dietary levels. The country acquired the dubious distinction of housing 300 million poor; by whatever definition one defines the poor.

He suggested that there has been a multiplicity of schemes that targeted such poor only to ensure that they remain at that level for granting political largesse through bureaucratic extravaganza. It is this contextual frame that would make us to look at the contents of the Draft of the Food Security Bill 2011 to offer

our comments. According to him, nutritional security is the whole while food security is a part of that, and therefore the law that is being contemplated should really be a food-cum-nutrition security law rather than a mere food security law. The proposed law should integrate the two concerns of food security and nutrition security through comprehensively embracing certain vital ingredients of both, which would guarantee this.

He said it is also worth noting at the outset that an important strategy for defending and expanding the rights of the poor in any scheme that seeks to guarantee a particular right is to fine-tune it to the other related schemes in a manner that all related schemes pull together all the rights that govern all the participants in such schemes. Such a synergy will guarantee all rights essential to the poor, each right reinforcing the other. Food and Nutrition security is no exception to such a synergy. The law should specifically refer to all the food and nutrition-related schemes as also schemes where the potential exists for the use of essential commodities (like in the MGNREGA) together and examine how much a poor household would access through all these programmes through biologically integrating them at the delivery level. Complementarities of the existing programmes require recognition and integration.

He said it is essential to change the provision in the NREGA in regard to this basic issue from guaranteeing just 100 days of employment to the entire household to guaranteeing 100 days of employment to every adult in a household. While on this, a point has been made out that the second most important objective of MNREGA, provision of livelihood opportunities has been almost forgotten. It is important to realize that people should be earning while contributing to production and not just for attendance. The skewed nature of MNREGA as voiced in the farm sector created serious imbalances in terms of availability of labour at the time when farmers require labour. Even the small and marginal farmers are now shifting to technology and such shift would also have long-term implications to soil fertility. The deeper the plough the larger would be the deprivation of soil fertility.

Former Rajya Sabha Member S Ramachandra Reddy felt that the Bill is politically motivated and seems to be targeting the gullible electorate. During the last elections, right to information and right to work have found their expression in legislation. This time around, the right to food is taking the shape of a grandiose Bill that is finally unimplementable.

He felt that the bill was formulated without considering the need to check irregularities in the public distribution system and ICDC projects.

Renowned environmental activist Dr S Jeevananda Reddy felt that this bill was brought in haste by bringing existing provisions under various ministries under one super regulatory body. He lamented that the bill is not reflecting the prime objective of ensuring food and nutrition security. Instead of proposing to provide general food items in uniformity, he felt it would be better if locally available food items were identified

"The basic principle of the bill is to divide the people", he observed. Dr Reddy said the bill failed to provide definition of Below Poverty Line. Without formulating a uniform procedure to identify the poor and leaving it to the discretion of the state government, he cautioned, would be problematic. He suggested that ration cards may be given in the name of elder women member of a family.

Prof Rama Melkote, Special Rapporteur to the Supreme Court on Food Security, said that one has to guarantee every Indian `freedom from hunger'. Stressing the need for decentralized approach, she suggested formulation of similar bills on food security by every state, as a single national enactment may not serve the purpose. She said hunger and poverty are closely related.

R Brahmanisree, faculty member of St. Ann's College, said that the bill is proposing so many tasks without a focus. She suggested that women empowerment should be the basis for it.

Dr B Yerram Raju, AP Govt. Expert Panel member on Cooperative reforms, presiding over the meet, suggested the need to encourage pulses cultivation and also include livelihood components in MGNREGS.

S Srinivas Reddy, Director, APSA, Mrs. Jaya Vindhyala, President and Ch. Narendra, Vice President, PUCL-AP; S Jhansi Laxmi Bai, DEWCL; Dr L Reddappa, CSD; M Mustafa and Ms Qadur Unnisa, IHRA; Dr V Vijaya Swarthy, Editor, Jagriti; C Rajeswari, Sannihitha; P Ravi Babu, JNTU; D Prakash, M V Foundation; Ms Sajnya, Sneha and others participated.

*Reported by **Ch. Narendra,** Vice President, PUCL-AP* ❑

Citizens' Statement on Koodankulam

We are shocked and disturbed by the recent spate of misinformation campaign launched by the nuclear establishment regarding the Koodankulam nuclear power plant. Even as the Expert Committee, appointed by the Prime Minister recently as a result of consistent struggle by the local people, springs into action and takes into account the views of activists and the Tamil Nadu government, the AEC and the NPCIL have gone on a media offensive claiming the protests are triggered by foreign elements. While this is an affront to the protesting people's integrity and knowledge and agency, it is also a clear attempt to undermine the ongoing consultation process. This is entirely unacceptable.

The AEC Chairman has also tried to undermine the very rationale of the consultation process by claiming that the Koodankulam reactor cannot be shut down. Independent experts have questioned the validity of such pronouncement and have underlined that a 'hot run' of the power plant does not involve any irreversible radioactive process. The PMO's press release last month also assured the activists that no radioactive process has been started in Koodankulam.

There have been precedents, like Shoreham in the US, where nuclear reactors have been shut down due to public disapproval.

We urge the government to go ahead with a transparent and democratic review of the Koodankulam nuclear power project. We also urge the nuclear establishment to desist from scuttling such process by going to media with misleading and irrelevant claims.

Signatures (in alphabetical order): **Aniket Alam** (EPW); **Arati Chokshi**, PUCL Bangalore; **Asit Das** (Activist and Researcher, New Delhi); **Dilip Mandal** (Writer and Columnist, New Delhi); **Dhirendra Sharma** (Centre for Science Policy, Dehradun); **Dunu Roy** (Hazard Centre, New Delhi); **Faisal Khan** (NAPM, Asha Pariwar); **Rohini Hensman** (Writer and activist, Bombay.); **Harsh Kapoor** (SACW.net); **Pradeep Indulkar** (Konkan Bachao Samiti); **Prakash Louis** (Patna, Bihar); **P K Sundaram**, (DiaNuke.org); **Pushkar Raj** (General Secretary, PUCL); **Soumya Dutta** (BGVS); **Sukla Sen** (CNDP) ❑

India does not need nuclear energy: Top scientist

Kumar Chellappan

One of the pioneer nuclear scientists in the country says that India can very well suspend its entire nuclear programme. "It is true that we have spent thousands of crores of rupees to set up nuclear power plants. But we will be forced to spend thousand times more than that in the eventuality of a nuclear disaster," said Dr MP Parameswaran, former scientist of the Atomic Energy Commission.

Referring to the agitation by the People's Movement Against Nuclear Energy demanding the closure of the Kudankulam Nuclear Power Plant, Dr Parameswaran, India's first PhD in nuclear science, said the country is not that hard-pressed for nuclear power.

"Of the 750,000 MW power projected for 2030, fossil fuels will account for 400,000 MW. A ten per cent increase in this can offset the shortage produced by the suspension of the nuclear energy programme. We have all the expertise and production capacity to do this," he said.

According to this scientist, nuclear energy will become viable only with the development of a foolproof mechanism for radioactive waste disposal and radiation damage.

"What they should do is to redesign the reactors at Kudankulam so that they could be operated either with coal or natural gas. Yes, there are costs involved in it. But the real cost of continuing with the nuclear programme is much higher," he said.

Dr Parameswaran, much senior to Dr Sreekumar Banerjee, the Chairman of the Atomic Energy Commission, took strong exception to the latter's comment that a nuclear power plant is not a car factory where you can switch off the system.

"That is exactly the problem. You cannot switch off the system and close gates for decades and even centuries after the plant has stopped generating energy. There are several reactors in USA and France, which produce no more power but cannot be switched off. These reactors require most of the system like cooling, radiation monitoring security and so on to keep working," he said.

The nuclear science veteran pointed out that the Fukushima disaster was caused not by the working reactor but by the spent fuel tank. He also refuted the claims of the AEC Chairman that the country's scientists have all answers on radiation, safety and other aspects.

"Has the issue of final disposal of radio active waste been solved? Has the possibility of nuclear accidents either due to human, mechanical or natural causes been totally prevented? The answer is 'No'," he said.

Dr Parameswaran asked the AEC Chairman to convincingly clarify the reason behind the pressure exerted on India by the Nuclear Suppliers' Group to sign the non-liability accord.

"If the nuclear reactors are so safe, why are they forcing India to sign this treaty? The manufacturers themselves are not convinced about the durability and safety of the reactors," he said.

He pointed out that the agitation against the KNPP was there from the beginning itself. "It became intensive after Fukushima. The NPCIL should not have gone for hot run at all once the opposition flared up. They thought that the opposition could be steamrolled," said Dr Parameswaran. ❑

Freedom of Press and Justice Katju

Justice Markandey Katju is making a very relevant point about the behaviour of media. The media has been taking more interest in trivial issues that entertain the elite like the Formula 1 race or trivia about Bollywood personalities. It has by and large ignored serious issues like conflicts, adverse impact of globalization on the large sections of Indian people, corporate greed and corruption, etc. If Media is non-entertaining, it is covering issues that catch the fancy of Middle-class like the disproportionate coverage given to Anna Hazare Movement for days without end as if there were

no other issues concerning the people of India.

With the menace of paid news, ordinary readers are not able to make any difference between news and advertisements and readers gulp down the disinformation of an advertisement planted by motivated and interested parties as if it is news and independent opinion or carefully verified facts that are being reported. Thus corporate elements, powerful institutions and rich personalities claim a largely disproportionate space within media leaving no or little space for human interest stories and information about health issues, education, extent of and causes of poverty. Even in such stories, the perspective is largely uppercaste, upperclass north Indian Male perspective masquerading as patriotism and nationalism.

Their coverage of conflicts is not free from bias; in fact it strengthens biases and prejudices against the minorities, dalits and women. Media's role in fanning communal conflicts has been criticized by a number of Inquiry Commissions.

The Editors and publishers of the media are ganging up against Justice Katju in the name of freedom of press to guard their financial interests and defend their misdemeanors.

Justice Katju needs to be supported on his bold stand. Let us all stand up for him and support him to clean the mess within media even while supporting freedom of press.

Irfan Engineer, Director, Institute for Peace Studies and Conflict Resolution, Mumbai ❑

Press Note: 04/11/2011

On the eve of 11th Year of Irome Sharmila's Fast M.S.D., P.U.C.L. and Lok Andolan Gujarat Organise Candle Light Vigil Demand Repeal of AFSPA and Release of Irome Sharmila

All know about Irome Sharmila's undeterred fast since 5th November - 2000 till today to protest enactment of Armed Forces Special Power Act (AFSPA) in Manipur and its Misuse by the army, causing misery and sufferings in the life of common people. Her fast will enter 11th Year on this 5th November. On the eve of it, citizens of Gujarat participated in candle light vigil organized jointly by Movement for Secular Democracy (M.S.D.), People's Union for Civil Liberties (PUCL) and Lok Andolan Gujarat, at Narmad-Meghani Library, Mithakhali, Ahmedabad on 3rd November. Among the well-known personalities who participated were Prakash N. Shah, Ilaben Pathak, Dwarikanath Rath, Gautam Thakar among others.

A "Save Sharmila Solidarity Campaign" Jan Karvan was organized last month from Kashmir to Imphal to support Irome Sharmila's cause, awardee of two peace prizes, a poet and a determined fighter against AFSPA. Among the participants in this Jan Karvan, in its last phase, were Ilaben Pathak and Meenakshi Joshi from Gujarat. They shared their experiences and condition of Manipur as they witnessed during this visit, in the meeting of M.S.D.

- Gautam Thaker, General Secretary, PUCL Gujarat; **Dwarikanath Rath,** Lok Andolan, Gujarat ❑

Joint Statement in Solidarity of Anti-Posco Struggle, Odisha

News reports say that the Orissa government is once again planning an assault on the proposed POSCO project area. Apparently at least 14 platoons of police will attempt to attack the coastal side of the villages. This comes after the people of Dhinkia and Gobindpur heroically resisted police attacks for more than two months in the heat of summer, drawing the attention of the entire country. It also comes in the wake of a grossly illegal clearance to the project from the Environment Ministry, in direct violation of the Forest Rights Act, despite two of the Ministry's own enquiry committees finding that the grant of clearance would be a crime. Moreover, the Centre itself now claims that projects of this kind will be subject, under its proposed new law, to the consent of 80% of the local community. Despite all this, the Orissa government is relaunching its criminal offensive, and the Centre as usual is doing nothing to stop it or to uphold the law. The sheer absurdity and injustice of the upcoming attack is further shown by the fact that, for more than a year, POSCO and the Orissa government have not even been able to renew their MoU on the project. When there is no agreement on what the project should be, what is the need to attack people and grab their land?

We condemn the imminent criminal attack on the peaceful people of the POSCO project area. We stand with them in their struggle against this destructive, unjust and illegal project.

Prof Manoranjan Mohanty, POSCO Pratirodh Solidarity Delhi; **Ajit Jha**, Samajwadi Janaparishad; Prafulla Samantra, NAPM; **Vijay Pratap**, Socialist Front; **Shankar Gopal Krishnan**, Campaign for Survival and Dignity; **Kiran Shaheen**, Media Action Group Delhi; **Mamta Das**, POSCO Pratirodh Solidarity Delhi; **Subrat Sahu** POSCO Pratirodh Solidarity Delhi; **Asit Das** POSCO Pratirodh Solidarity Delhi; **Bhanumati** POSCO Pratirodh Solidarity Delhi; **Faisal Khan** NAPM, Delhi; **Amit Chakravarty** Research Scholar JNU; **Nayan Jyoti** Krantikari Naujawan Sabha, Delhi; **Subhasini Shreeya** Krantikari Naujawan Sabha, Delhi; **Arya Thomas** Research Scholar JNU; **Prakash Kumar Ray** Editor bargad.org; **Rajnikant Mudgal**, Socialist Front Delhi ❑

Why Must the AFSPA be Withdrawn

Sankara Narayanan

The Army as well as the Defence ministry has opposed Omar Abdullah's demand for the withdrawal of the Armed Forces Special Powers Act (AFSPA) from four districts of J&K. The Army chief has stated that it will be impossible for the Army to operate without the cover of the Act, as the force will get bogged down in legal battles. CG's DGP Viswaranjan also grumbled that his SP in Dantewada was always dragged to civil courts upsetting the anti-Naxal operations. AFSPA was enacted in 1958 as a 'short-term measure' to allow deployment of the Army against separatists. It has been enforced in J&K since 1990. Section 6 of the Act gives the armed forces immunity from prosecution and other legal proceedings without 'the consent of the central government'.

Human rights activists and civil society groups contend that the Act has been grossly misused. Human Rights Watch, an internationally recognized NGO, has said, "Abuses facilitated by the AFSPA have led to anger and disillusionment against the Indian State. Justice Jeevan Reddy Committee, which examined the provisions of the Act after ascertaining the views of various stakeholders, observed that the Act should be repealed. It held that the Act "has become an object and instrument of discrimination and high-handedness". The committee also said that while providing protection against civil or criminal proceedings in respect of the acts or deeds done by such forces while carrying out the duties entrusted to them, "it is equally necessary to ensure that where they knowingly abuse or misuse their powers they must be held accountable and must be dealt with the law applicable to them". The Second Administrative Reforms Commission also recommended that the Act should be repealed. In April 2007 a working group in Jammu and Kashmir appointed by the Prime Minister suggested that the Act be revoked. Jeevan Reddy Committee also recommended the creation of grievance cells.

However, the Union cabinet did not act on these recommendations in the face of objections from the armed forces. Since 2002, Sharmila an activist in Manipur has been on hunger-strike demanding repeal of the Act. There have been many cases of disappearance of those picked up without warrants. There are indeed serious human rights violations in the enforcement of the Act but these are often justified as necessary. Omar Abdullah's demand may or may not be politically motivated, but the issue raised by him calls for reflection. The decision regarding withdrawal has to be a political one. Crucial is the stand of the army and the Defence ministry, but the government has to take its own call and if necessary overrule the objections of the army.

In the mean while, hawks in the Indian army must be reminded that India is not a military dictatorship that army officers can belittle an elected Chief Minister publicly. ❑

M.N. Roy Memorial Lecture, delivered on 29th September 2011 at New Delhi: Summary by N.D. Pancholi:

Democratic Transformation: An Impasse?

Prof. Ghanshyam Shah*

Democracy is the political system in which 'people' are the sovereign rulers. In India, during the anti-colonial movement the notion of democracy got articulated to original notion of democracy - the rule of all the people rather than of the Western liberal notion of rule of the propertied class or Marxist notion of rule by the proletariats. Democracy is not the rule of and by the people, but also for the people -their well-being and happiness. It is both ends and means to build society based on the principles of liberty, equality and fraternity. After Independence, India accepted co-existence of democratic system with growing modern market economy. In the process the tension between the two has continued with incremental democratization of society. With the neo-liberal idea of 'end of ideology' further expansion of democratization has been vitiated.

The 'spirit' in which the Constitution was drafted was to bring 'social revolution'. Directive principles of the Constitution reflect these principles. The architects of the Constitution hoped that adult franchise would empower people and they would assert their right for freedom, equality, justice and dignity. It was hoped that the social order envisaged in our Constitution could be built with trial and error, with struggles as well as by deliberations and negotiations among the citizens. For a common person, a notion of democracy is to realise equal rights and to get their basic necessities for one's wellbeing.

On the eve of Independence even industrialists did not advocate for laissez faire economic system. In the Bombay Plan they asked for regulated economy. Socialists and Gandhians were for some kind of socialism, emphasising need for state intervention in economic development. However the conservatives had not openly articulated their idea for nature of future Indian society. Some of them were for Hindu Rashtra based on India's past/ancient imagined glorious culture and traditions. The Congress Party in its first election manifesto rejected laissez-faire policy in industry, advocated co-

operative enterprise. It promised freedom of the masses from exploitation and want; and promised to provide as priority basic material needs of food, clothing and shelter to be followed by the provision for cultural growth. It declared that these objectives would be attained by peaceful and legitimate means. Later in 1956, the Party declared to follow the path of establishing Socialistic pattern of society. It also advocated ceiling on landownership, the formation of 'cooperative joint farming' and 'service society'. Such objectives disarmed the socialists in electoral politics.

As the Congress pronounced it objective to move towards building 'socialistic pattern of society' the business and industrial lobby and feudal interests went into speedy action to counter the move. A section of industrialists who were the authors of the Bombay Plan 1948 then pleaded for the control economy, formed the Forum of Free Enterprise in 1956, and kulkas organised All India Agriculturists Federations in 1958 opposing Congress policy for land reforms and increased priority to public sector. Swatantra Party pleading for laissez faire economic policy came into existence. Press, dominated by business houses gave wide currency to the charge that 'Sino-socialist minded planners'' were plotting for collective Indian agriculture. Feudal, business as well industrial sections rallied around the Swatantra party. Within the Congress the landed gentry that dominated most of the states was indifferent, opposed and sabotaged the government programmes. In this scenario, under USA advice and pressures from within the party, emphasis on technological change gained more importance over structural change in agriculture sector. China's suppression of Tibet revolt and later Chinese offensive on NEFA and Ladakh boarder tarnished Nehru's image. Food crisis added fuel to fire. Nehru with broken heart died in 1964.

His successor Lal Bahdur Shastri 'took exactly the opposite route than one charted by Nehru in the last years of his life'. Dominant landed classes gained control over the party. Later the party split in 1969. Mrs. Indira Gandhi followed populist politics with rhetoric 'garibi hatao'. The government appropriated left platform. Despite her popularity and control over decision making power in the party and the state she had no skill and will to monitor landed and business-industrial interests who had hold over the local party and government machinery. And, she had neither capacity nor keenness to rebuild the party. Though she formulated various programmes to help poor, was unable to translate them in reality. Personalized regime was built by concentrating all power to her-self. This was the end of the internal democracy of the party.

Her government could not meet the rising expectations. Food scarcity and inflation increased hitting hard to average citizens. Economic crisis deepened. Unrest among the people took the form of street protests. The students' movement in Gujarat and JP movement in Bihar provided opportunities to all the non-Congress parties and the forces to rally around against her. She imposed Emergency in 1975 and then lost power in the 1977 elections.

The Janata government though came in power with Jayprakash Narayan's blessings, had no cohesive view for economic development. Ideas like abandoning planning, and apolitical development (divorce between politics and development) were floated. Economic growth stagnated further. With internal squabbles the party lost power. The net beneficiary was the Jan Sangh as it had clarity about its mission and organised committed cadre of RSS. With legitimacy in civil society and political power, the Sangh Patrivar could successfully spread its tentacles in civil society and state structure. In the process socialists disappeared altogether. Their place was taken by a host of caste-ethnicity based political parties. Gandhians were left to themselves as helpless self-styled conscience-keepers, rested with NGOs.

Mrs. Gandhi again came in power in 1980. This was her new avatar. She moved 'rightward' in her economic policy. She adopted the policy of de-control for industries. Her attitude towards IMF was changed. Moreover, communal themes and symbols of Hindu hegemony gained currency in her public speeches. Her successor, Rajiv Gandhi moved further in the policy for liberalisation. And in 1991 the country changed industrial policy and moved to structural changes in its economy without much hue and cry, as it was fait accompli. The rest is the history known to all. In the 1990s and thereafter, all the governments irrespective of the party in centre and the State have followed neo-liberal economic policy. Interestingly, till 1991 the Congress manifesto does not declare its changed economic policy. Only in 1996 and subsequently, the party indicates its changed position, though it continues to use rhetoric to build garib ka raj. Other parties also do not tell in their manifestoes that they would follow neo-liberal policy. The economic reforms have been carried out secretly through manipulative and obfuscatory tactics.

Overwhelming people in 1971 supported Mrs. Gandhi because they had preference for radical values and goals such as the state's control over economy, ceiling on land and property. Similarly the 2004 election study shows that overwhelming number of the voters was in favour of 'ceiling on land and property'. Majority were also against privatisation of public sectors, down sized of government employees and unrestricted investment by the foreign companies. Contrary to general belief, proportion against the 'reform' policy is very high among the educated. In the 2009 NES study, nearly two-third voters opined that the government should run basic services: health, education, water, electricity and public transport.

'Development' has become a buzz word without contestation in the mainstream political discourse. What

is now talked is about 'management', now euphemistically called 'good governance'. The parties get engaged in abusing and finding fault with each other without confessing their own blunders and conscious deliberation to rejuvenate the system. People do not get hope that the parties would improve and become more responsible and moral bound than the past. Parties do not have internal democracy to deliberate on the critical issues. Manipulative politics loom large. To manage their organisations and fight elections they depend on corporate sectors, businessmen, builders, contractors and also underground world. The Election Commission estimated that on an average a candidate of the major parties had spent Rs. 10 cores in 2009 elections. This is beyond a reach of an average politically conscious citizen or an ideologically committed political group to contest and win any election. Family ties and/or one's capability to be closer to muscle power has greater chance to rise in the political ladder. More often than not, political representatives at all levels function as fixers and brokers, rather than policy makers.

The political parties and elected representatives enjoy the lowest trust of the people. The recent anti-corruption agitation by Anna Hazare bears out this.

However, the functioning of democratic system during the last six decade has brought certain positive transformation in our traditionally hierarchical society. Brahminical framework of social order has been de-legitimised. Rule of law, equal citizenship, social and economic equality have been codified in legal system and are accepted moral principles to be maintained and attained. In the process, political positions have no longer remained the sole prerogative of upper castes. A tiny segment from the lowest social strata, dalits and tribals has also emerged as political elite. Similarly women though in a microscopic minority in number have also begun to share political power and assert their rights. With this, a circle of political elite has been somewhat enlarged. But at the same time religious minority communities have been marginalised. One of the most striking positive contributions of the system is that have-nots have begun to assert for justice, rights and dignity. They participate in electoral processes in large number to express their needs and expectations. They frequently replace one set of political leaders and parties and elect the others with a hope that the alternative would be better to serve their interests. The system has provided a space for dissent and that space is a hope for further transformation.

A few handful number of people and groups - do get some crumbs. Such mechanism perpetuates hopes among the deprived that one day all will get share in benefits and improve their lots. Nonetheless they still do see hope in the system for their betterment.

Institutional mechanism has developed to maintain checks on each other's power. Federal structure and Panchayati raj have moderated concentration of power with the Union government. With the spread of literacy and education, mass communication system in non-government spheres provides democratic space for deliberation and dissent.

At the same time, institutional ethos and mechanism are increasing getting eroded for personal power and interests. Democracy has become a game of few who have or could manipulate muscle and money power to perpetuate their personal interests. For their power they ignore and break all norms of democracy. Criminalisation has increased unabated in politics. The present Westminster model of democracy has been manipulated to perpetuate dominance of the propertied classes. The State has almost abdicated its responsibility towards building egalitarian society. With its blatant neoliberal policy with crony capitalists, it seems whatever changes that the present system could bring for social transformation have reached to plateau and now it moves towards diminishing return. As a result despite high economic growth unrest in society is mounting. Political leaders are now unable to handle contradictions of neo-liberal trajectory.

The present economic growth is jobless. The workers, except less than six per cent are in unorganised sector with no social security. Despite high GDP, only 40 per cent of the population enjoys basic amenities. IMR as well as MMR have almost stagnated in the last decade. The nutrition level and calorie intake of the poor have declined. Despite a surplus of 65 million tons food grains, some 320 million people go to bed hungry every night. Literacy rate as well as school enrolment have improved but only a small number could get quality education to improve their life chances. In fact the education system reinforces inequality. Discrimination based on caste, gender, religion and region continue to persist.

Ironically democratic system has been used to perpetuate the power of few to decide the destiny of all. The system has been reduced to electoral engineering that works as a safety valve for vast majority of people to ventilate their grievances and reinforce their faith that something better would be done to them by replacing one set of representatives by another. Majority of the people feels helpless as they have no other way but to put faith in the system as a fait accompli.

What we experience in the last five decades is the silent bourgeois revolution, to put it other way the propertied class has hijacked the system for their prosperity and power. Elsewhere and in India, the champions for neo-liberal policy have followed three strategies in carrying out their agenda - 'obfuscation', 'compensation', and 'divide and rule'. The present day democratic system is at the best, degenerated liberal bourgeois democracy and at worse, a façade

of democracy to perpetuate capitalist economy and dominance of the propertied classes. It is the system of the few and for the propertied class ironically in the name of the people. Despite genuine (?) concern for the inclusive growth, neo-liberal economy in its very logic-in which private profit is the guiding force - and the way it is functioning bound to exclude large sections of society. And it is more so when the world capitalism is under siege.

Prof. Ghanshyam Shah, National fellow, Indian Institute of Advanced Study, Shimla ❑

PUCL Kerala:

State in Emergency-like Situation

The People's Union for Civil Liberties has alleged that the state is facing an Emergency-type situation with police officials getting ruthless with the public in the name of investigation and law enforcement.

"Some recent incidents are pointing to this fact," social activist K Venu said and added: "We believe it is the hidden policy of the state government to suppress anybody who differs from its political ideology".

PA Pouran, General Secretary PUCL Kerala cited the example of Valappad native PA Shaina as a case in point. "Just because she had certain political convictions, she was branded a Maoist and her family is now suffering. Even her mother and two children are being harassed by the police," he added.

Adv. P Chandrasekharan, President PUCL Kerala said that the Valapad police arrested even social activists taking out a peaceful procession in support of Shaina. A total of 35 persons were arrested and later released on bail.

Social activist TK Vasu said that the National Investigation Agency that was set up after the terrorist attacks in Mumbai, "is trying to usurp the powers of all other investigating agencies. Extra vigilance is one thing but to crack down on peace-loving citizens is quite another."

The PUCL will organise a convention for highlighting the recent human rights violations at Valappad, its organizers said. ❑

5th Tarkunde Memorial Lecture, GPF, Delhi on 10th Nov. 2011, organized by the *Tarkunde Memorial Foundation and PUCL:*

An Independent Judiciary

Justice Ruma Pal

The usual platitudes are inadequate to describe the honour conferred on me today by asking me to deliver a talk in memory of such an outstanding and multi-faceted personality as Justice V.M. Tarkunde. Unfortunately I never knew him personally but by all accounts his life reflected his deep commitment to ethical values: a commitment which he brought into every role he played in his life including those of a judge and a lawyer. In keeping with his strong principles, in 1981 he fought for the independence of the judiciary (as a petitioner before the Supreme Court[1] on behalf of 3 Additional Judges of the Delhi High Court. Incidentally one of those judges, Justice S.B. Wad, was my professor when I read for a law degree at Nagpur. This however is not the reason for my choosing to speak on an Independent Judiciary and what it means today. I chose the topic for several reasons: the issue is one which was close to Mr. Tarkunde's heart, it is of topical interest and it is also a subject which has bothered me greatly both during my career as a lawyer and as a judge. So I welcome this opportunity to speak my mind on the subject from the safe haven of retirement.

Independence

In writing of India's chances of ascending the international rankings in the coming years, Edward Luce in his book '**In spite of the Gods**' says: *"India also possesses institutional advantages that have convinced some people that the Indian tortoise will eventually overtake the Chinese hare. As India's economy develops, these 'soft' advantages, such as an independent judiciary and a free media, are likely to generate ever-greater returns*[2].

But is the judiciary in India really independent? A complete answer to the question warrants a doctoral thesis and a short discourse like of today is necessarily selective and therefore incomplete. I have tried to maintain a balance between legalistic and lay approaches while making it clear which side of the fence I stand.

Any attempt at an answer must be prefaced with two questions both of which I seek to briefly answer: The first question is: Who do we include within the term "judiciary"? Is it limited to Constitutional Courts or does it also include those tribunals which decide rights and have the trappings of a court? Second: What does 'independent' mean? I will answer the second question first.

Different dictionaries have given as many as 12 different meanings to the word 'independent'. Of the twelve I have chosen three-'Freedom from outside control'; 'Not influenced or affected by others; 'impartial' and 'capable' of thinking or acting for oneself. Independence in all these senses must be complete, unimpaired and uncorrupted and that means first-that independence is antithetical to corruption and second-that it is ensured by accountability. The Chief Justice of India has recently spoken of "institutional integrity"[3] and he drew

a distinction between personal and institutional integrity. I would like to borrow that phrase and draw a distinction between the institutional independence of the judiciary and the independence of a judge.

Institutional Independence

The independence of the judiciary which, to use the language of the Supreme Court, the Constitution so 'copiously' protects[4], is institutional independence with institutional immunity, insulation and autonomy [primarily from the Executive] guaranteed under the Constitution[5]. It is a facet of the separation of powers which underlies the Constitution and is a part of its basic structure[6]. To ensure freedom from Executive and Legislative control, the pay and pension due to judges in the superior courts are charged on the Consolidated Funds of the States in the case of High Court judges[7] and the Consolidated Fund of India in the case of Supreme Court judges[8] and are not subject to the vote of the Legislative Assembly[9] in the case of the former or Parliament in the latter case[10]. Salaries are specified in the Second Schedule to the Constitution and cannot be varied without an amendment of the Constitution. No discussion can take place in the legislature of a State with respect to the conduct of any Judge of a High Court in the discharge of his duties[11]. Nevertheless the Constitution apparently allowed a serious inroad into this freedom by virtually giving the Executive the final say in the appointment[12], transfer[13] and promotion of a judge as the Chief Justice of a State High Court or as the Chief Justice of India. All that is required of the Executive is to exercise the power in consultation with the Chief Justice and such judges of the Supreme Court or High Courts as the President thinks necessary. In practice the opinion of the Chief Justice of India on the suitability for appointment was given weight but not finality. Political considerations would on occasion trump merit. For the first 25 years after Independence apart from some aberrations the Executive left the judiciary alone in the matter of appointments to the judiciary. Again although there is no Constitutional provision prescribing the mode of appointment of the Chief Justice either of a High Court or of the Supreme Court there was a convention that the senior most would become the Chief Justice. This state of affairs continued till the seventies when the Executive began a sustained campaign to weaken the judiciary because judgments delivered by the judges did not suit the party then in power at the Centre and because of the growing perception of the Executive that the Judiciary was an 'impediment' to its political functioning.

It has been said of Britain by a British Judge that "the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it"[14]. The same could be said of the Indian Judiciary. The first assault as far as the Supreme Court was concerned, was the supersession of senior judges and the 'rewarding' of the dissenter with the high office of the Chief Justice of India. The superseded judges resigned in protest. In 1975 Emergency was declared when the powers of judicial review were severely curtailed. In 1976, 16 High Court judges were transferred to other High Courts by the Executive ostensibly with a view to strengthening national integration. The reason was rejected by the Supreme Court saying: "*It is indeed strange that the Government of India should have selected for transfer, by and large, those High Court Judges who had decided cases against the Government during the emergency*"[15]. In 1977 the Executive again used the 'punishment' of supersession to bypass the then senior-most judge in the Supreme Court, Justice H.R. Khanna, a politically 'inconvenient' judge, for appointment as the Chief Justice of India. Justice Khanna resigned.

The year 1976 also saw the Executive deliver what they must have perceived as the *coup de grace* against a stubbornly independent judiciary, by the enactment of the 42nd Constitutional Amendment which introduced Articles 323-A and 323-B. Article 323-A authorizes Parliament and Article 323-B the State Legislatures to create tribunals to which the power of adjudication of disputes on various subjects can be transferred while excluding the jurisdiction of the courts in respect of those Subjects. The power of adjudication so transferred included the power of judicial review which allows judges of the higher courts to determine the legality of executive action and the validity of legislation passed by the legislature. These two Articles were intended to allow and in fact did allow the Executive to take over the powers of adjudication from the courts because an independent judiciary was perceived as a thorn in the flesh of political parties in power. Both Parliament and several States have been prompt in enacting legislation setting up Tribunals manned by members of the Executive to deal with a variety of subjects normally within the jurisdiction of the High Courts. Incidentally before the Amendment was carried out Justice Tarkunde formed the People's Union for Civil Liberties to stem the political onslaughts on the judiciary and 'to strive for the restoration and strengthening of civil liberties and democratic rights' which the 42nd Amendment sought to affect[16]. Unfortunately like King Canute he was not successful in stopping the political tide then. Fortunes changed after there was a change in government and the Emergency was lifted. Many of the changes brought about by the 42nd Constitutional Amendment including the restrictions on the jurisdictions of the judiciary were done away with. However Articles 323A and B were retained. With a second change of Government coercive steps to curb the judiciary were again resorted to in the matter of the transfer of newly appointed judges[17].

Small wonder then that after this, a battered judiciary (after an initial regrettable hiccup in the form of the decision in *S.P. Gupta*'s case[18]) picked itself up and with all the interpretative tools at its command -termed by many as an unacceptable feat of judicial activism-by a composite judgment in several public interest litigations[19] virtually wrested the powers of

appointment, confirmation and transfer of judges from the Executive. Their reason for doing so was to secure the independence of the judiciary from Executive control or interference. Procedural norms were judicially prescribed for transfer and appointn1ent of judges. At present every proposal for appointment or transfer of a judge can only be initiated by a collegium of senior judges together with the Chief Justice of the High Court or Supreme Court as the case may be. From being a mere consultant, the Chief Justice of India and the Supreme Court collegium now have the final word. As the Supreme Court put it "*No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India"* and *"The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/ Chief Justices*."

The insulation of the judiciary from executive interference in the matter of appointment and transfer of judges is now almost complete. But the question remains, has this almost complete insulation achieved the object for which the constitutional interpretation was strained to an extent never witnessed before or after? In my opinion it has not. It has just changed the actors without any change either in the roles or the method of acting. One of the criticisms of the earlier law, to quote the Supreme Court was:

"*The mystique of this process (of appointments) is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions (sic) result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off*".

The same criticism may be made with equal justification of the present procedure for appointments and transfer of judges. As I have said elsewhere 'the process by which a judge is appointed to a superior court is one of the best kept secrets in this country'[20]. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system.

The solution as I see it lies not in a reversal to a *status quo ante* but in the setting up of a judicial commission with all the powers now vested with the Chief Justice of India and the collegium of Supreme Court judges. This is at present the subject matter of intense public debate but the suggestion is not new. In 1981 the Supreme Court itself after noting the setting up of judicial Commissions by Australia and New Zealand to consider all judicial appointments including appointments of High Court Judges said: "*This is a matter which may well receive serious attention of the Government of India*."[21]. In 1987 the Law Commission in its 121st Report suggested the setting up of a National Judicial Commission and suggested its composition[22]. The National Commission to Review the Working of the Constitution in its Report submitted in 2002 was also of the opinion that a National Judicial Commission should be set up for recon1mending appointments of all judges of High Courts and the Supreme Court with a composition different from that proposed by the Law Commission[23]. Others including retired judges have expressed the need for such a Commission but have differed as to its composition[24]. Whatever the composition, unless there are non-partisan members, well-defined objective criteria, with the possibility of choosing judges from a wider source than at present and that proceedings are open or at least recorded—the likelihood of not getting the best as judges and of arbitrariness in making judicial appointments will remain.

And now to answer the first question posed by me at the outset as to who composes the "judiciary". Historically and semantically all bodies form part of the judiciary which are vested (a) with the power of resolving disputes between litigants, (b) empowered to oversee the application and implementation of the law by the Executive and (c) empowered to determine whether executive and legislative actions are constitutionally valid. This definition includes in particular those tribunals who have, post the 42nd Constitutional Amendment, been vested with the jurisdiction earlier exercised by courts.

Although the Supreme Court intrepidly asserted the independence of the judiciary to justify virtually excluding the Executive from having any real say in the appointment of judges, it was timorous in defending the same independence when it was most needed namely in answering the question whether the powers of adjudication can be shared with the Executive. Under the Constitutional scheme in keeping with the separation of powers judicial functions are to be performed by the judiciary alone and not by the Executive. The Supreme Court declared that "*The competence of Parliament to make a law creating tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed*".[25] If the Tribunals are manned by judicial officers one could have no quarrel with the declaration. In my view, the curtailment and transfer of judicial powers of a particular court by Parliament or a State legislature can only be to another judicial forum whether called a Tribunal or by any other name. This was the situation prior to the 42nd Amendment. There were Rent Tribunals, Labour Courts, Motor Claims Tribunals which were all manned by judges or former

judges. It was for the first time post 1976 that the jurisdiction of the judiciary was sought to be curtailed by transferring the powers of court to the Executive.

In a Kalidas-like action of cutting the branch of the Constitutional tree on which the judiciary is sitting and what in less picturesque language one can describe as a judicial sell-out to the Executive, the Supreme Court has upheld the legislations establishing tribunals in a number of decisions[26] subject to certain 'adjustments' in the law which are more in the nature of sops to the concept of judicial independence rather than an assertion of it.[27]

To maintain the 'independence' of the judicial process needed to be followed by these tribunals to reach a decision, the Supreme Court has insisted on the appointment of 'judicial officers' such as former judges to head the tribunals. Judicial independence has also been the reason for excluding executive power in the matter of the appointment of even former judges as heads of tribunals[28].The exclusion of the High Courts' powers of judicial review has also been held to be unconstitutional and decisions of Tribunals have been made subject to "scrutiny by the High Courts"[29]. Decisions taken by the Executive Members in Tribunals are required to be taken 'in a judicial manner' or like a judge i.e. impartially. All this is not enough. To borrow the language of the United States Supreme Court: "*the legitimacy of the judicial branch depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action*". Nevertheless these Tribunals continue to have members of the Executive discharging judicial functions and all members including the judicial members remain subject to the administrative and financial control of the Executive.

A recent judgment of the Supreme Court says "*The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other separate branches*"[30]. That being so then why or indeed how, having regard to the principle of separation of powers, can the power of adjudication be shared with or be transferred to or be subject to the control of the Executive which is what tribunalisation has come to mean in this country?

Besides it would be too much to expect a Government Official who has represented and been and in some cases continues to be part of the Executive machinery and who has been committed to give effect to the policies framed by his/her political masters throughout his/her career (as every good Government official is expected to do), to suddenly be asked to discharge judicial functions which often requires a decision to be taken against the Government.

Why is this at all necessary? Delay, arrears of cases, specialized knowledge etc. have been usually cited as reasons for the creation of such tribunals. If the work of the judiciary is being hampered because of the litigation explosion, the Constitution envisages more judges being appointed and courts set up which can function with all the safeguards of insulation, independence and autonomy as part of the judicial system. The Constitution also allows the appointment of additional and acting judges to deal with an increase in the business or the arrears of work of the High Courts and the Supreme Court[3l]. It was not envisaged under the constitution as originally framed that the lacunae, if any, in the functioning of the judiciary at whichever level, would be filled by the Executive. As Chief Justice Subba Rao speaking for a Bench of 5 judges said in 1966[32]: "*It is unreasonable to attribute to the makers of the Constitution) who had so carefully provided for the independence of the judiciary) an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district Judges* (and now at the level of High Court judges), *recruitment from the executive departments?*"

But according to a recent pronouncement of the Supreme Court "*The presence of a technical member ensures the availability of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision making*"[33]. By that token all courts should have technical members to improve the 'quality of decision making'. Traditionally if technical expertise is required it is open to courts to seek the opinion of an expert as a witness but not as a colleague on the Bench. To have technical members (meaning officers of the Executive) on a Tribunal is as repugnant to the independence of the judiciary as, for example, having the Secretary of the Ministry of Finance sitting on a Bench of the Supreme Court or High Court to decide income-tax matters. A more serious in-road into institutional judicial independence would be hard to find.

Besides the 'tribunalisation' of justice has not worked in India. In 1997 the Supreme Court acknowledged "*Tribunals have been functioning inefficiently ... The situation at present is that different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some tribunals have been created pursuant to the Central legislations and some others have been created by State legislations*." More than a decade later, if one is to go by the Report of the Chairperson of the Intellectual Property Appellate Board submitted to the Madras High Court recently, the situation has not improved[34].

The litigant, in whose apparent interest tribunalisation has and is taking place has been the worst sufferer. When most of the rights are claimed by citizens against the Government how can people have faith in a body if even one member is perceived as being part of the Government? The credibility of the judicial process "comes from the office of the judge and his or her individual and institutional reputation for independence".[35]

Additionally every decision of a tribunal is subject either to appeal before the High Court or Supreme

Court and subject to judicial review. This has only meant further delay and expense for a litigant because of additional rounds of litigation. Several brave High Court judges have tried with faultless reasoning to set right this Constitutional anomaly in their decisions[36] but have unfortunately failed to convince the Supreme Court up till now.

There is another seemingly minor exception to judicial independence contained in the Foreign Contribution (Regulation) Act, 1976. Apart from other restrictions, the Act initially forbade, except with the permission of the Central Government, the acceptance of foreign hospitality by members of Legislatures, office bearers of political parties and employees of corporations[37].

In 1985, when the Law Ministry was headed by an eminent lawyer, the Act was amended to include judges (thus proving my theory that sometimes the worst enemies of Judges are those lawyers who while being members of the Bar also serve in the capacity of politicians). At present no judge, whether of the Supreme Court or the High Courts can accept any invitation from any foreign person or organization or indeed even visit a foreign country out of his/her personal funds, unless an application is made to the State and Central Governments *with the approval* of the Chief Justice two months ahead of the date of departure and the application is vetted by different Ministries and ultimately allowed or disallowed by an executive order which may or may not be received before the date fixed for leaving! Even if permission is granted by the Government to accept an invitation it is subject to the air-fare being *agreed* to be paid by the Government. Clearly the Government considers that being accommodated, wined and dined by a foreigner do not come within the word 'hospitality'! It also overlooks the fact that a judge would be obliged to various Joint Secretaries of the Government for exercising their discretion in favour of the judge not only in granting permission but also agreeing to bear the air-fare—a dangerous situation since the largest litigant before any court is the Government. Besides if the Chief Justice as the administrative head of the judiciary in each High Court and the Chief Justice of India in the Supreme Court approve, to subject the judge to Executive control does, in my opinion, interfere with the institutional independence of the judiciary. To complete the insulation of the judiciary the mischief created in 1985 must be undone.

An Independent Judge

The independence of the judiciary and of the judicial system of course ultimately depends on the personal integrity of each judge. It goes without saying and I do not intend to dwell on the fact that judges have to be above corruption in the monetary sense. But it needs restating just as it needed stating in 1988 when judges of 37 countries gathered in Bangalore and formulated what have come to be known as the Bangalore Principles. The principles are intended to establish standards for the ethical conduct of judges. Detailed guidelines have been classified under 6 heads termed 'values': Independence, Integrity, Impartiality, Propriety, Equality, Competence and Diligence. In fact all six values are facets of the first and cardinal one of 'independence'. Judges are fierce in using the word as a sword to take action in contempt against critics. But the word is also used as a shield to cover a multitude of sins some venial and others not so venial. Any lawyer practising before a court will I am sure have a rather long list of these. I have chosen seven.

The first is the sin of "brushing under the carpet" or turning a Nelsonian eye. Many judges are aware of injudicious conduct of a colleague but have either ignored it or refused to confront the judge concerned and suppressed any public discussion on the issue often through the great silencer-The Law of Contempt.[38]

The second sin is that of "hypocrisy". A favourite rather pompous phrase in judgments is "Be you ever so high, the law is above you" [39] or words to similar effect. And yet judges who enforce the law for others often break that law with impunity. This includes traffic regulations and any other regulation to which the "ordinary" citizens are subject. Some in fact get offended if their cars are held up by the police at all while controlling the flow of traffic-the feeling of offence sometimes being translated into action by issuance of a rule of contempt against the hapless police constable[40] all in the name of judicial independence[41].

The third sin is that of secrecy. The normal response of Courts to any enquiry as to its functioning is to temporize, stone-wall and prevaricate. As I have said elsewhere that the process by which a judge is appointed to the High Court or elevated to the Supreme Court is one of the best-kept secrets in the country. The issue whether the records relating to appointments of judges to the Supreme Court can be directed to be produced under the Right to Information Act is now pending decision before the Supreme Court[42] after which perhaps we will come to learn of the logical connection between judicial independence and secrecy.

If 'independence' is taken to mean 'capable of thinking for oneself' then the fourth sin is plagiarism and prolixity. I club the two together because the root cause is often the same namely the prolific and often unnecessary use of passages from text-books and decisions of other judges-without acknowledgment in the first case and with acknowledgment in the latter. Many judgments are in fact mere compendia or digests of decisions on a particular issue with very little original reasoning in support of the conclusion.

Often judges misconstrue judicial independence as judicial and administrative indiscipline. Both of these in fact stem from judicial arrogance as to one's intellectual ability and status. A judge's status like other holders of public posts is derived from the office or the chair. One has to merely occupy that chair during one's tenure with dignity and remember that each time a lawyer bows and says "Deeply obliged" — the bow is addressed to the office and not to the person. The Supreme Court has laid down standards of judicial behaviour for the sub-ordinate judiciary such as "*He should be conscientious, studious,*

thorough, courteous, patient, punctual, just, impartial, and fearless of public clamour, regardless of public praise[43] but sadly some members of the higher judiciary exempt themselves from the need to comply with these standards.

Intellectual arrogance or what some may call intellectual dishonesty is manifest when judges decide without being bound by principles of *stare decisis* or precedent[44]. Independence no doubt connotes freedom to decide but the freedom is not absolute. It is bound to be in accordance with law. Otherwise we have lawyers and the sub-ordinate judiciary baffled while "mastering the lawless science of our law" faced with "that codeless myriad of precedent, that wilderness of single instances."[45] Independence implies discipline to decide objectively and with intellectual integrity and as the judicial oath of office requires, without fear, favour, affection or ill will. Most importantly judges must be perceived as so deciding or to use Lord Hewart's classic dicta that "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*,"[46] because the belief of corruption is as damaging to the credibility in the independence of the judiciary as the act of corruption.

This brings me to the seventh and final sin of nepotism or what the oath of office calls 'favour' and 'affection'. What is required of a judge is a degree of aloofness and reclusiveness not only *vis- a-vis* litigants but also *vis- a-vis* lawyers. Litigants include the Executive. Injudicious conduct includes known examples such as judges using a guesthouse of a Private Company or a Public Sector Undertaking for a holiday or accepting benefits like the allocation of land from the discretionary quota of a Chief Minister.

I can only emphasise again that nothing destroys a judge's credibility more than a *perception* that he/she decides according to closeness to one of the parties to the litigation or what has come to be described in the corridors of courts as 'face value'. As the Bangalore Principles succinctly puts it: "*A judge shall not ...convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties*"[47].

And here I would like to pay tribute to the great majority of judges who are to quote N.A. Palkhiwala men (and women) of integrity, combining character with calibre[48] who are holding the fort against 'enemies' both within and outside the system by discharging their duties with courage and independence.

I will conclude with the most important facet of judicial independence. Judicial independence cannot exist without accountability. At present the only disciplinary power over judges is vested in Parliament which provides for the extreme punishment of removal for acts of proven misbehaviour by or incapacity of a judge[49]. Disciplinary methods include the Chief Justice advising a dishonest judge to resign or recommending a judge's name to the Chief Justice of India for transfer to another High Court.

Deprivation of jurisdiction or the non-allocation of work to a dishonest judge was resorted to by Chief Justice Sabyasachi Mukharji-when the impeachment of Justice V. Ramaswamy failed for political reasons. Sometimes Chief Justices control a recalcitrant judge by ensuring that the judge concerned sits with the Chief Justice or with a 'strong' judge until he or she retires. The situation becomes more difficult if the allegations are against the Chief Justice. Solutions evolved have proved inadequate and ad hoc. There is a need for an effective mechanism for enforcing judicial accountability[50]. The Judicial Standards and Accountability Bill 2010 now under consideration before Parliament provides for a mechanism for enforcing judicial discipline under a National Judicial Oversight Committee. But I would add a Caveat using the language of a Resource Document for the establishment of judicial accountability mechanisms in South Africa[51]: that "*accountability mechanisms"* [must be] "*embedded in the judiciary and satisfy the appropriate standards for judicial autonomy, respect the separation of powers framework, and are transparent and publicly known*". This would be in keeping with that "independence" which as I said at the outset the Constitution so 'copiously' protects.

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1. S.P. Gupta vs. Union of Indla, 1981Supp SCC87; 2. p. 358; 3 Centre for PIL v. Union of India, (2011) 4 SCC 1, at page 23 ; 4 Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193, at page 213 ; 5 Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193 ; 6 Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy, (1999) 7 SCC 725, at page 728 ; 7 Article 202(3)(d) ; 8 Art. 112(3)(d)(iii) ; 9 Article 203(1) ; 10 Article 113(I).See Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC J93, at page 2J7; 11 Article 211 ; 12 Art J24(2) in case of Supreme Court judges and Art. 217 in the case of High Court judges ; 13 Art. 222 ; 14 Quoted in "Should Judges Conduct Public Inquiries?" by Jack Beatson: LQR Vol 121 p.235 ; 15 Union of India v. Sankalchand Himatlal Sheth, (1977) 4 see 193, at page 234 ; 16 See Granville Austin: Working a Democratic Constitution p.384 ; 17 See N.A.Palkhiwala: Second Chimanla1 Setalvad Memorial Lecture, 1982; Granville Austin: The Supreme Court and Custody of the Constitution: Supreme but not Infallible. ; 18 S.P. Gupta v. Union of India, 1981 Supp see 87 ; 19 S.C.Advocates-on-Record Assn v. Union of India (1993) 4 see 441; Special Reference No.1 of 1998: (1998) 7 see 739 ; 20 "Information and Fundamental Rights": Sarat Bose Memorial Lecture, 2009 ; 21 S.P. Gupta v. Union of India, 1981 Supp SCC 87, at page 298. Since then several countries including England and Wales have set up a Judicial Appointments Commission to appoint High Court judges ; 22 The Chief Justice of India (Chairman), three senior most judges of the Supreme Court; the retiring Chief Justice of India, three senior Chief Justices of High Courts, the Minister of Law and Justice, Government of India, the Attorney General and an outstanding law academic. ; 23 The Vice President of India, the Chief Justice of India, two seniormost judges of the Supreme Court, the Chief Justice of the High Court when considering an appointment to that court and the Minister of Law and Justice. ; 24 V.R.Krshna Iyer, J: The Hindu: 20th October 2003; Rajindar Sachar, J.: The Hindu: 28th March 2003, PUCL Bulletin, February 2005 ; 25 Union of India v. R. Gandhi, President, Madras Bar Association, (2010) II see I, at page 49 ; 26 S.P. Sampath Kumar v. Union of India, (1987) I SCC 124; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261; Union of India v. R. Gandhi, President, Madras Bar Association, (2010) 11 SCC I ; 27 They were readily conceded by the Executive without any reference to Pariiament.S.P. Sampath Kumar Y. Union of India, (1987) I SCC 124; L. Chandra Kumar v. Union of

India, (1997) 3 SCC 261 ; 28 State of Haryana v. National Consumer Awareness Group, (2005) 5 SCC 284, at page 292 ; 29 L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, at page 311 ; 30 State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586, at page 612: per Katju, J: ; 31 Articles 128 and 224(1) ; 32 Chandra Mohan v. State of UP: AIR 1966 SC 1987 ; 33 Union of India v. R. Gandhi, President, Madras Bar Association, (2010) II see I, at page 40 ; 34 See in this connection Report submitted by the Chairperson, IPAB to the Madras High Court in Shamnad ; Basheer v. Union of India (W.P.12S6 of2011) ; 35 Jack Beatson: Should Judges Conduct Public Inquiries: Vol. 121 LQR 221, 243 ; 36 Sakinala Hari Nath v. State of A.P.:((993) 2 An WR 484; See further L. Chandra Kumar v. Union of India (1997) 3 SCC 261, 284 paras 37, 38 ; 37 Section 9 ; 38 See for example Surya Prakash Khetri v. Madhu Trehan 2001 cr. L. 3476 ; 39 See for example: S.P. Gupta v. Union of India, 1981 Supp see 87, at page 223; Arundhati Roy, In Re. (2002) 3 see 343; Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 see 54, al page 92 ; 40 See for example: Biman Basu v. Kallol Guha Thakurta, (2010) 8 SCC 673 ; 41 Red Lights on the Cars of the Hon'ble Judges of the High Court v. State of U.P. 1988 Cr. L.J. 4212 ; 42 Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agrawal, (2011) 1 SCC 496 ; 43 High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil, (1997) 6 sec 339, at page 355 ; 44 See for example State of U.P. v. Jeet S. Bisht, (2007) 6 sec 586, at page 623 ; 45 Alfred Tennyson ; 46 R.v. Sussex JJ, ex p McCarthy: (1924) I KB 256 ; 47 Clause 49 ; 48 N.A.Palkhiwala: We, the Nation: Crisis of Public Faith in the Judiciary at page 223 ; 49 Article 124(4), Article 217 (I)(b) ; 5o See in this connection Mechanism for Judicial Accountability by J. S. Verma, Former Chief Justice of India ; 51 lDASk March 2007

(*Received the lecture from* Manik Tarkunde *&* N.D. Pancholi) ❑

Jiten Marandi - The Fate of an Openly Political Cultural Activist

Prasant Haldar (Translated by Amit Basole)

[*Jiten Marandi is a cultural activist from Jharkhand and also one of the Secretaries of Committee for the Release of Political Prisoners. He was arrested in 2008 and accused by the police of being involved in the murder of 20 villagers, including the son of former Jharkhand chief minister Babulal Marandi, in Chilkari in 2007. He was sentenced to death in June 2011 by a lower court in Jharkhand. He has been an active participant in the movements against forcible land acquisitions in Jharkhand - and was actually arrested while he was on the way back from one such rally organized by the Visthapan Virodhi Jan Vikash Andolan, almost an year after the killings. The police charge-sheeted him under various clauses of the penal code, and it has also been alleged that false witnesses were brought forth during the trial, leading to the death-sentence. This case falls into the larger pattern of victimization of the cultural political activists as well as those adivasi voices who are resisting the various injustices being inflicted by the state. The following article, written in Hindi, is one of the first detailed expositions of the case*]

One may recall that recently when a Raipur court sentenced Dr. Binayak Sen, the human rights activist from Chhattisgarh, to life imprisonment, protests came from all corners of the world. Subsequently the Supreme Court granted him bail. Now, after a court in Jharkhand's Giridih district has sentenced folk artist Jiten Marandi together with Manoj Rajwar, Chhatrapati Mandal and Anil Ram to death, protests have again gained strength. Reactions are being expressed form different directions.

This sentence has been handed down for a massacre that took place on 26 Oct, 2007 in Chilkhari village of Jharkhand's Giridih district in which Anup Marandi, the son of ex-Chief Minister Babulal Marandi was killed along with 19 others. It is said that the massacre was carried out by the Maoists. It is beyond dispute that whoever was responsible for it, it was a reprehensible act which cannot be condemned enough. But it would be even worse if innocents are punished instead of the perpetrators.

After this incident, on 28th Oct. an FIR was registered by one Puran Kisku, the bodyguard of Nunulal Marandi, borther of Babulal Marandi, accusing one Jiten Marandi and ten others. But no details were given regarding the hometown or father's name of the accused. Subsequently, on 29th Oct, the Ranchi-based daily "Prabhat Khabar" published a news item with the headline "Naxalite Attackers Identified" and named Jiten Marandi as the leader of the squad that carried out the killings and also alleged that he had participated in a rally of the Committee for Release of Political Prisoners. The newspaper also published his photograph. The very next day, that is on 30th Oct, Prabhat Khabar published a correction to the news item saying that the Jiten Marandi depicted in the photograph is not the same as the one named in the FIR. The person in the photograph is the one who recently gave a speech in a rally for the release of political prisoners and who often participates in such programs. The newspaper apologized for the serious mistake.

Along with correcting their mistake Prabhat Khabar also brought to light he fact that there are two people named Jiten Marandi. There was turmoil among the police. This revelation had put a question mark on their claim that they had identified the accused. This was published in other newspapers and the news eventually ran out of steam.

All of a sudden, five months later, on 5th April 2008, on Rachi's Ratu Road, plain clothes policemen arrested the same Jiten Marandi who had spoken at the rally for release of political prisoners. Delivering an inflammatory speech and causing road blocks were given as reasons for his arrest. He was sent to Hatwar Jail in Ranchi. Before he could get bail, on 12th April Giridih police remanded him to custody for the Chilkhari massacre. Rendering the correction offered by Prabhat Khabar meaningless, the police made him an accused in this matter.

Aparna Marandi, Jiten's wife along with several groups from Jharkhand, spoke out that Jiten Marandi was being framed and that he was innocent. These claims of

innocence were made much before the handing down of the death sentence. Ever since the arrest, people have been saying that he has been framed making use the fact that he shares a name with a Naxalite. Dr. Sawa Ahmad, vice-president of Jharkhand Vikas Morcha and aslo an ex-minster asked for a CID investigation into the Chilkhari incident alleging that: "the police have arrested cultural worker Jiten Marandi instead of another person of the same name. To save their own skins, the police have ensnared innocent Jiten in half a dozen Naxalite cases." These are not just empty allegations. Many things become clear if we pay attention to the dramatic nature of his arrest, the police diaries, the court hearing and the witnesses.

In Paragraph 37 of the log for Case 167/07, relating to an incident in Devri, one finds written that "A report was prepared by the Devri police station to be sent to the Station In-Charge at Nimiyaghat, in Dist. Giridih in the form of letter no. 205/08, dated 21-2-2008, which asked that a search and arrest warrant be issued in the name of the accused Jiten Marandi aka Shyamlal Kisku, son of Kati Kisku, village Thosaphuli, police station Nimiyaghat, Dist. Giridih." It is clear that instead of arresting the Jiten Marandi that police was searching for, they arrested a Jiten Marandi who is the son of Budhan Marandi and is from the village Karando (Chilga) which falls under police station Peertaand, Dist. Giridih.

Before his arrest, a new story was concocted. On 25 Feb. 2008, three new witnesses were introduced: Moti Ram, Pati Ray and Sukhdev Marandi. In their testimonies to the police two Jiten Marandi's are mentioned, one form Nimiyaghat and the other from Peertaand, the later running Jharkhan A-one (a cultural organization). In this way this other Jiten Marandi is dragged into the case, a mistake for which Prabhat Khabar had earlier apologized. Even though earlier witnesses had named only one Jiten Marandi without any information on the name of the father or the name of the hometown. A statement (no. 164) had also been filed to this effect with the Magistrate.

This was the plan that brought Jiten Marandi from Peertand into the list of accused. After this, on 12 April 2008 the Giridih police arrested him and with lightening speed by 30 June 2008 filed a charge-sheet against him which even denied the possibility of bail. All the cases registered against Jiten Marandi that the police were originally looking for, were now dumped on this one. All these cases are false, because they are naming someone else. For example Peertaand police station case no. 42/08 was attached to him when in fact at the time of that incident he was already in jail for some other reason. Another case in which he was charge-sheeted, Teesri police station case no. 44/03 is also false because at the time of that incident he had been arrested while participating in a program in Patna. Despite all this, citing S.P. supervision as the reason, after his arrest he was trapped in jail.

The process of witnesses giving testimonies during the trial was also filled with conspiracy. The three witnesses who had first brought two different Jiten Marandis into the case made an about-face in the court and refused to take any names. Because the police had not received their testimonies in front of a magistrate, this change in their stance became possible. Thus the entire process can be called premeditated by the police. In reality all that the police needed from these witnesses was to bring two people named Jiten Marandi into the picture so that Jiten Marandi from Peertand could be targeted. Now that a charge-sheet had been filed by the police against only the Jiten Marandi from Peertand, a court testimony about two Jiten Marandis being involved would put a question mark on the police charge-sheet itself. So, the witnesses were called just to complete the formality of testifying and were let go.

The remaining two witnesses, who had attested to only one Jiten Manradi being involved, now became important because they had not supplied either the father's name or an address of the accused. To make this inadequate testimony complete it was essential that the witnesses identify Jiten Marandi. This is what the police made them do. But this identification was not done via an identification parade as is the normal practice. Rather the witnesses were asked to identify him in court.

In this regard Jiten Marandi had already informed the court in writing that the witnesses had been coached in who he was before he was produced in court, which was an entirely unjust act. This is how he described the incident: "On 24th March, 2009, when all the accused in the Devri incident no. 167/07, that is, Session Trial No. 170/08 reached the court and were all sitting in the sessions lock-up, the Station Chief of Giridih Town came there and he called me and asked my name etc. In return I asked him to identify himself upon which he told me that he was the Chief of Giridih Town police station, although at the time he was in plain clothes and there was no indication as to his office. After some time, I was singled out and asked to start walking, to be produced in court. I asked why the others were not coming with me and I was told "stop asking questions and move." When I came out of the Session lock-up I saw a crowd of people, among them the police chief. He pointed to me and told the others, "this is Jiten Marandi, make sure you recognize him." Subsequently the other accused followed me to the court of Hon.Judge Mohd. Kasim Ansari. There too, people saw me carefully and the clerk tried to take me back without getting me to sign in the court register. When I asked in a loud voice, why I had been brought here, I also had to listen to a warning from the judge. I accepted my mistake and apologized. Meanwhile the others also reached there, signed and were returned to the session lock-up. After returning the others

told me that all the people standing outside were witnesses in session trial no. 170/08. They knew this because some of them were neighbors of the other accused. These were the witnesses produced on 1 April 2009. Two of them Moti Sau and Subodh Sau appeared in court and identified me."

Jiten Marnsi's description rings true because the people who identified him in court were all either miles away at the time of the incident in which he is accused or were from villages Teesri and Gavaan which are far from Jiten's village. If they had not seen him ever before of course it was impossible to identify him in court. During cross-examination when they were asked how they knew Jiten, they replied that he often came to their village with a (Maoist) Squad. If this was true why had they not notified the police about this earlier? It also appears that these witnesses are all workers of the Jharkhand Vikas Morcha whose leader is Babulal Marandi himself. Not only that, they have several criminal cases against them and they have also been witnesses is several prior trials.

This raises the question, why did the police select such witnesses? Was there not a single person in the village of Chilkhari or in the Devri area who was an eye-witness to the incident? So much so that even the wounded who testified in court did not name any person as culprit. Puran Kisku who had registered the FIR, had also not named any person as responsible. But the court accepted as incontrovertible the testimony of those witnesses who are suspect on many grounds.

It should be emphasized that since his arrest Jiten Marandi has been speaking out in different ways about the police harrasment meted out to him and his implication under false charges. While in jail he has sent petitions requesting for justice to the sessions court in Giridih, the DM, SP, IG, the Chief Justice of the Ranchi high court as well as the National Human Rights Commission in New Delhi. But his calls have fallen on deaf ears and no one has asked for an investigation into the matter.

The key question is, why have the police and the government targeted Jiten Maandi? So far people have known him as a folk artist and an activist in popular movements. People have seen him sing and dance to the rhythm of a *dholak*. They have seen him with children, carrying art to various cities and villages, winning people's hearts. Cassettes of his songs in Khorta, Santhali Nagpuri are found playing in various neighborhoods. Why has this man been declared a gun-totting Maoist?

In fact his cultural expressions and his thoughts are at the root of the problem. In his writings and songs one finds the pain of starvation, loot and displacement going on in Jharkhand today, and one finds an attack on the system that is responsible for it. His songs are the voice of popular resistance. This is the source of his popularity and the cause of the government's anger. He has been arrested while leading workers' movements, sent to jail for participating in anti-government protests, and accused of inflammatory speech. Despite this he has continued awakening the masses. Whether the issue was displacement or corporate loot Jiten Marandi was there with his troupe. He was there in the fight to release political prisoners. Perhaps it became difficult for the government to tolerate this man who was becoming the emblem of popular resistance in Jharkhand. It became necessary to silence this voice of opposition. It became even more urgent to suppress him because his voice was becoming a weapon in the resistance against the loot of *jal-jungle-zamin* and mineral resources by national and multinational corporations. Every act of repression was making it even more potent. This is the truth behind the conspiracy against Jiten Marandi, this is the reality of Jharkhand today. ❑

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