Democracy and People's Rights in the Neo-liberal Era
The Role of Judiciary

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The recent judgments and orders from various levels of higher judiciary indicate a drastic shift in their outlook and approach. A close look reveals two trends developing within the judiciary. Firstly, the judiciary has been exhibiting a clear bias towards markets and big business. On the other hand, there is a growing apathy towards the issues of poor, downtrodden, working class and other exploited sections. Secondly, recent pronouncements of the courts show a growing intolerance towards the democratic rights of people and their organised activities. In sum, the progressive judicial activism of previous welfare state era has been transformed into a reactionary activism in favour of ruling classes and against the democratic rights of the people.

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Neo-liberalism is a new, extreme and aggressive version of classical liberalism of 18th and 19th centuries. The theory of classical liberalism developed by Adam Smith and David Ricardo, propounded that the capitalist economy is self-regulating through the action of market forces.

Consequent upon the Great Depression and the Second World War, the classical liberalism lost its dominance and was replaced by Keynesian regulationist model. The Keynesian model assigned a more active role for the state in regulating the market forces. This intervention in the market mechanism through the policies of welfare state, enlarged the democratic space of the state which is basically an instrument of class oppression. The world capitalist class accepted this Keynesian model of interventionism reluctantly. The weakening of capitalism due to the depression and Second World War, the desperate need of the capitalist class to overcome the crisis and the failures of the system, rise of a new socialist block as a challenge to capitalism, growth of national liberation movements and rising tide of revolutionary uprisings across the world are some of the important reasons attributed to the compulsion of capitalist classes to accept the Keynesian model. In this complex situation, world capitalism in its bid to save the system adopted a different course and put on its face a mask of welfare state.

The Keynesian model and welfare state strategy had been guiding the capitalist governments all over the world for a quarter of a century following the Second World War. Since the late seventies, the Keynesian model started losing its prominence and the world witnessed the ascendancy of neo-liberal philosophy. The capitalist development process also led to growing concentration of production and capital. The major component of this accumulated capital is finance capital, which is huge in volume, highly mobile and speculative in character. This capital, which seeks newer and immediate avenues of profits, wanted an international order conducive for its free movement across national boundaries. It was this objective condition that created the present process of neo-liberal globalisation.

With the acceptance of structural adjustment programme and with the adoption of policies of liberalisation, privatisation and globalisation in 1991, India was also integrated into this neo-liberal paradigm. All the important characteristics of neo-liberal experiment – domination of international finance capital over the national economy, withdrawal of State from economic activity, massive privatisation of public sector, opening up of economy through trade and financial liberalisation were evident in our country also. A major casualty of this neo-liberal experiment of last 15 years has been our democratic process. The democratic foundations of our nation have suffered a great deal of erosion over this period. There are many aspects to this issue.

Firstly, the national government had to surrender its right to choose economic policies and an independent development model. The international finance capital through the institutions like IMF, World Bank, WTO and MNCs has set the terms under which the government has to make policies. This kind of pressure is not only seen in the choice of economic policies but we have seen witnessing increasing interventions even in foreign policy matters and other domains of national sovereignty. The Parliament has not either been given adequate opportunities for meaningful debate on international treaties and agreements or even bypassed in those matters. The weakening of sovereignty in the key areas of economic and political decision making has resulted in the serious marginalisation of our democracy.

Secondly, there has been a transformation in the character and role of the State under neo-liberal dispensation. The limited role of the State in the sphere of economic activity, its retreat from social sectors and providing a free hand to the market forces has led to the systematic dismantling of whatever limited economic gains and social progress the country had achieved under the bourgeois democracy over the last 45 years since independence. These policies have resulted in rising poverty, increasing inequality, widespread closure of industries and growing unemployment situation, worsening rural life as reflected by alarming number of farmers' suicides. This increasing misery and pauperisation of masses have led to large-scale social discontent and frustration. In turn, this has provided a fertile ground for religious fundamentalism, terrorism and divisive forces in the country. This has further diluted democratic consciousness, values and principles in our national life.

Thirdly, elimination of the democratic functions of a welfare state has made it a mere facilitator of capital and markets. The reduction in its role has confined it mainly to the duties of national security and law and order. As a result, the repressive class character of the state has been increasingly revealed.

The Indian experiences show that the State in the entire period of liberalisation has been increasingly indulging in direct assault over the democratic rights of the people. The most affected section is obviously the working class. Various amendments proposed to labour laws which seek to curtail the trade union rights of the people, naked suppression of workers' bid to form unions as happened in the case of Honda workers, etc., are examples of State conniving with the employers in sabotaging the workers' rights. All these are done by the State, in order to make the labour force 'disciplined' and silent, which is in the interest of both foreign and domestic capital.

Fourthly, a broad consensus has emerged among ruling classes over the neo-liberal agenda. All the mainstream parties are part of this broad consensus, except the left. It is because of this unanimity that the ruling elite has been able to

implement the same neo-liberal policies even after their repeated rejection by people in all the elections. The ruling classes – the political elite and bureaucracy – through their dubious alliance over neo-liberalism have been able to overcome people's mandate and thus the very purpose of democratic process.

Conduct of Judiciary

As an important organ of State Power, the conduct of judiciary is more and more reflecting these changes. The State acquiring more authoritarian character and the general consensus among the dominant classes over neo-liberalism have been decisive in shaping the mindset of judiciary. The recent judgments and orders from various levels of higher judiciary indicate a drastic shift in their outlook and approach. A close look will reveal two trends developing within the judiciary.

Firstly, the judiciary has been exhibiting a clear bias towards markets and big business. On the other side, there is a growing apathy towards the issues of poor, downtrodden, working class and other exploited sections.

The Supreme Court judgment in TMA Pai Vs. State of Karnataka in October 2002 is a reflection of the judicial bias towards markets and capital. In this case, the matter before the court was confined only to issues related to minority status of educational institutions. But the Supreme Court went beyond the purview of the case and its order conferred unfettered rights on private unaided institutions. The court ruled that institutions not receiving any aid from the government (unaided institutions) can have their own admission criteria and fees structure. The role and scope of government in regulating these institutions were considerably minimised by this judgment. Some observations made by the court in this judgment are indicative of the influence of neo-liberal philosophy. The court said that the student being the sole beneficiary of higher education should pay for it. This has precisely been the perspective of World Bank, IMF and GATS 2000 of WTO. The references made by the court also conform to the spirit of Ambani-Birla Commission Report, which is a blue print for further commercialisation of Indian education. The Supreme Court went further by stating that rising fees are the worldwide trend and though education should not be used for profiteering, a reasonable surplus can be made out of it. At the same time, the Hon'ble Supreme Court has not defined the vague idea of reasonable surplus and has not distinguished it from the concept of profiteering, which left enough space for misinterpretations.

Naturally this has resulted in chaos and confusion in admission. In view of this, a seven-judge bench was constituted in 2005 to reinterpret the judgment. On 12th August 2005, the Bench gave its clarification and in doing so the court making a step further, abolished the State quota and reservation in the private unaided minority and non-minority colleges. Reiterating the earlier position in TMA Pai case, the court held that unaided minority and non-minority institutions had absolute rights to admit students of their choice in professional courses without government interference. The Bench said imposition of government quota or enforcing reservation policy in unaided professional institutions constituted a serious encroachment on their right to autonomy. This judgment once again served the interests of market forces and made all the efforts of government regulation of market forces practically impossible. It was in this context and due to strong social pressure that the government brought legislation in order to overcome the difficulties created by this judgment.

The decision was a departure by the apex court from its earlier position that recognised education as a right. In Mohini Jain case in 1992, the same Supreme Court had held that the right to education is concomitant to fundamental rights enshrined in Part III of Constitution. According to the judgment, capitation fees brings to the fore a clear class bias. The court observed that the system of capitation fees amounts to the denial of opportunities to poor but meritorious students. The court sharply criticised this situation as unjust, unfair and unreasonable. The court categorically stated that merit alone should be the criteria for admission. This judgment by recognising education as a fundamental right had upheld high values of social justice and democratic approach.

In the very next year in 1993, in Unnikrishnan Vs. State of Andhra Pradesh, the Supreme Court diluted its position and moved a few steps backwards. In this case, the Supreme Court evolved a new scheme of 50% free seats and 50% payment seats for the working of self-financing colleges. According to the court, this scheme of cross subsidization was meant to ensure social control over self-financing institutions. Though the Unnikrishnan case verdict on the one hand had legitimised the self-financing system, on the other it had imposed some sort of social control over these institutions.

And a decade after, coming to the TMA Pai case in 2003 and the 2005 verdict, we have seen a somersault by the highest seat of judiciary. The Supreme Court is now prepared to open up all the doors to market forces. The underlying principles of these judgments are precisely those emanating from neo-liberal philosophy.

In another case in 2005, the Division Bench of the High Court of Kerala allowed the multinational giant Coco Cola to extract 5 lakh litres of water per day. The court had not taken into account the grave situation existed in the Plachimada village, where the Coco Cola plant conducted its operations. Due to the overexploitation of groundwater thousands of families were virtually denied drinking water, vast areas of cultivating land was devastated and the life of the entire village came to a standstill. The people started agitation and the local panchayath took the issue to the court. However, the High Court failed to take note of the extraordinary situation and issued an order in favour of Coco Cola. The real issue involved in this case was the right over an important natural resource, i.e., water. The order of the court amounts to the denial of people's right over water. It is in this era of globalisation that even global commons like water are being transformed into market goods. The globalisation has led to the elimination of people's ownership over global commons and illegitimate acquisition of these resources by transnational capital. By permitting Coco Cola to extract huge volumes of water and by entrusting them with the responsibility of serving water to the village population through tankers, the court unhesitatingly placed the ownership of water at the hands of Coco Cola instead of village population.

In the Narmada case, the Supreme Court favoured the interests of big capital at the expense of poor and helpless Adivasis facing displacement and loss of their livelihood. The court order permitting to increase the height of the dam caused more displacements. In this case the court did not take into account the larger issue or right to life of a most vulnerable section of our population. The court was rather concerned with the neo-liberal obsession of development.

These are some important instances of direct intervention by judiciary in favour of markets and big capital. At times, when it suits the interests of neo-liberal globalisation, the judiciary has also been followed a policy of non-intervention. In

the matters of Enron Power Project and privatisation of Balco, the judicial response was that it would not interfere with the economic policy of the government. But the ultimate objective of this double-edged strategy of intervention and non-intervention has always been the protection of neo-liberal model. When the judiciary has declined to intervene in matters of economic policies of government, there has been no hesitation on the part of judiciary to intervene against the interests of working class. The trend shows that, in the recent past the interpretation of various labour laws have swung in favour of employers. These biased interpretations have assisted the process of flexibilisation of labour laws and creating conditions for hire and fire regime.
It was a historic judgment in 1960 by the Supreme Court in the Standard Vacuum Oil Company case, which led to the enactment of the law to abolish contract labour in 1970. In another landmark judgment in 1997, the Supreme Court ruled that contract workers who were working at the time of the scheme to abolish contract labour was being implemented had the right to be absorbed in the workforce on a permanent basis. However in 2001, in a case relating to Steel Authority of India Ltd., Constitution Bench of Supreme Court ruled that the contract workers were not entitled to "automatic absorption". This retrograde step by the Supreme Court has to be viewed in the context of neo-liberal requirements for labour market flexibility. The beneficiaries of these kind of rigid interpretations and verdicts are the employers. And no doubt at the receiving end is the working class.

Secondly, another tendency prevailing over judicial pronouncements in the recent period is growing intolerance towards the democratic rights of people and their organised activities. It was in 1998 that a three member Bench of Supreme Court approved the decisions of a Full Bench of Kerala High Court that there cannot be any right to call or enforce a bandh that interferes with the exercise of fundamental freedoms of citizens. The court held that no political party or organisation can claim that it is entitled to paralyse industry and commerce in the entire state or nation. But the reality is that national losses in these days are not created by strikes or bandhs. According to the Second Labour Commission, in the post-reform period a total of 129 million man-days were lost in lockouts and the loss due to strikes in the same period is much less. Though judiciary in this period is very much keen on keeping the labour force and people's organisations in check, the growing indiscipline among the employers and government authorities are constantly overlooked.

Then came the shocking anti-strike judgment by a two-member Bench of Supreme Court in T.K. Rangarajan Vs. State of Tamil Nadu in 2003. The Bench declared that government employees have no fundamental, legal or statutory right to go on strike. It was said that under the "prevailing situation" the remedy for redressing their grievances lay not in strikes but in discharging one's duties and responsibilities. This piece of advice is nothing new. We are very much familiar with such prescriptions in the neo-liberal era. Those are the same set of prescriptions preached by our financial press and our ruling classes since the introduction of economic reforms. Now our judiciary is echoing this also. We can easily understand that the "prevailing situation" about which the Supreme Court reminds the working class is nothing but the prevailing order of neo-liberalism.

But this was not the way of interpretation of workers' right to strike in the previous periods. In the Gujarath Steel Tubes case, Justice V.R. Krishna Iyer in the Supreme Court held that a strike might constitute an infraction of law but it might still not be justification for the extreme punishment of mass dismissal. In

another case in 1989, related to the Trade Authority of India's dismissal of certain employees, Justice A.M. Ahmadi said "the right to strike is an important weapon in the armoury of workers, recognised by almost all democratic countries as a mode of redress".

The Supreme Court in dealing with the Rengarajan case failed to take note of these two very important cases as far as the right to strike is concerned. The Bench comprised of Justice M.B. Sha and A.R. Lakshman also overlooked statutes including ID Act and various ILO conventions. The petition before the Bench was only regarding the dismissal of government employees and it was not necessary for the bench to question the right to strike. Yet, the Bench had gone into matters extraneous to the petition and declared a ban on the right to strike of government employees. An environment that is dominated by the values of capital of course inspires this activism of the judiciary.

In Ex. Capt. Harish Uppal Vs. Union of India and Another (2002), the Constitution Bench of Supreme Court held that lawyers have no right to go on strike or give a call for a boycott and even they cannot go on a token strike.

An assault on the democratic rights of another section of society occurred when the Kerala High Court banned political activity in the campuses. In Sojan Francis case, the Kerala High Court entrusted the managements with an authority to prohibit political activities in their institutions. The timing of this judgment was crucial because this has come at a time when the students were agitating against the commercialisation of education and malpractices of private managements. This verdict became a strong weapon at the hands of private managements who freely used this to keep the protesters silent and to protect their commercial interests.

In this case also court had gone extraneous to the petition in which a student, victimised by college authorities, sought an order permitting him to appear for university examinations. The issue of student politics was not involved in this case and it was not necessary for the court to pass orders on that aspect. While banning the organised activities of students, the court overlooked the reality that strong organisations of private managements, active in the State are engaged in lobbying, bargaining and they even go to the extent of closure of educational institutions as part of their pressure tactics. They are strong enough to challenge the government and we have seen in the recent years that they succeeded in sabotaging a government policy regarding self-financing institutions. As rightly pointed out by Justice V.R. Krishna Iyer, the judgment has not defined the term "politics". According to Krishna Iyer, the constitution, which is the supreme authority and to which the judiciary is also accountable, itself is political document evolved out of a political struggle for the independence of our country. While banning the student politics, the court has undermined the fundamental rights guaranteed by our Constitution. Freedom of expression, freedom to form association and freedom of assembly are the fundamental rights, which were denied to students due to a ban on campus politics.

Last year in Kerala, when students started an agitation on the vital issues of admission and fee structure of self-financing colleges, the High Court of Kerala acting suo motu, directed the State Government to take all measures to prevent it. But when a meritorious engineering student who belonged to a weaker section of society committed suicide because she had to discontinue her studies due to the inability to pay exorbitant fees, there were no suo motu proceedings by the court. The tragic incident took place at the office of the Entrance Examination

Commissioner, in the state capital. The absence of judicial activism in this issue of great social concern is not at all surprising. This is because the judiciary is highly influenced by the perceptions of propertied and hegemonic classes.

Here we have seen that in the entire neo-liberal period the judicial activism has played a double role – a combination of interventions and non-interventions. Whenever, aggressive interventions are needed to safeguard the interests of markets and capital, the judiciary is not at all hesitant and whenever direct interventions are not necessary to protect those interests, the judiciary will remain as a mere silent spectator.

The growing intolerance towards democratic rights is also evident in frequent invoking of provisions of criminal contempt on the part of Supreme Court and High Court. Contempt case against famous writer Arundhathi Roy, environmentalist Medha Patkar and senior lawyer Prasanth Bhushan and conviction of Arundhathi Roy on contempt charges is an example. There have been many other instances of contempt cases. The details of which I don't want to elaborate here. The judiciary does not tolerate even fair comments and reasonable criticisms. But this was not the earlier trend. The approach was comparatively liberal and progressive.

Some recent incidents of confrontations between judiciary and legislature is an unhealthy consequence of overall weakening democratic culture in the higher levels of state power. The neo-liberal era has resulted in, among many other things, a shift in the equilibrium of power between three major organs of state – legislature, executive and judiciary. Judiciary and executive are acquiring unchecked powers and legislatures have been marginalised in this process. The growing encroachments in the democratic rights of the people are extended to legislatures also.

In the Jharkand case and in the Cash for Quierie episode, we have seen Supreme Court's interference with the proceedings and privileges of legislatures. It is a well-accepted constitutional principle that the legislature is the sole guardian and judge in all matters relating to its proceedings and privileges. Subject to the provisions of constitution, each house of the Parliament is empowered to regulate its own procedure and the conduct of business. The courts have no power to interfere with such rules or their administration, unless there is a contravention of the constitution.

In short, one and half decade long, neo-liberal process has done a systematic occupation over the democratic rights of different sections, right from the working class to the student community. The globalisation has unleashed an onslaught on our democratic culture and institutions also. The gains of our bourgeois democracy itself are under siege. The supremacy of market forces over our democracy is an important feature of neo-liberal paradigm. But we must know that democratic principles are alien to markets. The change in the role of state as a facilitator for markets is more and more revealing its aggressive class character. Being a prime organ of state power, the role and functions of judiciary has also changed accordingly. The progressive judicial activism of previous welfare state era has been transformed into a reactionary activism in favour of ruling classes and against the democratic rights of the people. It is this kind of activism that acted as a key instrument in the counter democratic process initiated by neo-liberal forces of globalisation.