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D. Y. Chandrachud
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Constitutional and Administrative Law in India*

D. Y. CHANDRACHUD**

A Constitutional Perspective in India:

The Indian constitution contains in Part III, a Chapter on fundamental rights. The fundamental rights cover a broad spectrum, including

- the right to life and personal liberty;
- the right to equality and equal protection;
- freedom of conscience;
- the right to profess, practice and propagate religion;
- freedom of association and assembly,
- free movement within the territory of India, and
- freedom to practice a profession, trade or business.

The fundamental rights are not absolute because the freedoms that are recognized by Article 19 are subject to reasonable restrictions in a variety of contexts.

Part IV of the constitution recognizes economic, social and cultural rights in a chapter on Directive Principles of State Policy. The dichotomy between civil and political rights, recognized by Part III, and Directive Principles in Part IV means that while the freedoms in Part III are specifically enforceable by constitutional remedies, Article 37 provides that the Directive Principles shall not be enforceable by any court, though they are fundamental in the governance of the country.

* This article is a summary of the presentation made by D.Y. Chandrachud. It was prepared by Uma Narayan, IALL Board member and chair of the Mumbai Conference Local Planning Committee.

** D.Y. Chandrachud graduated from St. Stephen's College, Delhi, in 1979. He completed an LL.B from Delhi University in 1982, and holds an LL.M and SJD degrees from Harvard University. He was designated a Senior Advocate in 1998, specializing in constitutional litigation. He was appointed an Additoinal Solicitor General of India in 1998, and remained at that post until his elevation to the bench at the Bombay High Court in 2000.

The dichotomy between civil and political rights (enforceable by constitutional remedies) and Directive Principles (which cannot be directly enforced in a court) has been progressively diluted by a judicial restatement of the right to life under Article 21 of the Constitution. The right to life has been interpreted by courts to be broad enough to comprehend within its sweep all those facets that make life meaningful. While the Constitution recognizes that life or personal liberty can be regulated or taken away by procedure established by law, courts assert that procedures for limiting or denying these broad Article 21 rights must be fair, just and reasonable to be constitutionally valid. The expansive construction of the right to life thus became a jurisprudential foundation for reading into the “right to life” everything that imparts content to life.

The rights to legal aid, to a speedy trial, to housing, education, public health, information and to a clean environment have in successive decisions come to be recognized as being comprehended in the broad sweep of the right to life. Judicial interpretations preceded a formal amendment to the constitutional text since it was more recently that the right to education was recognized as a fundamental right through the 86th amendment. Consequently, the dichotomy has broken down between civil and political freedoms that are specifically enforceable and economic, social and cultural rights which are not. The traditional notion that civil and political rights are possessed of a negative content obligating the state to keep away from a sphere of activity left for the individual in contrast with socio-economic freedoms which have a positive content gave way to a more realistic balance between the two sets of rights. Increasingly, courts came to a realistic appraisal of the fact that economic, social and cultural rights could be read into civil and political freedoms by constitutional interpretation. The need for a harmonious construction between the two sets of rights thus assumes an important character in every inquiry into the genesis and interpretation of those rights.

The Supreme Court has repeatedly drawn sustenance from the recognition conferred upon economic, social and cultural rights by the Covenant on ESCR of 1966, while interpreting domestic legislation or while considering challenges to the validity of enacted law. For example, in *Daily Rated Casual Labour v. Union of India*,¹ the Supreme Court held that the deprivation of equal pay for equal work amounted to an exploitation of labor and was contrary to the spirit of Article 7 of the Covenant. And in *Christian Medical College Hospital Employees Union v. Christian Medical College*

¹ AIR 1987 SC 2342.

Vellore,² the Supreme Court held that a college conducted by a religious minority could not claim an exemption from labor legislation. The court held that the Covenant was a basic document declaring certain specific human rights in addition to proclaiming the right to work, equitable conditions of work, adequate remuneration and other rights protective of the welfare of labour.

In *Kapila Hingorani v. State of Bihar*,³ the Supreme Court held that the Government of a state which had pervasive control over a corporate body formed by the state would be held duty bound to enforce human rights obligations owed to employees who were facing starvation for want of salaries. These decisions were rendered in the context of labor legislation. In *Minerva Mills Ltd. v. Union of India*,⁴ the court recognized that the Directive Principles of State Policy which embody a commitment to economic, social and cultural rights are reflective of human rights norms, just as the fundamental rights embody human rights of a civil and political nature.

In elaborating upon the right to housing, the Supreme Court has placed extensive reliance on the Covenant on Economic, Social and Cultural rights, as seen in cases like *Ahmedabad Municipal Corporation v. Nawab Khan*,⁵ and *Chameli Singh v. State of U.P.*⁶ In *Apparel Export Promotion Council v. Chopra*,⁷ detailed guidelines were framed on matters relating to sexual harassment at the workplace. The court relied upon the Convention on the Elimination of Discrimination Against Women and the Covenant on Economic, Social and Cultural rights.

CASE STUDIES IN THE BOMBAY HIGH COURT

1. Malnutrition: The deaths of children in tribal areas

The Bombay High Court took cognizance *suo motu* of newspaper reports which brought to the fore a significant number of deaths by malnutrition of children aged from infancy to five years old. The deaths of these young children were seen to be most prevalent in six of the poorest tribal districts of the state. India acceded to the Convention on the Rights of the Child in December 1992. The genesis of the problem of infant

² AIR 1988 SC 37.

³ (2003) 6 SCC 1.

⁴ (1980) 2 SCC 625 at 702.

⁵ (1997) 11 SCC 121.

⁶ (1996) 2 SCC 549.

⁷ AIR 1999 SC 625.

malnutrition lay in tribal poverty. Marriages within tribal communities at the age of fifteen or earlier resulted in situations where a young girls had already experienced multiple pregnancies within a few years of marriage. These girl brides in tribal areas were often found to be anemic, and the successive children born to these young mothers have diminished chances for survival. Additionally, many tribal people did not use available health care out of traditional beliefs and a sense of cultural alienation from health care providers.

Drawing upon the guarantee of the right to life under Article 21 and the obligation assumed by India under the Convention on the Rights of the Child, the Bombay High Court issued a series of directions. These directions included

- (i) the identification of undernourished and severely malnourished children;
- (ii) medical intervention for ensuring medical treatment of all children in grade III or earlier;
- (iii) visits to villages by qualified doctors;
- (iv) the formation of rural committees at the district level;
- (v) Directions to the State to ensure an adequate supply of food grain, supplemental nutrition to beneficiaries, and up gradation of the infrastructure of rural hospitals.

The malnutrition case has been used by the court to issue writs of continuing mandamus. The continuing mandamus is founded on the premise that a one-time direction by the court in terms of formulating doctrine would not be adequate to deal with serious situations involving social deprivation. The continuing inertia of an administering agency would require directions by the court from time to time in order that the court may monitor compliance of its directions.

2. The National Park: Housing for the Poor vs. The Environment

In 1995, the Bombay Environment Action Group (BEAG), an NGO specializing in matters of environmental concern filed a public interest case in the Bombay High Court, seeking the court's intervention to remove illegal encroachments in the National Park (SGNP) and for protection of the park. Covering 107 sq.kms., SGNP is a notified National Park under the Wildlife Protection Act. It is arguably the only National Park within municipal limits anywhere in the world. SGNP is a unique natural biosphere reserve. It is the home of a huge number of unique species of flora and fauna, including several large mammals such as the panther and, recently, even the tiger. The

Bombay Natural History Society reports that SGNP boasts over 800 flowering plants, 274 bird species, 42 mammal species, 38 species of reptiles and a staggering 8000 insect species, including over 150 species of butterflies.

Thus, the court faced a delicate situation. On the one hand, the law mandated the clearance of illegal encroachments from the national park. On the other hand, there was the issue of rehabilitating the encroachers outside the park and doing so in a just and humane manner. The case presented a sensitive human conflict and required a careful balancing act between the preservation of the environment and the protection of the right to housing. But what makes this a truly remarkable case is the approach of the court itself, and of the petitioners. Though the BEAG's brief is focused on environmental protection, it approached the case as a human problem requiring a humane solution, and urged the court to evolve a scheme on those lines. This is precisely what the court did; at no time did the court venture into the realm of writing landmark decisions. Instead, it focused on solving the problem, one that was inherently huge and intricate. In doing so, it delicately balanced two competing public interests.

3. The Courts and Problems of the Physically Challenged

In 1995 Parliament enacted the Persons with Disabilities Act (Equal Employment, Protection of Rights and Full Participation). The Act mandates an identification of jobs and review of employment under the state, and carves out reservations of not less than 3% of posts in public employment for physically challenged persons. There is a mandate under the Act to create schemes providing for training and welfare, age limits, health and safety measures and for the creation of a non-handicapping environment. The Act requires affirmative action in the allotment of land at concessional rates. The Act further requires non-discrimination in transport and on the road by adapting rail compartments, vessels and aircraft.

On 31st March 2004, an initial direction was issued by the Bombay High Court to the Municipal Corporation in a public interest litigation to purchase 30 public buses capable of accommodating disabled persons, including those with wheel chairs. In a separate order, the court dealt with the problem faced by visually challenged hawkers at railway stations. A report was submitted before the court by an NGO, India Centre of Human Rights and the law which took note of grave acts of police brutality against visually challenged hawkers. Their goods were thrown on railway tracks and some were subjected to assault. 60% of the hawkers earned Rs.50/- to Rs.100/- every day, while the rest earned less than Rs.50/- every day. Most were found

to hawk because of an inability to find gainful employment. The report complained of a discriminatory enforcement of law. Blind hawkers who were not in a position to pay bribes were the ones who were targeted for police action. The Court issued several directions to the railway authorities seeking to protect the welfare of these hawkers.

The Bombay High Court was moved on an important issue involving the exercise of franchise by physically challenged persons. Despite an order passed by the Supreme Court mandating the provision of ramps in cities and metropolitan areas, no provision had been made to comply with the order. The Court was moved in order to facilitate the exercise of the right of franchise by visually challenged persons. The method which was followed earlier by the state involved a visually challenged voter appearing in person before the presiding officer of a polling station and being assisted to place his ballot against the name of a candidate of his choice on the electronic voting machine. This involved a serious infraction of the principle of secrecy of the ballot. On the suggestion of interested NGOs, the court found a low cost alternative to ensure the preservation of the secrecy of the ballot while at the same time enabling visually challenged voters to exercise their franchise. In short, the state was directed to print dummy ballot papers in Braille. Every visually challenged voter would be allowed access to this dummy ballot paper in Braille which would be at every polling station. This would indicate to him the position of each candidate on the electronic voting machine and enable the voter to exercise his franchise. In related areas, the Court has given directions to the state to constitute committees to identify the jobs where reservations in the form of affirmative action could be adopted for the physically challenged.

Conclusion

The formulation of a constitutional precept is the first stage. This is an important step, because the evolution of doctrine has a significant role to play in a democratic polity in order to legitimize the role and position of the judiciary in the constitutional scheme as an expounder of human rights. The implementation of human rights can commence upon a jurisprudential recognition of the entitlement of the individual to freedoms, not only of a civil and political character, but to those with an economic, social and cultural content as well. Raising these human rights to a level of constitutional protection and interpreting them in the context of international conventions confers upon the process a degree of continuity and sanctity in a democratic polity. Courts have a vital role to play in mandating the observance of human rights in an economic, social and cultural context.