"FUNDAMENTAL RIGHTS IN THEIR ECONOMIC, SOCIAL AND CULTURAL CONTEXT"

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I must thank the Commonwealth Secretariat and the Ford Foundation for giving me an opportunity to convene and organise this Judicial Colloquium where high judicial personages from different parts of South Asia and South East Asia as well as Africa, Australia, Europe and the USA are participating in the discussion of a subject of vital interest to the well-being of all humanity. We have gathered together here to discuss the subject of "The Domestic Application of International Human Rights Norms". It is a vast and special subject and it is not possible to deal with all its manifold aspects within the limited space of a paper or even within the limited time available to a workshop. One can only focus on a few of its important aspects, though even what is important amongst its various aspects may itself be a matter of some controversy.

The basic theme in the discourse on human rights to which we must address ourselves is how we can convert the rhetoric of human rights into reality. The rhetoric of human rights draws on the moral resources of our belief in the significance of an underlying common humanity and points in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realised in, and protected by law. Human rights discourse can therefore serve both as a potent source for radical critiques of actual social arrangements and also as a powerful basis for working out and presenting alternative institutional practices.

The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights which ideally use the language of universality inalienability and indefeasibility should be transformed into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems. The meaning and scope of each right has to be clarified, the content and location of any co-relative duties must be spelt out and the permissible range of exceptions and limitations specified.

Whether this work is done by the framers of the constitution, the ordinary law making procedures or the activities of the courts themselves, it may be regarded as realisation or positivization of human rights through law. The most obvious form in which this is done is through specific constitutional provisions which incorporate a statement, or Bill of Rights, which are given the status of fundamental law. These rights are then regarded as superior to ordinary legislation, and are used to render invalid any legislative action or administrative or other governmental decisions which are held to run counter to the enumerated rights. Institutionally this invalidation is normally achieved through the medium of courts, whose task it is to rule on the constitutionality of ordinary legislation as also executive action and to determine whether the fundamental rights of the citizen have been infringed in particular cases.

This model, which had its origin in the United States, has been adopted with variations in most of the countries which attained independence after the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December 1948 and recently it has been incorporated also as part of the Canadian Constitution. This mechanism gives major power in positivizing human

rights to courts, since the type of decision to be made in applying highly general statements of rights to specific circumstances results, in effect and substance, in creating detailed formulations which are applicable in the particular circumstances of each case. This mechanism has the advantage that there is an institutional avenue for challenging violations of human rights by governments, though it is open to the charge that it is undemocratic. It is perhaps for reasons of democracy and accountability, that the protection of human rights is left to elected legislative bodies, like Parliament in the United Kingdom, while courts are in effect limited to the determination of whether the executive organs of government have acted within the law.

However, this apparently more democratic process leaves human rights vulnerable to the decisions of bodies which have much more on their collective minds than the protection of human rights and are subject to majoritarian populist pressures and reasons of state which so often lead to human rights violations. It is therefore believed in many jurisdictions such as the United States, Canada and most of the countries whose justices are participating in this Judicial Colloquium, that the special function of human rights in placing limits on state action cannot be left safely in the hands of the legislature or the ordinary processes of law. It is the firm conviction of the people of these countries that the best mechanism for positivizing human rights and realising human rights through law is through the enactment of basic or fundamental rights in the constitution and entrusting constitutional courts with the power and duty to interpret and enforce these human rights.

It is necessary to point out that a certain degree of positivization or particularisation is required if specific human rights are going to have practical force, because it is only when they are positivized and particularised that they can become a basis for challenge to legislative or executive action which is violative of them as also for compulsorily generating effective executive action. There are certain human rights which operate as a restraint on the power of the state and such restraint is necessary because of the possibility of abuse and misuse of power by the state which is inherent in the legitimate possession of the monopoly of force within a society and equally there are certain other human rights which require affirmative action to be taken by the state, particularly in cases where the realisation of a given human right requires to be facilitated by state action. It would not therefore be incorrect to observe that the state is the necessary friend as well as the recurrent enemy of human rights.

The process of realising human rights involves translating idealised objectives into specific rules which require clarity in formulation untypical of ideological discourse. And this can best be done through the mechanism of a strong and independent judiciary which is in tune with the ideologue of human rights. The Bill of Rights can at best only enunciate broad and general statements of human rights but to positivize them, to spell out their contours and parameters, to narrow down their limitations and exceptions and to expand their reach and significance by evolving component rights out of them while deciding particular cases, is a task which the judicial mechanism is best suited to perform provided of course the judges have the right attitudinal approaches. The judges have to be careful while positivizing human rights and giving them meaning and content to ensure that they do not in the process dilute human rights but enlarge their scope and ambit and advance the purposes for which they are enacted as part of the fundamental law.

Interpreting the Constitution

Since the judiciary has to perform an important role in the interpretation and enforcement of human rights inscribed in the fundamental law of a country, it is necessary to consider what should be the approach of the judiciary in the matter of constitutional interpretation. Mr Anthony Lester, QC has in his paper referred to what he has called a generous and purposive approach to constitutional interpretation as observed in several decisions of the Judicial Committee of the Privy Council. I would like to repeat what I said in the course of the speech delivered by me at the Commonwealth Law Conference in Jamaica in regard to judicial interpretation in constitutional law: -

> "It must be remembered that a constitution is a totally different kind of enactment than an ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship: it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out certain objectives and goals. It cannot therefore be interpreted like any ordinary statute. It must be interpreted creatively and imaginatively with a view to advancing the constitutional values and spelling out and strengthening the basic human rights of the large masses of people in the country, keeping in mind all the time that it is the constitution, the basic law of the land, that we are expounding and that ultimately, as one great American judge felicitously said, 'the Constitution is what we say it is.'"

The judiciary must therefore adopt a creative and purposive approach in the interpretation of fundamental rights embodied in the constitution with a view to advancing human rights jurisprudence.

There is a serious controversy in the United States between the originalist interpretation of the constitution and the creative and purposive interpretation. Speaking for myself, I am not in favour of the originalist interpretation of the constitution. The court in interpreting the constitution is not bound to accept the meaning which the constitutional provisions had in the "original understanding" of the framers, drafters and adopters of the constitution. If that were so, many of the progressive interpretations of the provisions in the Bill of Rights in the United States would not have been possible and so also in Canada and India. The constitution is a living document and the interpretation which must be given by the court is that which advances the constitutional values and enhances the protection of the people by limiting and structuring the executive and legislative power and ensuring realisation by the people of the human rights guaranteed to them under the constitution. The constitutional history of many countries which have a Bill of Rights in their constitution shows how a creative and imaginative interpretation of constitutional law can advance the cause of human rights and social justice.

There are three traditions in the interpretation of the fundamental rights guaranteed in a constitution. The first tradition is what I call the bureaucratic tradition where the constitutional text is treated like any other statutory enactment. Judges display a high level of fidelity to the written text which is treated as ex cathedra and they claim that they do not allow their judicial function to be confused by social, political

and economic considerations. This view, I am afraid, cannot sit easily in the apparatus of decision making of a modern judge in this over simplified form. Judges cannot just interpret the constitutional guarantees in a mechanical fashion unconcerned with the consequences of their decision or to use the words of Holmes, J. with the potential radiation of the decision they are making.

The second tradition of judicial interpretation has its origin in liberal Whigism. The constitution confers power on various organs of the state and also lays down the limits within which such power can be exercised. It is necessary to ensure that these limitations are observed and there is no abuse or misuse of power. Where there is abuse or misuse or excess of power by the state or its officers and the rule of law is violated or in other words where the state acts outside the constitution and the law, it is guilty of what I call state lawlessness which has to be controlled by the judiciary. This is what I call the abuse of power approach. But obviously judicial concern must extend beyond merely containing state lawlessness, to the most substantive features which constitutionalism requires judges to promote and structure.

Social Justice

That takes me to the third approach to constitutional interpretation, namely, the approach of social justice. It is an approach which the Supreme Court in India has adopted in the last decade. The judges in India have asked themselves the question: Can judges really escape addressing themselves to substantial questions of social justice? Can they simply turn round to litigants who come to them for justice and the general public that accords them power, status and respect and tell them that they simply follow the legal text, when they are aware that their actions will perpetuate inequity and injustice? Can they restrict their inquiry into law and life within the narrow confines of a narrowly defined rule of law? Does the requirement of constitutionalism not make greater demands on the judicial function?

It is a truism as pointed out by a great American judge that the constitution is what judges make it and judges cannot therefore remain oblivious to social needs and requirements while interpreting the constitution. There are normative expectations from judges and these normative expectations arise from the revolution of rising expectations which characterises modern society in most parts of the Third World. The world is at present on the threshold of a new era of freedom and progress because with a passion unequalled in the past century, the peoples of the developing countries are today demanding freedom; not only freedom from arbitrary restraint of authority but also freedom from want, independence from poverty and destitution and from ignorance and illiteracy. It is this freedom which is now demanded by millions of people all over the world and the judges in interpreting the fundamental rights enshrined in the constitution cannot remain aloof and alienated from this demand of the people for social and economic freedom which I subsume under the label 'social justice'.

I stress this aspect because I believe that most of the jurisdictions in the Third World countries have made a determined attempt to shift the focus of constitutional interpretation away from the bureaucratic and abuse of power modes of discourse and taken to the social

justice approach. The result is that there is now greater emphasis in developing countries on social and economic rights than on civil and political rights. There is unfortunately, today, a misguided controversy in regard to the question of choice between civil and political rights on the one hand and social and economic rights on the other. I am of the view that the problem of choice is actually more apparent than real because in fact two sets of human rights are so inter-related as to form one single pattern of human rights. The relationship between these categories of rights is so obvious that the International Human Rights Conference in Tehran declared in its final proclamation that:

> "Since human rights and fundamental freedoms are indivisible the full realisation of civil and political rights without the enjoyment of economic social and cultural rights is impossible."

It is indeed questionable how human freedom and dignity can be promoted and protected at all without realisation of both categories of human rights. Whether there is conflict or antithesis between these two categories of human rights has been and still remains a matter of international debate but there is no logical reason to perceive this debate as indicating any incompatibility between these two sets of rights. The apparent difference stems from two different ideologies, one being the ideology of the Western liberal tradition and the other being the communist ideology. It is not necessary to enter into any discussion in regard to this controversy because it has now been recognised in the International Covenants that both categories of human rights are extremely important and valuable.

The Western liberal tradition of course emphasises the individual rights which are largely civil and political rights but the validity and practicability of the Western conception of human rights has been doubted in its application to the developing countries. Fouad Ajami of Princeton University has questioned the completeness of the liberal concept of human rights, its vulnerability to charges of particularism and self righteousness, and its incapacities. There are far too many forms of deprivations of human rights which are embedded in the contemporary global context.

It is natural that in view of the chronic and widespread poverty and disparities in the Third World, social and economic rights should be thought of as being of priority. By contrast, civil and political rights often seem a luxury and an irrelevance in the face of stark inequality and starvation. Nonetheless the harsh reality of the poverty in the Third World and the consequent disillusionment with Western liberalism ought not to blind us in a moral trap. It is imperative to view human nature and the problem of structuring power in a proper perspective in order that we should not fall into extreme laissez faire or totalitarianism. For both, in the last analysis, add to our repression of human freedom and dignity.

I may reiterate that since some time past, the focus of human rights in developing countries has shifted from civil and political rights to social and economic rights. This has been assisted by two developments in human rights jurisprudence which are extremely important. One is the decision of the Human Rights Committee that it will also examine violations of economic, social and cultural rights and the other is the increasing recognition which has now been given to the right to development as a human

right. It is now realised that the right to development is a basic human right without the realisation of which it is not possible to enjoy any other human right. The right to development has received recognition both as an individual and as a collective right and in fact the United Nations has adopted a Declaration on the Right to Development. I will therefore concern myself in this paper with the domestic application of social and economic rights.

Judicial activism : the Indian experience

Before I come to the international human rights norms set out in the International Covenants on economic, social and cultural rights I may once again point out that the interpretive approach of the judiciary in India, as in Canada, has been creative and purposive. The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of the constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identified by justices as well as by people as "the last resort for the purpose of the bewildered". The transition from traditional captive agency with a low social visibility into a liberated agency with high socio-political feasibility is an interesting development in the career of the Indian appellate judiciary. The Supreme Court of India has, through judicial activism, found a new historical basis for the legitimation of judicial power and acquired a new credibility with the people. This development has been the result of intense social activism on the part of some of the justices of the Supreme Court of India.

I propose to give a few examples of the manner in which the judiciary in India has tried to give effect to the human rights norms embodied in the two International Covenants. Article 9(3) of the International Covenant on Civil and Political Rights provides that persons awaiting trial should be released, subject to guarantees to appear for trial, and Article 28 of the Principles on Equality of the Administration of Justice of the Indian Constitution lays down that:

> "national laws concerning provisional release, custody pending or during trial shall be so framed as to eliminate any requirement of pecuniary guarantees."

Article 16(2) of the Principles of Freedom from Arbitrary Arrest and Detention also provides that:

> "to ensure that no person shall be denied the possibility of obtaining provisional release on account of lack of means, other forms of provisional release than financial security shall be provided".

These human rights norms have been incorporated into the domestic law by a process of judicial interpretation. Article 21 of the Indian Constitution says that:

> "No person shall be deprived of his life or personal liberty except by procedure established by law".

The view was held by the Supreme Court of India for a long time that this Article merely embodied the Diceyian concept of the rule of law, namely, that no one can be deprived of his life or personal liberty by the executive without the authority of law. It was enough so long as there was some law authorising such deprivation, and it did not matter what was the nature or character of that law. The decision in Maneka Gandhi's case marks a watershed in the history of constitutional law in India, for the Supreme Court of India held that it is not sufficient merely to have a law in order to authorise constitutional deprivation of life and personal liberty, but that such law must be prescribed by procedure and such procedure must be reasonable, fair and just. The Supreme Court of India by a process of judicial interpretation, brought in the procedural due process concept of the American Constitution, though the original intent of the framers of the Constitution was to exclude a due process clause. The Supreme Court of India proceeded to hold that insistence on monetary bail in a case of a poor accused would be inconsistent with reasonable, fair and just procedure so far as the poor accused is concerned, and therefore violative of the constitutional guarantee under Article 21. It was held for the first time that more liberal norms consistent with human rights should be adopted on which accused persons may be allowed to remain at liberty pending trial. It was observed by the Supreme Court that the risk of monetary loss is not the only deterrent against fleeing from justice, but there are others which act as equal deterrents against fleeing.

Thus, the entire law of bail was "humanised" by a judicial interpretation of Article 21 and the Supreme Court of India held that a new insight should inform the judicial approach in the matter of pre-trial release. If the court is satisfied after taking into account the information placed before it, that the accused has roots in the community and is not likely to abscond, it need not insist on a monetary bond and may safely release the accused on a personal bond. The human rights norm set out in the international instruments was thus translated into national practice.

The Supreme Court of India also in the same case adopted an activist approach and took positive steps in the direction of implementing Article 14(3)of the International Covenant on Civil and Political Rights which lays down that everyone shall be entitled in the determination of any criminal charge against him "to be tried without undue delay". Article 16 of the Principles on Equality in the Administration of Justice reiterates that everyone shall be guaranteed, in the determination of any criminal charge against him, the right to a prompt and speedy hearing. The Supreme Court of India held that the right to a reasonably expeditious trial is an integral and essential part of reasonable, fair and just procedure in case of an accused who is in jeopardy of his life or personal liberty. It is therefore implicit in the fundamental right to life and personal liberty enshrined in Article 21. The state accordingly has a constitutional mandate to do whatever is necessary to ensure an expeditious investigation and a speedy trial. The Supreme Court of India for the first time read the fundamental rights as imposing an affirmative obligation on the state instead of merely reading them as negative restraints on the power of the state. The Supreme Court of India in another case, following upon this view, held that so far as juveniles are concerned the criminal trial against them must be completed within a period of two years at the outside and if it is not so completed, the criminal prosecution would be liable to be quashed. The Supreme Court of India thus not only gave effect to the right to speedy trial enshrined in the international instruments but also

gave effect to the right of a child to expeditious disposal of any criminal proceedings against him.

Access to Justice

Nationally and internationally, access to justice has now been recognised as one of the most important basic human rights without which it is not possible to realise many of the human rights whether they be civil and political or social and economic. There is in fact considerable literature on access to justice as a human right. The Constitution of India included by an amendment made in 1976, Article 39A in the Directive Principles of State Policy, with a view to ensuring equal access to justice to the people irrespective of their caste, creed or resources, but this Directive Principle was not being implemented. The Supreme Court of India found that the state was dragging its feet in providing access to justice. Large masses of people in the country were leading a life of want and destitution and on account of lack of awareness, assertiveness and availability of machinery, were priced out of the legal system and were denied access to justice. The Supreme Court in a leading case, therefore took the view that in a criminal case which imperils the life or personal liberty of an accused, if the accused is on account of his poverty or ignorance or socially or economically disadvantaged position unable to afford legal representation, it would be violative of Article 21 of the Constitution to proceed to try him without giving him proper and adequate legal representation. The Supreme Court took the view that providing proper and legal representation to a poor accused in a criminal trial is part of reasonable, fair and just procedure and is therefore implicit as a fundamental right in Article 21 of the Constitution. The Court in keeping with its newly found role of protector and promoter of human rights, directed the state to provide free legal assistance to a poor accused in a criminal trial through creative judicial interpretation of Article 21. It held that the right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must therefore be held implicit in the constitutional guarantee of Article 21. The Supreme Court of India thus spelt out the right to legal aid in a criminal proceeding from the language of Article 21 and evolved the affirmative obligation on the state to provide legal assistance. The Court also held in a subsequent case that if the magistrate does not inform the accused that he is entitled to free legal assistance, or if the accused is not provided with such free legal assistance in a criminal trial, the conviction would be liable to be set aside.

The judiciary in India also had occasion to interpret the expression "the right to life". In a seminal decision, the Supreme Court held that life does not mean merely physical existence, but it also includes the use of every limb or faculty through which life is enjoyed and also implicit in it is the right to live with basic human dignity, because without basic human dignity life would not be worth living. The state cannot deprive a person of his right to life with basic human dignity which would include the basic necessities of life. On the words of Article 21 the state can effect such deprivation by reasonable, fair and just procedure prescribed by law. However, the judiciary held that no procedure which deprives a person of the right to live with basic human dignity can possibly be reasonable, fair and just. The right to live with basic human dignity was thus elevated to the status of a fundamental right which could not be abridged, defeated or taken away by the state and this was achieved through a process of judicial interpretation.