Fundamental Rights in their Economic, Social and Cultural Context

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This is the second in the series of judicial colloquia which are being organised by members of the judiciary throughout the Commonwealth assisted by the Commonwealth Secretariat. The first, as you know, was held in Bangalore, India, where predominantly South Asian and South East Asian Chief Justices met in order to discuss the topic of "The Domestic Application of International Human Rights Norms". It was a highly stimulating experience for all of us who attended the colloquium. The host of the present colloquium, Chief Justice Dumbutshena, was also good enough to respond to my invitation and participate in the Bangalore Colloquium.

At the end of the deliberation, we came out with "The Bangalore Principles", a copy of which has been supplied to each of the participants present here.

When I refer to the Bangalore Principles, I cannot help recalling the calamity that befell my friend Salleh bin Abbas, ex-Lord President of Malaysia. It has a direct relevance to the topic we are discussing at this Colloquium. It is only a strong and independent judiciary that can internalise in its domestic jurisdiction the international human rights norms. In fact, it would be no exaggeration to state that human rights would be safe in a society only so long as its judges are bold and independent. Salleh bin Abbas paid the price for his integrity and independence and he has left us a glorious example to follow. He has taught us that we judges should not be timorous souls, anxious to cling to our positions; but we should rather be bold, adventurous spirits prepared to make any sacrifice demanded of us in our pursuit to advance and enforce human rights.

But what are the human rights which need to be advanced and enforced? So far as the Western developed countries are concerned, the emphasis has always been on civil and political rights, and human rights are sought to be equated only with civil and political rights. The reason for this is that the concept of human rights assumed great importance after the holocaust of the Second World War, when civil and political rights were completely suppressed by the Nazi fascist regime. Therefore, after the conclusion of the Second World War, when the Western powers came to formulate the Universal Declaration of Human Rights, they were naturally more concerned with civil and political rights than with any other category of human rights.

They realised that peace is indivisible: if there is violation of civil and political rights in one country, it is bound to have repercussions in other countries, leading to strife and instability. Moreover, the Western countries having attained a fairly high stage of development in material and economic resources, social and economic rights did not find much pre-occupation in

their minds, and their concern was largely confined to civil and political rights. That is why in the Universal Declaration of Human Rights, there are only a few articles - and then towards the end - which deal with social and economic rights. It may also be noted that when the Universal Declaration was adopted, most of the Third World countries had not yet achieved political independence and so did not have the opportunity of participating in the framing of the Universal Declaration.

But soon it came to be realised, both by reason of the Third World countries becoming active members of the United Nations - and also the influence of the socialist countries - that though civil and political rights are precious and invaluable, because without them freedom and democracy cannot strive, they just do not exist for the vast masses of people in the developing countries who are subjected to exploitation and are suffering from want and destitution. It is only if economic and social rights are ensured to these large masses of people that they will be able to fully enjoy civil and political rights. That is why the International Human Rights Conference called by the General Assembly in Tehran in 1968 declared in its final proclamation: "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights is impossible".

It is now being increasingly realised that civil and political rights have no meaning and value unless they are accompanied by economic and social rights. This is particularly important in Third World countries. We in the Third World countries have unique problems, totally different from those in the Western countries. In Western countries democracy and individual freedom came at the end of a period of sustained industrial revolution and therefore they had no particular difficulty in reconciling the claims of individual freedom with the collective welfare of the society. But we in the Third World are trying to bring about change in the social and economic conditions of the large masses of people with a view to uplifting them from the quagmire of poverty and ignorance and so making basic human rights meaningful for them while at the same time guaranteeing freedom of the individual such as freedom of speech and expression, freedom of association, etc. This exercise in which we are all engaged does apparently seem to involve a clash between the individual freedoms which are enshrined in civil and political rights and the collective advancement of the large numbers of deprived persons which requires realisation of economic and social rights. We seem to be dividing two unruly horses which are apparently clashing with each other, but yet we cannot afford to give up either. At times this apparent conflict between the freedom of the individual and the collective rights of the poor and under-privileged segments of the society fails to be resolved by the judiciary and a balance has to be achieved - a solution has to be found. This delicate task requires wisdom, courage and judicial statesmanship with social vision and an insight for perception of the people, and it raises challenges for the judiciary. These challenges can be met successfully only by an activist goal-oriented judiciary which is imbued with a determined spirit for the promotion and enforcement of both categories of human rights, namely, civil and political rights, and economic and social rights. The judiciary

must also possess the requisite judicial craftsmanship for doing so.

If human rights are to become a reality for the large masses of people, the judiciary has to play an activist role, and this activist role becomes all the more necessary in cases of economic and social rights. Judicial activism is an undeniable feature of the judicial process in a democracy, and the necessity of it flows directly from the nature of the judicial function itself. It is now acknowledged, even by British jurists, that judges do in reality make law, whether interstitially as Justice Holmes would have it, or otherwise. It must also follow as a necessary corollary from this position that judicial activism is a necessary and inevitable part of the judicial process.

Judicial activism can take many forms. It may be what I would describe as "technical activism", which ensures that judges have the necessary freedom of action - i.e. freedom to choose between alternative courses of action. It consists of a declaration of the freedom to have recourse to a wide range of techniques and choices. I call this activism "technical" because it is concerned merely with keeping juristic techniques open-ended.

"Judicial activism" may be contrasted with what I would call "juristic activism". Juristic activism is not concerned merely with the appropriation of increased power but is concerned as well with the creation of new concepts, irrespective of the purpose which they serve. In this kind of juristic activism, the judge is not concerned with the social consequences generated by new concepts or principles, or with the question as to whom these new concepts or principles will serve. This kind of juristic activism may help to preserve the status quo, or it may impel the realisation of social and economic human rights. But what is needed is to use juristic activism for the advancement and realisation of human rights. We must move away from formalism and use judicial activism for achieving the objective of making human rights a living reality for the people we serve. Human rights must not remain merely paper declaration or mere hortative statements. They must be invested with meaning and content. The modern judiciary, particularly in Third World countries cannot afford to hide behind notions of legal justice and plead incapacity when human rights issues are addressed to it. The judges must boldly and imaginatively resolve human rights issues. Most of the Third World countries have written constitutions which contain a charter of human rights. But the charter can at best only enunciate broad and general statements of human rights. It is to the judiciary that the task is assigned to positivise human rights; 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.

The judges must therefore boldly and creatively interpret their charters of human rights. But in so doing, they are not adrift on an unchartered sea. They can and must take into account international human rights norms for expanding the reach and ambit of the human rights. Enumerated in their domestic law

international human rights norms are to be found in various international instruments, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These international instruments have been ratified by some of the States, while some others have not yet ratified them. But, whether ratified or not, these international instruments embody human rights norms which are broadly accepted by the entire international community and they should and must be incorporated into national jurisprudence through a process of judicial interpretation.

I may point out that sometimes a question is raised by judges as to how we can incorporate into our domestic jurisprudence economic and social rights embodied in the International Covenant on Economic, Social and Cultural Rights, if they represent merely objectives which are to be attained by a State to the extent to which its resources may permit. But I do not think this question presents any real difficulty. In the first place, while interpreting and applying the human rights embodied in the charter of human rights in our respective constitutions, we can certainly take into account economic and social rights and interpret and apply the specifically enumerated human rights in such a manner as to advance and achieve economic and social rights. The scope and ambit of the specifically enumerated human rights can and must receive colour from economic and social rights. Secondly, there are certain economic and social rights (such as those set out in Articles 6,7 and 10) which can be spelt out from the specifically enumerated human rights and thus become enforceable by the judiciary. Everything depends on the creativity, valour and activism of the judge deciding the particular case.

Some of us in India have internalised in our national jurisprudence to a fairly large measure many of the international human rights norms through our own judicial creativity and activism. But this has to become a global phenomenon, or at least a Commonwealth phenomenon since Commonwealth countries have inherited elements of the common law system and are developing their own jurisprudence on the secure foundations of that system. I would like to illustrate what I have said by giving a few examples.

I will first refer to Article 2(3)(a) of the International Covenant on Civil and Political Rights which seeks to ensure that any person whose rights or freedoms are violated shall have an effective remedy, and Article 14 (3)(d) of the same Covenant which requires that every person charged with an offence shall be entitled to have legal assistance assigned to him without payment by him, if he does not have sufficient means to pay for it. We found that the poor and the disadvantaged were unable to afford the luxury of legal assistance in order to be able to vindicate their rights, but the State was dragging its feet and not setting up any legal aid programmes. The judiciary therefore stepped in to remedy this state of affairs. We have in the Indian constitution Article 21 which provides that no one shall be deprived of his life or personal liberty except by procedure established by law. We interpreted this Article to mean that no one can be deprived of his life or personal liberty unless there is law which authorises it, that law must prescribe a procedure for such

deprivation and that such procedure must be reasonable, fair and just. We thus introduced the American procedural "due process" concept into our constitution, though it was contrary to the original intent of the founders of the constitution who in their deliberations had decided to omit any reference to it. We did so because we thought it was necessary to advance human rights jurisprudence. We then, in subsequent cases, laid down new and more liberal norms for pre-trial release as part of a reasonable, fair and just procedure so as to incorporate in our national jurisprudence the right in Article 9(3) of the International Covenant on Civil and Political Rights. We also held that legal aid to an indigent accused in a criminal trial where he was in jeopardy of his life or personal liberty was a basic human right, because any procedure which does not provide legal representation to a poor accused cannot be regarded as reasonable, fair and just under an adversarial system for the administration of justice. We took the view that in a criminal trial where the accused is poor and cannot afford legal representation, the State must provide it at State cost, and the magistrate must inform the accused of this right. We thus brought into our natural jurisprudence, through a process of judicial interpretation, the rights to access justice and to have legal assistance free of cost, which rights are enshrined in Article 2(3)(a) and Article 14(3)(d) of the International Covenant on Civil and Political Rights.

But still there was difficulty in enforcing the human rights of the poor and the disadvantaged, because they are not aware of their rights, they lack the capacity to assert those rights and they do not have the material resources to approach the courts in cases other than criminal. As a result a large range of human rights remain unenforced. We therefore developed the strategy of public interest litigation. We held in a seminal decision that the ordinary rule of Anglo-Saxon jurisprudence is that an action can be brought only by a person to whom legal injury is caused. However, this rule must be departed from in the cases of poor and disadvantaged classes of people where legal injury is caused to a person or class of person who, by reason of poverty or disability or socially or economically disadvantaged position, cannot approach the courts for judicial redress. Thus we held that any member of the public, or social action groups acting bona fide, can approach the court seeking judicial redress for the legal injury caused to such person or class of persons, and that in such a case the court will not insist on a regular petition being filed by the public spirited individual or social action group espousing their cause and will readily respond - even if its jurisdiction is invoked merely by means of a letter addressed to it, as can happen in the case of habeas corpus actions. This widening of the rule of locus standi introduced a new dimension in the judicial process and opened a new vista of a totally different kind of litigation for enforcing the basic human rights of poor and underprivileged sections of the community, and ensuring basic human rights dignity. Much of the human rights jurisprudence in India has been built-up by the courts as a result of public interest litigation. The courts have been enforcing basic human rights of the deprived and vulnerable sections of the society in cases under trial as well as convicted prisoners,

women in distress, children in jails and juvenile institutions, bonded and migrant workmen, unorganised labour, "untouchables" and "scheduled tubes", landless agricultural labourers who are denied minimum wages or who are victims of faulty mechanisation, slum and pavement dwellers and victims of extra-judicial executions and many more. It would be no exaggeration to say that almost the entire body of human rights activism has been initiated and built up by the judiciary in India.

Now turning to the International Covenant on Economic, Social and Cultural Rights, I will cite one example to show how Article 7 of that Covenant has been enforced. This Article confers the right to enjoyment of just and favourable conditions of work which ensure inter alia minimum wages, equal remuneration for work of equal value and safe and healthy conditions of work. We had a case where large numbers of workers were working in stone quaries under unhealthy and inhuman conditions of work. They were not getting clean drinking water, they had no medical attention at all, and the dust flying from the stone crushers was affecting their lungs. We took the view that the right to life enshrined in Article 21 of the Indian constitution comprised not only the right to physical existence but also the right to every limb and facility through which life is enjoyed, as also the right to live with basic human dignity which includes adequate food, clothing and shelter. The workmen were therefore entitled to just and humane conditions of work which would ensure them their "right to life" in this judicially-expanded sense and we accordingly directed the State to ensure that the workmen got clean drinking water and proper medical attention, and that the stone crushers were fitted with devices which would prevent the emanation of harmful dust.

In another case there were two categories of workers employed by State, one a category of casual workers and the other a category of permanent workers. The casual workers were paid daily wages without any holidays or other peripheral benefits while the permanent workers were getting monthly wages with all benefits which amounted to much more than the casual workers were getting, though both were doing the same kind of work. We directed that the same remuneration be paid to both categories of workers since they were doing the same kind of work. There have been numerous other cases where the economic rights set out in Articles 6,7 and 10 have been incorporated into natural jurisprudence and enforced through a process of creative judicial interpretation.

If we judges want to advance human rights jurisprudence, a task which is committed to our care by the society we serve, it is essential that we be fearless in the discharge of our functions, that we adopt an activist, goal-oriented approach and that we creatively build up our national jurisprudence by incorporating into it the international human rights norms which have received broad acceptance by the entire international community. There is a considerable body of human rights jurisprudence evolved by the United Nations Human Rights Committee, the European Court of Human Rights and the national courts of many countries around the world which can afford guidance to us in our task of building up our own human rights jurisprudence. We have to expand the reach

and ambit of human rights in the light of international human rights norms and render them meaningful to the people. We have to be ever alert to repel all attacks, obvious or subtle, against human rights and we have to guard against the danger of allowing ourselves to be persuaded to attenuate or constrict human rights out of a misconceived concern for State interest, concealed political preferences, or sometimes ambition, weakness or fear of executive reaction. Human rights in all our countries will be safe for so long as we are deeply committed to human rights and imbued with the spirit of international human rights norms.