

THE INDIAN CONTEXT

***Justiciability of
Economic, Social &
Cultural Rights***

The Prime Mover

- Indian judiciary solely and single responsible
- Unique position as
 - Independent organ of state
 - Countervailing check on functioning of other two organs-Leg & Exec
 - Judiciary ultimate and final interpreter of Constitution
 - Authorized to strike down executive, quasi-judicial & legislative action as unconstitutional

The Prime Mover

- Expounds and elaborates features of constitution
- SC's declaration of law is binding and mandatory upon all courts in India
- This coupled with power to punish for contempt of court
- Judiciary is the constitutional authority enforcing accountability/answerability of other organs of the state

The Prime Mover

- Role of Courts undergone a dynamic and complete change
- Moved beyond narrow function of interpreting statutes/legislations
- Court has made laws as well
 - through interpretation
 - legislated where there is legislative vacuum

The Initial Hurdle

- Part III supreme
- Part IV sub-ordinate
- Supreme Court restricted itself to narrow interpretation
- And in the event of any conflict between the two, FR would prevail solely and exclusively

The Initial Hurdle

- Later court expounded that
 - DPSP fundamental in governance
 - Sometimes FR to be subordinate in order to achieve a just social order
 - FR and DPSP are complementary and neither are mutually exclusive

The Catalysts

- Declaration of Indivisibility of FR & DPSP
- The assertion of doctrine of substantive due process (executive, legislative, quasi judicial action to pass ‘just, fair, reasonable test’)
- The expansion of the scope and content of certain core FR
- New innovative tools to access justice

Specific Contribution

- Access to ESCR
- PIL/SAL concept
 - Art 32-enforcement of FR ‘through appropriate proceedings’
 - Art 32 itself a FR
 - PIL done away with adversarial system
 - Third party intervention entertained

Specific Contribution

- Traditional rule of *locus standi* extended to public law litigation also
- Writ jurisdiction under Art 32 & 226 of Indian constitution widened
- Broadened horizon of 'justiciability' for enhanced judicial vigilance-notices issues to state govt on how much food stocked in storehouse

Specific Contribution

when people dying of hunger, issues of food security brought to light

- SC used writ jurisdiction to evolve new remedies to suit exigencies of situation
 - awarded compensation to victim
 - often accused to pay to victim for his/her action that resulted in violation of victim's FR
 - Symbolic & tokenism stance

Specific Contribution

- Courts interpret law and do not legislate
- Filled up existing legal vacuum through case law
 - Lakshmikant Pandey vs UOI, 1987*
on in/inter country adoption
 - Vishaka vs St of Rjasthan, 1997* on right against sexual harassment at workplace

Specific Contribution

- Judicial decisions traditionally binding only on litigating parties
- Now binding on others as well
- Judicial process now participatory and moved beyond adversarial set up if issues of larger public interest are at stake
 - Gopi Acqua Farms vs India 1997*- industry affecting fragile environment prohibited and this decision binding on even those who were not parties to the case

SOME ESCR

- Right to Work –Case of regularization of casual workers in postal dept of govt.
 - Art 41 ‘state shall.. secure right to work..’
 - Art 38 ‘...promote welfare of people
 - Art 43 ‘..secure living wage, decent standard of living
 - Court held min pay cannot be denied as its exploitation, govt shd be model employer, security of work most imp

SOME ESCR

- Right to work- Bandhua Mukti Morcha vs UOI
 - Invoked art 39, 41, 42 for protection/strength and health of men/women workers, protect children from abuse/exploitation, lack of wages, dignity, coerced labour is against Art 21
- Art 43 A- new insertion to secure participation of workers in management
 - Case where SC decided that workers have right to be heard when management deciding closure of industry under an order of court

SOME ESCR

- Right to Shelter
- Right to livelihood
 - Art 21 includes all this
 - Olga Tellis vs Bbay MC
 - MS vs Khan- Court held that Arts 38, 39, 46 mandate state to ensure socio economic justice to minimize inequalities in status and opportunities
 - HR perspective touched upon and went beyond statutory interpretation
 - Residence and settlement an illusion for poor

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SOME ESCR

- Right to Health
 - Art 47 duty of state to improve public health
 - Traditional under ambit of Art 21
 - In one case injured labourers condition worsened as hospitals refused to admit him
 - Court ordered State govt to pay compensation to labourer
 - Directed govt to prepared blueprint of primary health care with special reference to emergencies

SOME ESCR

- Right to education
 - Art 45 provides for free & compulsory education to children below 14 yrs
 - Only Art in constitution that has a time restriction
 - In 2005 became a FR
 - Still not notified

Contemporary Situation

- Pro-Active role not altered situation completely
- Court more effective in enforcing CPR
- Alliance between state/multi national and elite getting stronger by the day
- Increasingly court decisions abandoning people's rights- Narmada Bacchao Andolan case, Bhopal gas tragedy case

Specific Contribution

- Developmental issues tricky-rights of poor vs progress, rights of environment vs progress
- Orders, directions of courts often not obeyed by state governments
- Enforcement of social welfare legislations erratic & difficult
- Judiciary remains the last and only hope all though !

Legislative Initiatives

- National Rural Employment Guarantee Act 2006
- The Unorganized Sector Workers Social Security Bill 2005
- Oct 10th 2006 notification on child domestic work to be included as 'hazardous occupation' under CLPRA 1986

The Debate on Judicial Intervention

- Positive Implications
 - Finding space for an issue that would otherwise not have merited sufficient attention
 - Eg. Sexual harassment ignored by executive legislature
 - Catalyzing changes in law and policy
 - Eg. Right to education-general & primary

The Debate on Judicial Intervention

- Devising benchmarks and indicators in several key areas

Eg. *Paschim Banga case*- delineates right to emergency medical care for accident victims in forming a core minimum rights to health

- Develop and apply new Principles in new

The Debate on Judicial Intervention

Sectors

Eg. Polluter pays principle in environment law

- Development of a Jurisprudence of Human Rights that converges with development of international law

The Fallout

- Conflict of Rights
- Challenges to Legitimacy
- Not Accounting for competing public interests
- Continuity in the treatment of the issue
- Allegations of usurping role of Legislature

The Midas Touch

- Issue brought before court is far imp that petitioner so no chance of withdrawal of complaint
- Assistance of expert individuals, committees, investigatory commissions sought to sharpen focus of court
- Technique of issuing interim orders to avoid undue delay and injustice

The Midas Touch

- Courts building into directions warning for non compliance
- Post judgment retained a board for monitoring
- In order to remain within limits of justiciability, court has explained legal basis for intervention Eg right to health integral to right to life

The Midas Touch

- Intervention necessary when failure by those charged with constitutional/govt duty

Other Initiatives

- NHRC under PHRA 1993
- State HRC under PHRA 1993
- Human Rights Courts under PHRA 1993
- National Commission for SC & ST referred to in Art. 338 of Indian Constitution
- National Commission for Backward Classes under National Commission for Backward Classes Act 1993

Other Initiatives

- National Commission for Safaikarmacharis under National Commission for Safai Karmachari's Act 1993
- National Commission for Women
- State Commission for Women
- Special Schemes for Different Vulnerable Groups
 - ICPS
 - ICDS

In the Pipeline

- National Commission on Children
- Comprehensive Bill on Child Abuse, Child Protection and Development
- Central Bill on Right to Education
- Several state Bill on Right to Education