RIGHT TO LIFE : LEGAL ACTIVISM OR LEGAL ESCAPISM ?

THE SCOPE and meaning of article 21 has been augmented in various ways through judgments in public interest litigation (P.I.L.) cases, among which *State of Himachal Pradesh* v. *Umed Ram Sharma*[1] breaks new grounds. Unlike other P.I.L. cases, which interpret right to life as right to livelihood, this case interprets it as not only the right to livelihood but also the right to *means* of livelihood. This raises some very basic questions about the limits and directions in which article 21 can be interpreted, besides presenting an occasion for reflecting on some basic issues concerning the role of law and the nature of the Indian Constitution.

In this case scheduled caste residents of the villages of Bhainkhal, Baladi and Bhukho in the Shimla district addressed a letter to the Chief Justice of the Himachal Pradesh High Court, complaining about the lack of a proper road in their area. This, they said, not only affected their livelihood, but also their development. It was also pointed out that the sum allocated by the government for the construction of the road was insufficient, and moreover even this money was appropriated by the corrupt officials. The letter was treated as a writ petition by the court.

The court held that every person is entitled to life as enjoined in article 21. On consideration of the facts of the case read in conjunction with article 19(1) (*d*) in the background of article 38(2), the right to life embraces not only physical existence but also the quality of life, and for residents of hilly areas, access to road is access to life itself.

The court accordingly directed the Superintending Engineer of the Public Works Department to proceed with the construction of the road and complete the assigned work during the course of the financial year. It further directed the engineer to make an application to the state government for an additional sum of Rs. 50,000 for the purpose and to report the progress in construction with regard to the case.

The State of Himachal Pradesh filed a special leave petition before the Supreme Court asking whether in view of articles 202 to 207, the High Court had the power to issue prerogative writs under article 226 to regulate financial matters in the state.

In the Supreme Court V.D. Tulzapurkar, R.K. Pathak and Sabyasachi Mukharji, JJ., noted that the question of separation of powers is indeed important, but that in this case the High Court had not taken over the functions of the executive or the legislature. They highlighted that the more important fact was the utter deprivation of life opportunities for the hill people, and that the High Court had moved in the right direction in reinterpreting article 21. In this context the authority of *Sant Ram*,[2]

1. 1986(1) Scale 182.
2. *In re Sant Ram*, (1960) 3 S.C.R. 499.

Kharak Singh,[3] *A.V. Nachane*,[4] *Olga Tellis*,[5] *Municipal Council, Ratlam*,[6] *Francis Coralie Mullin*,[7] and other cases were cited.

The reason for this case being significantly different from others relating to article 21 is that it applies a principle of judicial interpretation which generates an open ended arena of meanings. This paper seeks to discuss whether such a legal strategy is legally prudent in the long run for the development of law The other issue that arises is as regards the limits and divisions of power between the judiciary and the executive. The Bench, undoubtedly, quotes Madison, Locke and others to support its view about the division of power. But it is questionable whether the view of these jurists and philosophers is applicable to law when the very nature of legal enterprise is changed by such interpretations of article 21. These issues necessitate deeper reflection.

To begin with let us first note the jurisprudential ramifications of article 21. There are two aspects to the interpretation of this article, the first relates to the internal problems of meaning and scope and the second to the purposes for which this interpretation is being done.

The first internal problem of meaning and scope is this : the notion of livelihood and means to livelihood are much wider than that of life. The range of goods, offices and opportunities required to sustain livelihood are far too many. For example housing is just as necessary for livelihood as roads. Once it is agreed that right to life includes the right of having roads in accordance with article 19(1) (*d*). one may as well claim that it entails the right of having a house in accordance with article 19(1) (*e*)—the right to reside, for one cannot reside without a house. Similarly if the right to move freely throughout India, as provided in article 19(1) (*d*), entails the right to roads then it also includes the right to having public transport. for one cannot commute without transport. In the same vein one may interpret article 19(1)(*a*)—freedom of speech and experession—as implying the right of possessing the means to it : telephones, walkie-talkie, radio, *etc*. Once the right to life is interpreted as the right to livelihood and the means to it, the rights proliferate alarmingly. The scope of article 21 is endangered by its very width of meaning. How does one delimit its domain in a manner that gives precise meaning to the article without defeating the court's purpose?

Some tentative suggestions are as follows invocation of right, after all, is an invocation of some claim or entitlement. Claims are of two types : *needs* and *desert*. Need is a lack of the ensemble of means required to realise the human goods of preservation and development. Desert

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3. *Kharak Singh* v. *State of U P.*, (1964) 1 S C.R. 332.
4. *A.V. Nachane* v. *Union of India*, (1982) 1 S.C.C. 205
5. *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 S C.C. 545.
6. *Municipal Council, Ratlam* v. *Shri Vardhichand*, (1981) 1 S.C.R. 97.
7. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516.

rests on the possession of some quality that places an individual in a preferred position relative to some good. Most P.I.L. cases relating to article 21 involve rights pertaining to needs, not deserts. The scope of the article can be limited to such rights alone, but then an explicit theory of needs would have to be evolved by the courts.

But at this stage one must stop to ask : Is enforcing the wider interpretation of article 21 the only *legal* way to obtain the minimum need for the deprived people? Moreover, is it the *legally* most efficacious way to achieve what is desired? Neither the judgments nor the literature around the cases have gone into these two basic questions. They have naively claimed that such 'judicial activism' through new interpretations of the article has brought about a major change in our colonial legal heritage.[8] Assertions or vain glorious proclamations are one thing, actual change another. There are two basic reasons why this type of 'judicial activism' is not as active as it is *prima facie* made out to be. First, there are problems emerging from the theory of precedent as to what type of judgments can really qualify as precedent in the law making process. Second, there are issues relating to the constitutional aspirations *vis-a-vis* judicial activism, *viz.*, does the Constitution itself envisage an active role for the judiciary? And if so, is it rightly reflected in what has been achieved through reinterpretion of article 21?

The liberty of the judiciary to break away from the conventional modes of judgment writing does not entail the liberty to flaunt some basic jurisprudential principles of precedent. Indian judges, it seems, have not cared to inform themselves of some basic principles relating to the theory of precedent. Not any and every judgment is capable of becoming a precedent merely because it has been enunciated in a case. There are internal logical (both syntactical and semantical) properties of arguments, which are necessary if a judgment is to really become a precedent. The minimal structural requirement of the argument is, (*a*) the *obiter dicta* must deductively follow from the 'reasons' of the judgment; (*b*) the reasoning must be based on a *ratio* of general applicability whose domain of operations is determinate; the *ratio* itself must, of course, be either a constitutional or some other basic jurisprudential principle ; and (*c*) the invoked general principle of law (or natural justice) must coherently hold together with other constitutional basic legal principles ; the reasoning would have to make explicit these other principles as well as their relationship with the *ratio*.[9] Evidently, there is much more to the theory of precedent than what has been mentioned here, this is not the occasion, however, to discuss the theory itself. What is important to note is the nature of judgments in the light of the theory. One may note that in the

8. See, for example, S.K. Agrawala, *Public Interest Litigation in India* (I.L.I., 1985).

9. For a fairly good account of the issues involved in 'precedence' see Rupert Cross, *Precedent in English Law* (1977).

Olga Tellis[10] (*Slum Dwellers*) case, the *obiter dicta* is neither logically deducible from the reasons given nor coherently related to the *ratio*. *Ratlam Municipality*[11] invoked no general constitutional or basic legal principles in its *ratio* nor related it to other operational legal principles, as such it enunciates no general principles of determinate applicability. There are similar problems with the judgments in the *Doon Valley Mining*,[12] *Shriram Fertilizers*[13] and other cases relating to right to life. In fact one can discern a similar apathy for structural and jurisprudential aspects in P I.L. judgments in general.

It is not on account of the author's personal jurisprudential interests that this paper seeks to draw the judges' attention towards the theory of precedent, nor is there any disagreement with Upendra Baxi that suffering must be taken seriously.[14] It is pleaded that to take suffering seriously one must take the law making enterprise seriously too. In the absence of this, judgments become decree by *fait*, they become remedies for specific events, not precedent for general application. As such it detracts from the objectivity of law, it makes justice seeking a subjective enterprise dependent upon the judge and not on the rule of law. If the rule of law is not developed the public will always be apprehensive whether similiar justice can be attained when the judges change.

Negative criticisms without positive suggestions will obviously not do. One must squarely face the question: What manner of precedent making will lead to the generation of the rule of law and not merely of rule by judges? This takes us to the constitutional ethos. It was evident to the framers of the Constitution that the total weight of the earlier exploitative colonial laws far outweighed the liberational mandate. The Constitution making was not the final ending of colonialism, but only a step—a major transformative leap—which would allow the future generations to create a just society. The enacted Constitution is only an instrument for realising this since the majority of the laws concerning natural resources, land, habitation, working conditions, *etc.*—all those which directly regulate the life and livelihood of the vast poor majority—are of colonial heritage.[15] The Constituent Assembly could not take upon itself the task of changing all these laws. This had to be done by the future legal system. To achieve this they gave the emerging judiciary a most magnanimous power through article 13. It gives the judiciary a major power to review and repeal all past and future laws, inconsistent with the constitutional aspirations. The article lays down a major moral and legal obligation on the

10. *Supra* note 5.

11. *Supra* note 6.

12. *Rural Entitlement Litigation Kendra* v. *State of U.P.*, A.I.R. 1985 S.C. 652.

13. *M.C. Mehta* v. *Union of India*, 1986(1) Scale 153-154, 199-219.

14. See Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 8-9 *Delhi L. Rev.* 91 (1979-80).

15. For a detailed discussion on the relationship of laws to common property resources, see, Chhatrapati Singh, *Common Property and Common Poverty* (1985).

judges. Have the judges stood up to the moral obligation entrusted to them by the Constituent Assembly? Has any one so far compiled a list of colonial laws, and their sections thereof, which are inconsistent with the fundamental rights and directive principles and which directly or indirectly affect the life or livelihood of the poor? If seriously researched these would surely run into thousands. The alternative is to wait till these laws come up for scrutiny in litigation. But have the judges made use of the opportunities when such laws have come under their purview in litigation? The point is that the right-to-life-litigations are precisely those cases which have provided the judges the opportunity to scrutinise, repeal or amend the colonial laws which deprive the poor of their livelihood. Amongst such laws are the Indian Forest Act 1927, the Land Acquisition Act 1894, the Factories Act 1947, the Mines (Regulation and Development) Act 1947, the town planning Acts and numerous other municipal laws.

In each case the judges have taken the easy way out. They have not asked: The implementation of which laws *causes* the loss of life and livelihood to the poor people? They merely look at the circumstantial *effects* and seek specific case remedies. Evidently, if justice is to be done to protect people's right to livelihood, it is the *cause* that must be eradicated, so that all future generations are protected; merely providing remedies for the present effects will not do. As mentioned above the power to eradicate the causes is given to the judiciary through article 13. Unfortunately, the text-book writers on the Indian Constitution do not seem to understand the significance of this article by and large. They describe it merely as a 'principle of interpretation.'[16] The article is anything but that; it is a principle of a mighty judicial power—a power which can transform the lives of at least 500 million people if properly used. The judiciary has of course realised that article 13 is not a mere principle of interpretation. After *Golak Nath*[17] it wrested back the power which Parliament had usurped, through *Kesavananda Bharati*[18] and *Minerva Mills*.[19] The point, however, is not merely having the power for review but to what end has it been used? Although the judiciary may feel satisfied at having regained the power, the people of India will not assess its greatness by the mere fact of acquisition of power, but the goals that are achieved in its exercise. Public interest litigation, specially the right to life cases, have provided ample opportunities to the judiciary to exercise it but has missed using it in almost all the cases.

The jurisprudence concerning article 13, *vis-a-vis* its relation to the pre-constitutional laws, has not been well developed. In *Keshavan Madhava Menon* v. *State of Bombay*,[20] the Supreme Court held that

16. See, for example, V.N. Shukla, *Constitution of India* 24(1982).
17. *Golak Nath* v. *State of Punjab*, A.I.R 1967 S.C. 1643.
18. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 S.C.C. 225.
19. *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 S.C.C. 625.
20. A.I.R. 1951 S.C. 128.

article 13(1) does not have retrospective effect, *i.e.*, all pre-constitutional laws cannot be declared void on this basis. However, in the same year in *State of Bombay* v. *F.N. Balsara*[21] the court developed the 'rule of severability', according to which inconsistent parts can be separated from the Act and declared void, so that the whole Act does not become invalid and article 13(1) would not have retrospective effect. Subsequently in *Bhikaji Narain Dhakras* v. *State of M.P.*[22] and other cases the court also developed the doctrine of 'eclipse' according to which the inconsistent parts of the pre-constitutional Acts become 'eclipsed', hence inoperative, unless a constitutional amendment takes away the prohibition cast on them.

Even if the retroactivity of article 13(1) is not allowed to do away with the past explorative laws, the Indian courts are well equipped with the twin armoury of the 'rule of severability' and the 'doctrine of eclipse' to deal with all those laws which infringe peoples' right to life or livelihood. What has the power of this article to do with the theory of precedent or judicial activism—one may wish to ask again ? Let us retrace and summarise the argument step by step:

(*i*) Judicial activism does not mean merely expanding the meaning of articles 14 and 21; in widening their meanings undeterminately the very specificity of the articles is endangered.

(*ii*) Judicial activism means taking upon oneself the task of amending and facing up to the vast majority of pre-constitutional law, which in fact are causative in exploiting the right to livelihood. The power for doing this is available through article 13.

(*iii*) The litigants need not and should not seek remedies for their loss merely under article 21. For long term solutions they must also challenge the constitutionality of the very laws which brought about the loss in the first place.

(*iv*) To create proper precedent the judges must:

(*a*) present a judgment in a manner whose parts are deductively corelated;

(*b*) invoke and spell out not just basic concepts, such as of dignity, development and estoppel, but actual legal principles of natural justice or constitutional law;

(*c*) in their arguments, show how the rights or liberties provided by these basic principles are infringed or impossible to realise due to other past laws;

(*d*) amongst the pre-constitutional laws they must distinguish the *causative* laws (*i.e.*, those which bring about the conditions of deprivation) from *regulative* laws (*i.e.*, those which merely regulate the life of the people after their life resources or livelihood has been taken away);

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21. A.I.R. 1951 S.C. 318.
22. A.I.R. 1955 S.C. 781.

(*e*) they must invoke article 13 or the authority of other case law to repeal those sections of pre-constitutional Acts which directly *cause* deprivation;

(*f*) they must lay down new norms in place of the repealed ones, specifying clearly what would constitute 'similar circumstances' for the future;

(*g*) in their orders they must specify clearly the actual bodies on whom the duty falls for the purposes of the realisation of the rights, so that the rights and duties are properly correlated in each case.[23]

The above list is not meant to be exhaustive, but only an indicator of rational expectancy. The points may be better illustrated with some examples. Take the *Doon Valley Mining* case[24] for instance. Here the concern was to save the ecology of the area so as to protect the livelihood of the deprived people. Now it is well-known that a great deal of the ecological destruction in the area is done at the behest of the forest department which permits contractors to mine, even in 'reserved' forest. If ecology was the serious concern the court could have seized the opportunity to invoke article 13, as well as repeal and amend certain sections of the Indian Forest Act, which gives the department the authority to bring about ecological disaster in a totally unchecked manner. But the court did not do so. Amending the Forest Act which *causes* the ecological devastation would have had a far greater repercussion, as a precedent, than the delivered judgment. The *Tehri Dam* case[25] similarly presented an opportunity to go into the rationalisation of the whole issue of compensation in the Land Acquisition Act, the Forest Act, *etc.* The issue of compensation to the poor who are deprived of land or livelihood resources, needs to be seriously reconsidered.[26] *Ad hoc* remedies by the court are not long term solutions. To take another example, the recent, *M.C. Mehta* case, popularly known as *Shriram Fertilizers Gas Leak* case[27] presented an opportunity not only to think about the compensation to the victims, but also to remedy the Factories Act, the Delhi Municipality Act and those Acts, relating to town planning.

So much for the legal task; let us turn now to the other issue, of division of power between the judiciary and the executive, as it relates to the issue.

To begin with, one must first understand why in this decade the people have begun to turn to the judiciary instead of the government for protecting their livelihood. It is a matter of historical contingency that the

23 For a detailed discussion on the correlation of rights with duties, see, Chhatrapati Singh, "The Inadequacy of Hohfeld's Scheme: Towards a more Fundamental Analysis of Jural Relations", 27 *J.I.L.I.* 117 (1985).

24. *Supra* note 12.

25, *Tehri Bandh Virodhni Sanghrash Samiti* v. *State of U.P.* The case is presently *sub-judice* at the Supreme Court. Writ petition no. 12829 of 1985.

26. For some detailed discussions see, Chhatrapati Singh, *supra* note 15.

27. *Supra* note 13.

executive and legislative divisions have failed to provide the necessary conditions for livelihood and the means to it for a large number of citizens. Hence, the people rush to the courts as a last resort to attain the necessities of life. However, there are internal limits to what the law can achieve.

It arises from the peculiarity of this right. Right to life is a positive *in rem* right, that is, it is a right in relation to all people (the state) the realisation of which does not depend upon one's own action but positive action by others. The other in this case is some department of the legislative, executive or some private corporate body. The duty to realise the right, therefore, falls on such bodies. Insofar as every right is necessarily correlated with some duty, in every P.I.L. case of this kind the courts must, not only locate the body on whom the duty falls but also see to it that the duty is carried out.[28] This implies that they will necessarily intervene in the executive function. How much of the executive function the judiciary takes over will depend upon the nature of the duties involved.

In the present case the Supreme Court judges deny that executive functions were taken over by the judiciary. Clearly monitoring, regulating or administering specific tasks which pertain to public good is not the task of the court. They usually deal with the law and not administration. Hence it is questionable whether in this case the Supreme Court is right in interpreting the courts' action as purely juridical. The point is not that the court should have recognised the non-juridical action of the High Court but, insofar as the right to life is a positive *in rem* right whose realisation depends upon official actions by bodies other than the courts, in interpreting and enforcing article 21 the courts must confess or face the fact that they are undertaking a task which involves more than law making, namely, implementation of the law by the executive. They are doing so because the other organs of the state fail in their respective functions. Such a recognition evidently raises basic questions about separation of powers and the social context in which such separation is tenable. This case does not go into this basic question, it simply reiterates what Adam Smith, Thomas Paine, Madison and others have said about separation of powers, without looking at the socio-political context in which it was said or the theoretical assumptions about the state within which the separation is to be accepted. Evidently, this is not the occasion to go into the fundamental issue, the inevitability of the court's intervention in the executive function when it takes up the sovereign task of the realisation of positive rights, is all that needs to be noted here. This intervention is inevitable because the realisation of a positive right to life demands

28. For a discussion on the correlation of rights and duties in another context see, Chhatrapati Singh, "Law, Communication and National Development", X *Indian Socio-Legal Journal* 139 (1984).

obtaining needs and deserts ; in other cases the courts are normally equipped to obtain only justice.

What is the upshot of this case and the arguments raised in it ? These can now be briefly summarised Litigation on the basis of right to life necessarily demands a theory of needs and deserts, which the courts will have to evolve by and by. However, it is not necessary that the realisation of such needs be tied up to article 21 alone. This is an easy and immediate remedy but not judicial from the point of view of long term development of law and of a just society. The same ends can be attained, *albeit* in a more laborious way, by undertaking actual legal reform in the manner suggested. Though this will not detract from the efficacy or the promptness of the remedies, it will, however, demand more homework by the judges and the litigants. However, if one understands the ethos of the Constitution, one will understand that this homework is a moral obligation too. The executive and the legislative bodies of the society have neither the legal expertise, nor are they as closely involved with the complexity of the law as the judiciary is. The major task of law reform is therefore, delegated to the judiciary by the Constituent Assembly. The exploitative colonial laws, which erode livelihood base of the rural and tribal people have continued for over three decades after Independence. In not addressing itself to these laws, in cases which provide the opportunity, the judiciary makes it evident that it has not understood its constitutional task very clearly. It evades law reform by taking up legal strategies which never get to the heart of the matter. In the face of the actual task for nation building, such strategies can only be called 'escapism', not in a derisive sense, but in its true psychological sense.

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