

The 'Fundamental' Status of Economic and Social Rights in the Indian Constitution

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Content

- I. Introduction
- II. Economic and Social Rights: Constitutional Provisions
- III. The Interdependency of all Human Rights
- IV. Liberal Interpretation of Fundamental Rights to Include Economic and Social Rights
- V. Affirming the Fundamental Status of Economic and Social Rights: Recent Decisions
- VI. Conclusion

I. Introduction

Unlike classic liberal constitutions which do not typically include economic and social rights, 'early social democratic constitutions' did include reference to such rights, though not as justiciable rights.¹ One such instance is the Indian Constitution which like that of Ireland includes a number of economic and social rights as 'directive principles of state policy', which are not justiciable, that is, not enforceable by a court of law.² Economic and social rights are rights concerned among other aspects with basic necessities such as food, shelter, and healthcare as well and education, employment, and livelihood, essential for a life with dignity. However, most constitutions across the world do not include these as justiciable rights, and at the international level also, these rights were not 'justiciable' for many decades after the International Covenant on Economic, Social, and Cultural Rights (ICESCR) came into effect 1976, and it was only after the Optional Protocol to the ICESCR (adopted in 2008) received the requisite number of ratifications in 2013 that individual complaints on rights under the covenant could be filed, and the rights could be said to have become justiciable. In India, while most economic and social rights form part of the Directive Principles of State Policy and are not as such

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¹ Mark Tushnet, 'Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-first Century', 4 *NUJS Law Review* 177, 177 (2011). He further points out that more recently

adopted Constitutions like that of South Africa in 1996 include such rights as justiciable rights, without making any distinction from civil and political rights.

² Article 37, Constitution of India.

justiciable, liberal interpretation of the justiciable fundamental rights by the judiciary, as well as enactment of legislation by the Parliament translating some of these into legal rights have led to these rights becoming justiciable.

This paper briefly looks into the status of economic and social rights in the Constitution, and the approach of the judiciary, both in terms of interpreting the relationship between the fundamental rights and directive principles, and giving an expanded interpretation to the fundamental rights so as to extend protection to numerous economic and social rights. It also considers some recent decisions in this regard.

II. Economic and Social Rights: Constitutional Provisions

The inclusion of civil and political rights as justiciable fundamental rights under part III of the Indian Constitution and economic and social rights as non-justiciable directive principles in part IV is comparable to the initial position of the International Covenant on Civil and Political Rights (ICCPR) and ICESCR. The optional protocol to the former adopted along with the covenant permitted individual complaints to be filed for violations of ICCPR rights, while as mentioned, a similar mechanism for the ICESCR took many decades to be adopted and operationalized.

Most economic and social rights in the Indian Constitution form part of the Directive Principles of State Policy. These include rights relating to work—employment, wages, as well as working conditions (such as requiring the state to

secure to all citizens, the right to an adequate means of livelihood [Article 39 (a)], equal pay for equal work for both men and women [Article 39 (d)], just and humane conditions of work and maternity relief [Article 42], within the limits of its economic capacity, effective provision for securing the right to work [Article 41]; to secure to all workers work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural activities [Article 43]; as well as to secure participation by workers in the management of industries [Article 43A], among others). There is also a provision concerning social assistance, namely Article 41, which requires the state to make effective provision, within the limits of its economic capacity, for public assistance in cases of unemployment, old age, sickness, disablement, and other cases of undeserved want. While basic needs such as food, shelter, water, health and healthcare do not find express mention in the directive principles, related rights such as raising the level of nutrition and the standard of living, and improvement of public health as among the primary duties of the state [Article 47], making effective provision for securing the right to education [Article 41] and the educational interests of the scheduled castes and scheduled tribes [Article 46] are included. Only one major right, namely, the duty of the state to provide free and compulsory primary education to children between the ages of 6 and 14, has been converted to a fundamental right vide article 21A (2002).

III. The Interdependency of all Human Rights

At the international level, it has been recognized and often reiterated that all human rights are indivisible, interdependent, and interrelated.³ In the Indian Constitution, the two sets of rights, civil and political, and economic, social and cultural are placed separately, and distinction is drawn between them as regards enforceability by courts. The judiciary also initially adopted a strict or literal interpretation of this position holding that the directive principles were to run subservient to the fundamental rights.⁴ But this position underwent changes with time, with the court recognizing that the directive principles and fundamental rights were complementary and supplementary to each other,⁵ and later that the harmony and balance between part III and part IV of the Constitution forms part of its basic structure.⁶ Not only this, the directive principles have been seen as relevant, and as a 'book of interpretation' in interpreting the fundamental rights as well as other constitutional provisions, and they are viewed as the 'soul of the constitution'.⁷

Thus it may be said that Indian courts have also recognized the interrelationship between the two sets of rights. This is also demonstrated by the liberal interpretation

of the provisions of the fundamental rights to include economic and social rights (discussed in more detail in the next section), which indicates that neither set of rights can be adequately protected without extending protection to the other.

In the discussion of the relationship between the directive principles and fundamental rights, it is also important to mention certain amendments that were made to the Constitution seeking to give primacy to the directive principles over the fundamental rights. The Parliament, vide the 25th constitutional amendment (introducing article 31C in the Constitution) sought to give primacy to two directive principles, articles 39 (b) and (c) over the fundamental rights and also to exclude laws made under these provisions from judicial review. This amendment was upheld in *Kesavananda Bharati*,⁸ though the court preserved its power of judicial review. By the 42nd Amendment Act, amendment was made to article 31C and primacy sought to be given to all directive principles over fundamental rights, but this amended form of article 31C was held unconstitutional in *Minerva Mills*.⁹

³ See for instance, the Vienna Declaration and Programme of Action, 1993, para 5.

⁴ For instance, *State of Madras v. Smt. Champakam Dorairajan*, AIR 1951 SC 226.

⁵ For instance, *His Holiness Kesavananda Bharati Sripadagalvaru and Anr. v. State of Kerala and Anr.*, (1973) 4 SCC 225; *C.B. Boarding and Lodging v. State of Mysore*, AIR 1970 SC 2042.

⁶ *Minerva Mills v. Union of India*, AIR 1980 SC 1789. See more recently, *I.R. Coelho (Dead by LRs) v. State*

of Tamil Nadu and Others, (2007) 2 SCC 1, wherein again, the need for balancing the fundamental rights and directive principles was emphasized.

⁷ See *Charu Khurana v. Union of India*, (2015) 1 SCC 192; *Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁸ *His Holiness Kesavananda Bharati Sripadagalvaru and Anr. v. State of Kerala and Anr.*, (1973) 4 SCC 225.

⁹ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

IV. Liberal Interpretation of Fundamental Rights to Include Economic and Social Rights

While the directive principles are not enforceable under the Constitutional provisions, the judiciary by interpretation of the provisions of the justiciable fundamental rights, most importantly article 21, has sought to protect numerous economic and social rights such as health, education, food, livelihood, etc. After the landmark judgment in *Maneka Gandhi*,¹⁰ the courts have gone on to interpret the right to life as 'a right to live with human dignity and all that goes with it, namely, bare necessities of life such as adequate nutrition, clothing and shelter, and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings'.¹¹

It has recognised the right to food,¹² water,¹³ shelter,¹⁴ health and healthcare,¹⁵ livelihood,¹⁶ equal pay for equal work,¹⁷ and education,¹⁸ among others. These decisions have been based on interpretations of article 21 as well as other fundamental rights such as article 19, and equality provisions in articles 14 and 15. This approach has been the subject of both praise and criticism, the latter on account inter alia, of amounting to 'selective transfer' of some directive principles into fundamental rights, which would serve only to weaken the directive principles,¹⁹ as well as on separation of powers grounds,²⁰ while others recognise the contributions of the judiciary in implementing these rights, though noting that the approach of the courts on economic and social rights issues has been 'oscillating',²¹ rather than consistent.

¹⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹¹ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

¹² *PUCL v. Union of India* (CWP 196/2001), various orders.

¹³ *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664

¹⁴ *Chameli Singh v. State of U.P.*, (1996) 3 SCC 549; AIR 1996 SC 1051; *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, (1997) 11 SCC 121.

¹⁵ *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922; *State of Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703 at 1705–06; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426; *N.D. Jayal v. Union of India*, (2004) 9 SCC 362; *Confederation of Ex-Servicemen Associations v. Union of India and Others*, (2006) 8 SCC 399.

¹⁶ *State of UP v. Charan Singh*, Civil Appeal no 2381 of 2007, Supreme Court of India, decided on 26

March 2015; *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

¹⁷ *Grih Kalyan Kendra Workers' Union v. Union of India*, AIR 1991 SC 1173; *State of Punjab v. Surjit Singh*, (2009) 9 SCC 514.

¹⁸ *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858; *J.P. Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178.

¹⁹ Mahendra P. Singh, "The Statics and Dynamics of the Fundamental Rights and the Directive Principles—A Human Rights Approach", 5 *SCC (Jour)* 1, 3 (2003).

²⁰ Ellen Wiles, "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law", 22 *American University International Law Review* 35, 58–59 (2006).

²¹ Anashri Pillay, "Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication", in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* 340 (Hart Publishing, Oxford and Portland, Oregon 2014).

Besides recognizing the rights, the court has also adopted certain other mechanisms towards more effective protection of rights including economic and social rights, from ensuring access to courts through the mechanism of public interest litigations (which enables access to courts on behalf of weaker segments of society unable to represent themselves), to verification of facts²² through appointment of commissioners, and monitoring implementation of its orders, both through appointing commissioners to report on the same²³ as well as through continuing mandamus, that is, hearing the matter from time to time after short orders are passed for monitoring implementation, before passing the final judgment.²⁴

V. Affirming the Fundamental Status of Economic and Social Rights: Recent Decisions

Recent decisions of the Supreme Court and High Courts on matters involving economic and social rights demonstrate a similar trend of interpreting or affirming an expanded interpretation of article 21 so as to ensure a right to life with dignity. The Allahabad High Court in *Rajiv Kumar v. State of U.P. and Another*,²⁵ in fact observed that the enlarged meaning of life and its ever deepening understanding lay at the 'core' of the philosophy of article 21, and

was 'fundamental to realizing the right vested by Article 21'.

In the Supreme Court, restating the established position, the right to livelihood was held as part of the right to life recognizing that the state has a duty to ensure that vulnerable persons (to exploitation by the rich and capitalists) are not subjected to such exploitation.²⁶ Similarly, another recent decision, *Dr Ashwani Kumar v. Union of India*,²⁷ which involved a petition seeking enhanced social assistance and protection for the rights (particularly health, medical assistance and shelter) of senior citizens, reiterated that the right to live with dignity is part of article 21 of the Constitution; and that social justice which has been given pride of place in the constitution is perhaps 'the most important and significant form of justice'. The Court reaffirmed the expansive meaning of the right to life as including inter alia, the rights to dignity, shelter and health but at the same time, in view of steps already taken, arguments as to financial constraints, and the mandate under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 issued certain directions including filing of information regarding available old age homes, medical and geriatric facilities, etc. and directed that the matter be retained as a continuing mandamus so as to ensure recognition and enforcement of the rights

²² *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802

²³ *PUCL v. Union of India* (CWP 196/2001), order of 8 May 2002.

²⁴ See *Swaraj Abhiyan v. Union of India*, Writ Petition (C) 857/2017, 13 May 2016, Supreme Court of India.

²⁵ Writ A no. 53425/2019, 11 March 2019, Allahabad High Court.

²⁶ *Senior Divisional Commercial Manager and Others v. SCR Caterers, Dry Fruits, Fruit Juice Stalls, Welfare Association and Another*, WA 1573-75/2003, 29 January 2016, Supreme Court of India.

²⁷ W.P. 193/2016, 13 December 2018, Supreme Court of India.

of people. The mechanism of continuing mandamus to ensure regular monitoring and better implementation of rights thus also continues to be utilized by the court in recent decisions as well.

In *M.C. Mehta v. Union of India*,²⁸ once again in view of the expansive interpretation already given to article 21, the Court emphasized that the right to live in a 'clean environment free from smoke and pollution follows from the "quality" of life which is an inherent part of article 21'. It also took the view that the larger interest of the health of the population would outweigh the much smaller pecuniary interest of industry. The right to unpolluted air was also emphasized in an earlier decision, *Arjun Gopal v. Union of India*,²⁹ which was concerned with restrictions on fireworks during Diwali, and also took a similar approach as concerns commercial interests and health.

While Indian courts have often referred to provisions of international human rights instruments including the ICESCR to which India is party in elaborating on the meaning of rights and obligations of the state, certain concepts such as that of 'minimum core' adopted by the Committee on Economic, Social and Cultural Rights (CESCR) have not been explicitly utilized. However, the Delhi High Court in some decisions has made reference to the concept, recognizing a

non-derogable minimum core obligation while acknowledging that the concept is difficult to define.³⁰

Recent decisions thus can be said to be maintaining the established position of protecting the right to life with dignity and related rights which implies not only protection of civil and political rights but also economic and social rights.

Similar protection of economic, social and cultural rights by interpretation of other rights can be seen at the regional level, where the jurisprudence of the European Court of Human Rights under the European Convention on Human Rights (ECHR) can be taken as an important illustration of such a position. The ECHR basically incorporates what are categorised as civil and political rights, though the right to education is included under its 1952 additional protocol. And it is by interpretation of these rights that protection has been extended to economic and social rights not enumerated in the ECHR.³¹

VI. Conclusion

In India, thus while in literal terms, economic and social rights included in the Constitution are not enforceable by courts, they have contributed to recognizing and implementing the same through their interpretation of the relationship between the fundamental rights and directive

²⁸ W.P. (Civil) 13029/1985, decided 24 October 2018, Supreme Court of India.

²⁹ W.P. 728/2015, IA52448/2017, 2 September 2017, Supreme Court of India

³⁰ See *Mohd Ahmed (Minor) v. Union of India*, decided 17 April 2014, Delhi High Court; also *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, decided 2 June 2010, Delhi High Court.

³¹ See for instance, *Connors v. United Kingdom*, Complaint 66747/01, 27 May 2004; *M.S.S v. Belgium and Greece*, application no 30696/09, 21 January 2011; *Nencheva v. Bulgaria*, Application 48609/06, 18 June 2013; *Centre for Legal Resources on behalf of Valentin Câmpenu v. Romania*, Application 47848/08, 17 July 2014.

principles as well as expanded/liberal interpretation of the fundamental rights. In this process, particularly in ensuring implementation or actual realization of the rights, mechanisms such as appointment of commissioners and continuing mandamus have also played a role. While the court has at times been criticized for such interpretation, including due lack of consistency, their approach has also been sought to be explained as one of 'conditional social rights' that is recognition of rights conditional on government action taken such as existing legislation which has not been adequately implemented.³² However, implementation of the decisions of the court, which is not seen in all decisions concerning economic and social rights (consistently), as well as the need for a fixed set standards of judicial review needs to be addressed in order to improve and strengthen protection of these rights.

³² Madhav Khosla, "Making Social Rights Conditional: Lessons from India", 8 *I.CON* 739 (2010).