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Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary

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I. Introduction

The Constitution of India recognises as fundamental rights many of the individual rights that comprise the International Covenant on Civil and Political Rights (ICCPR). These include the right to life,¹ to equality,² to the freedom of speech and expression³ and the right to seek judicial redress before the Supreme Court of India⁴ for enforcement and protection of these rights which are contained in Part III of the Constitution. Part IV of the Constitution contains the Directive Principles of State Policy (DPSPs) many of which correspond to the individual rights enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR). For instance, minimum living wages,⁵ free and compulsory education for all children up to age of fourteen,⁶ minimum standards of living, nutrition and public health,⁷ protection and improvement of environment, forests and wild life⁸ and the right to free legal aid.⁹ Article 37 of the Constitution declares the Part IV provisions (DPSPs) as being non-justiciable and states that they “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”

The Indian judiciary has a unique position under the Constitution as an independent organ of state designed to provide a countervailing check on the functioning of the other two organs in their respective spheres. Armed with the power to strike down executive, quasi-judicial and legislative actions as unconstitutional, the judiciary has, as the ultimate interpreter of constitutional provisions,¹⁰ expounded the basic features of the Constitution of which the power of judicial review has been recognised as forming an integral part.¹¹ Every attempt at diluting or dispensing the power of judicial review through statute or constitutional amendments has been rebuffed with certainty.¹² Secondly, the Supreme Court’s declaration of the law is mandatorily binding “on all courts within the territory of India”¹³ and “all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court of India.”¹⁴ This coupled with the power to punish for contempt of the court,¹⁵ reinforces the position of the judiciary as a constitutional authority that enforces accountability and answerability of the other organs of the state.

The role of the Court has, over the fifty-two years of its working, undergone a transformation that has witnessed its emergence as a dynamic institution playing an active role in expanding the scope and content of individual and collective rights of citizens, in the civil and political spheres as well as in the economic, social and cultural (ESC) spheres. A series of developments brought this about:

- The declaration of the indivisibility of the fundamental rights on the one hand and the DPSPs on the other. It was said that “In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to the directive principles”¹⁶ and that both were complementary, “neither part being superior to the other.”¹⁷
- The assertion of the doctrine of substantive due process as permeating the entire Part III of the Constitution comprising the fundamental rights. Thus, in order to pass judicial scrutiny an executive, quasi-judicial or legislative action would have to satisfy the ‘just, fair and reasonable’ test.¹⁸
- The expansion of the scope and content of the fundamental right to life as encompassing “the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms.”¹⁹
- The innovation of public interest litigation (PIL) as a tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically. A conscious attempt was made to relax the rules of standing and procedure and free litigants from the stranglehold of formal law and lawyering.²⁰

- The expanded notion of the right to life enabled the court, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESC rights. The early PIL cases witnessed attempts by the court to rescue bonded labour from dehumanizing conditions of work,²¹ ensuring availability of free legal aid to destitute undertrial prisoners²² and protecting the right of pavement dwellers to processual due process while facing forced eviction.²³
- More recently, the court has been able to evolve binding guidelines to deal with the problems of sexual harassment of women at the workplace,²⁴ and the availability of the bare minimum rations through the public distribution system for those below the poverty line.²⁵

This piece proposes to examine the nature and enforcement of orders of the Indian courts in the context of economic, social and cultural rights. It attempts to examine the positive features of the court's interventions as well as the possible criticisms that such an exercise inevitably draws from those who envision a restricted role for courts.

II. Nature of Court Orders

Judicial orders in the ESC sphere has by and large been in PIL cases and this analysis confines itself, for the sake of convenience, to those handed down by the Supreme Court of India. The enforcement of the orders of the court depends to a large extent on the nature of the order. There are invariably two facets of an order – the declaratory part and the mandatory part. Declaratory orders and judgments, without consequential directions to the state authorities, have to await the acceptance of their binding nature under Articles 141 and 144 by the state and their consequent implementation. In *Unnikrishnan J.P. v. State of Andhra Pradesh*,²⁶ the court declared that “right to education is implicit in and flows from the right to life guaranteed under Article 21”²⁷ and that “a child (citizen) has a fundamental right to *free education* up to the age of fourteen years.”²⁸ The state responded to this declaration nine years later by inserting, through the Ninety-third amendment to Constitution, Article 21-A which provides for the fundamental right to education for children between the ages of six and fourteen.²⁹

Mandatory orders, on the other hand, are premised on the general apathy displayed by the executive to move to action and spell out a plan of action as well as a time schedule within which compliance with court orders is expected. In *Bandhua Mukti Morcha*,³⁰ the court declared that the non-enforcement of welfare legislation like the Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act, 1976 would tantamount to “denial of the right to live with human dignity enshrined under Article 21 of the Constitution.”³¹ However, the court did not stop with the declaration of the law but issued a series of directions for compliance by state authorities. The court then proceeded to monitor the implementation of these directions, an exercise that is continuing till the present date.³²

III. Techniques and Facets of Enforcement of Orders

The PIL jurisdiction of the court has enabled innovation in relation to the manner of dealing with issues, undaunted by the possible incapacity to comprehend complex issues that may prima facie seem not amenable to ‘judicially manageable standards’. A brief overview of the techniques adopted by the court would help appreciate this:

- The issue brought before the court is far more important than the person bringing it. Thus, it is not open to a petitioner in a PIL to withdraw the case, and in that event, the court may dispense with the petitioner while continuing to engage with the cause.³³
- Very often, as has been happening with fair regularity in the recent past, the court appoints a senior counsel as *amicus curiae* to assist it in the proceedings.³⁴ The *amicus curiae* assists the court in addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings and in helping sharpen the focus of discussion, conscious of the contingencies of judicial functioning.³⁵ This also ensures that an element of continuity is maintained at the stage of implementation of the orders and not made dependent on the continued enthusiasm of the PIL petitioner.
- The court takes the help of commissioners or expert bodies for ascertaining facts or for an independent verification of the facts presented by the petitioner or the state.³⁶ The same device can be adopted at the stage of implementation of the court's orders.³⁷
- Unlike the regular run of cases, PIL cases are not disposed of by a single judgment at one point of time. A series of short orders are passed and their implementation ensured, before the court proceeds to a final judgment. The court has described this device as a 'continuing mandamus'.³⁸
- The court usually builds into its directions a forewarning of the consequences of disobedience or non-implementation. Thus while laying down a detailed schedule for conversion of the mode of motor vehicles plying on Delhi roads to clean fuels, the court warned that violation of the order would invite action for contempt of court.³⁹ In the PIL relating to the protection of the forest cover, the court has often had to wield its contempt power to pull up recalcitrant and adamant state officers who were seen thwarting the implementation of its orders.⁴⁰
- In the post-judgment phase too, the court has often retained the case on board for monitoring the implementation of its directions. Thus the PIL in which detailed guidelines concerning arrests were laid down has been listed with fair regularity and the directions monitored till the present, six years after the main judgment.⁴¹
- Aware of the need to remain within the limits of justiciability, the court has been careful to explain the legal basis for its intervention in the different areas concerning ESC rights. Thus the right to education was explained as forming an integral part of the right to life,⁴² as was the right to environment⁴³ and to health.⁴⁴
- The court has also stressed that its intervention is warranted only where it finds that there has been a failure by those charged with performing their statutory and constitutional functions to address the problem.⁴⁵ It is in this context that the court intervened to direct the governments at the centre and the states to make available foodgrains, overflowing in state godowns, to be made available on a priority basis to those living below the poverty line.⁴⁶
- In an area where the court is of the view that the issue is in the realm of executive or legislative policy, it is usually reluctant to intervene although such policy may have implications for ESC rights. Thus the court declined, recently, to interfere in the decision of the government to disinvest its shares in a public sector undertaking on the ground that this was in the realm of economic policy of the government and that the court was plainly not equipped to evaluate its appropriateness.⁴⁷

The court thus attempts to strike a balance between remaining within its sphere of influence while continuing to ensure answerability and accountability of the other organs of state.

The Debate on Judicial Intervention

The intervention by the court in a wide range of issues, including those involving ESC rights, has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long been perceived as belonging properly within the domain of the other organs of state.⁴⁸ But that by itself may not explain the necessity for the court's intervention in the larger perspective of the development of the law and of healthy democratic practices that reinforce public accountability. To place the debate in its perspective, it may be necessary to briefly recapitulate the implications of judicial intervention through PIL in the area of ESC rights.

The positive implications may be stated as:

- Finding a space for an issue that would otherwise not have merited sufficient attention. The decision in *Vishaka*,⁴⁹ for instance, has brought into public discourse the issue of sexual harassment of women in the workplace which had otherwise been completely ignored by the executive and the legislature. It becomes immediately useful, as a law declared by the Supreme Court, to demand recognition and enforcement of the right to access judicial redress against the injury caused to women at the workplace.
- Catalysing changes in law and policy in the area of ESC rights. Many of the recent changes in law and policy relating to education in general, and primary education in particular, are owed to the decision in *Unnikrishnan*⁵⁰.
- Devising benchmarks and indicators in several key areas concerning ESC rights. For instance, the decision in *Paschim Banga*⁵¹ delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health and the orders in *PUCCL*⁵² underscore the right of access for those below the poverty line to food supplies as forming the bare non-derogable minimum that is essential to preserve human dignity.
- Development of a jurisprudence of human rights that comports with the development of the international law. PILs concerning environmental issues have enabled the court to develop and apply the 'polluter pays principle',⁵³ the precautionary principle,⁵⁴ and the principle of restitution.⁵⁵

Other issues that have arisen in this context are:

- *Conflict of rights*: Some of the PILs concerning ESC rights throw up issues concerning conflicting rights of different sets of individuals. Thus the decision to order closure of a polluting abattoir in Delhi was seen as also affecting livelihoods of butchers,⁵⁶ and the decision to construct a dam across the Narmada to provide water for the citizens of one state as conflicting with the right to shelter of those that belonged to another.⁵⁷
- *Challenges to Legitimacy*: The continued non-implementation, for instance, of a declaratory judgment, may be seen as undermining the court's authority.⁵⁸ It is a moot question whether the use of the contempt power, in the context of practical problems posed by lack of resources, is indeed the best way of ensuring implementation of the court's orders.
- *Not accounting for competing public interests*: It is possible that in dealing with an issue from the point of view of those bringing it, the court may not be mindful or able to anticipate the impact its orders may have for others not present before it. Thus it may happen that while ordering the closure of a polluting industry, the workmen and their families who may be adversely affected, may not be heard.⁵⁹ It is not always possible for the court to satisfactorily redress their grievances at a later point in time.

- *Continuity in the treatment of the issue.* Since by their very nature PIL cases, including those concerning ESC rights, require monitoring by courts of the implementation of their directions over a long period of time, it is imperative that there is a degree of both continuity and consistency in their approach to the issue. If this is not able to be ensured, and some times it is not, the gains of judicial intervention may not be able to be sustained.

IV. Conclusion

The above discussion serves to highlight the need for continued judicial intervention in the area of ESC rights even while the issues that such intervention throws up are addressed. In a country where large sections of the population continue to be denied access to survival rights and entitlements, the judiciary is very often called upon to intervene in exercise of its primary role as a protector and enforcer of basic rights. The experience of the Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame. By taking on board the citizen's concerns about an inactive or indifferent legislature or executive, the court provides the platform for the state and civil society to engage as active participants in the scheme for realization of ESC rights.

Endnotes

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¹ Article 21.

² Article 14.

³ Article 19(1) (a), which is available to all citizens and is subject to reasonable restrictions specified under Article 19 (2).

⁴ Article 32. Writ petitions can be filed directly in the Supreme Court of India where there is a violation of an fundamental rights specified in Part III of the Constitution. For violation of these and other constitutional rights writ petitions can also be filed in the High Courts under Article 226 of the Constitution.

⁵ Article 43.

⁶ Article 45.

⁷ Article 47.

⁸ Article 48-A.

⁹ Article 39-A.

¹⁰ *State of Rajasthan v. Union of India* (1977) 3 SCC 592 at 662.

¹¹ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

¹² For instance, in *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651, the Supreme Court struck down a portion of the 52nd amendment to the Constitution, which sought to immunize from judicial review the decision of a Speaker of the legislature in the context of the anti-defection law.

¹³ Article 141.

¹⁴ Article 144.

¹⁵ Article 129 in the case of the Supreme Court and Article 215 for the High Court. This power is in addition to be found under the Contempt of Courts Act, 1971.

¹⁶ *Kesavananda Bharati v. State of Kerala supra* note 11 at 879.

¹⁷ *State of Kerala v. N.M.Thomas* (1976) 2 SCC 310 at 367.

¹⁸ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

¹⁹ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608.

²⁰ The objective of PIL has been explained in *S.P.Gupta v. Union of India* 1981 Supp SCC 87.

²¹ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

²² *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81. Article 39-A, a DPSP in Part IV IC, which provides for the right to free legal aid, was held to explain the content and scope of the right to life under Article 21 and hence enforceable as such.

²³ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

²⁴ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

- ²⁵ *People's Union for Civil Liberties (PUCL) v. Union of India* (2001) 7 SCALE 484.
- ²⁶ (1993) 1 SCC 645. The case concerned the challenge to the validity of certain state legislations regulating the charging of fees by private educational institutions and prohibiting the charging of 'capitation' fees from students seeking admission.
- ²⁷ *Id.* at 730.
- ²⁸ *Id.* at 735. The court added: "We cannot believe that any state would say it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the state." Further, the court clarified: "The right to education further means that a citizen has the right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. By saying so we are not transferring Article 41 from Part IV to Part III – we are merely relying upon Article 41 to illustrate the content of the right of the right to education flowing from Article 21."
- ²⁹ Another example of a declaratory judgment would be *Vishaka v. State of Rajasthan*, *supra* note 24.
- ³⁰ *Supra* note 21.
- ³¹ *Id.* at 183.
- ³² For a recent order, see *Bandhua Mukti Morcha v. Union of India* (2000) 10 SCC 104. One recent instance is the PIL seeking strict implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 aimed at preventing the malaise of female foeticide: *CEHAT v. Union of India* (2001) 7 SCALE 477 and (2001) 8 SCALE 325.
- ³³ *Sheela Barse v. Union of India* (1988) 4 SCC 226. See also, *S.P.Anand v. H.D.Deve Gowda* (1996) 6 SCC 734.
- ³⁴ For instance, Mr.F.S.Nariman, Senior Advocate assisted the Supreme Court as amicus curiae in the case relating to sexual harassment of women at the workplace (*Vishaka*, *supra* note 24).
- ³⁵ An instance of such an involvement is that of Mr. Harish Salve, Solicitor General of India, in the PIL concerning the protection of forest cover: *T.N.Godavarman Tirmulapad v. Union of India* (1997) 2 SCC 267.
- ³⁶ Senior lawyers were appointed as commissioners in the PIL concerning child labour in Tamil Nadu: *M.C.Mehta v. State of Tamil Nadu* (1996) 6 SCC 756 and a bureaucrat in the bonded labour case: *Bandhua Mukti Morcha*, *supra* note 21.
- ³⁷ In *Sheela Barse v. Union of India* (1994) 4 SCALE 493, a senior advocate was given the mandate of ensuring the implementation of the judgment of the court in *Sheela Barse v. Union of India* (1993) 4 SCC 204 which had declared the jailing of the mentally ill in jails to be unconstitutional. In the PIL concerning the protection of forest cover, a High Powered Committee appointed by the court has been charged with overseeing the implementation of the court's directions.
- ³⁸ *Vineet Narain v. Union of India* (1998) 1 SCC 226 at 243.
- ³⁹ *M.C.Mehta v. Union of India* (1998) 6 SCC63.
- ⁴⁰ *T.N.Godavaraman Tirumulapad* (1998) 3 SCALE 669 and (1998) 9 SCC 672.
- ⁴¹ *D.K.Basu v. State of West Bengal* (1997) 1 SCC 416 (main judgment). For a sampling of subsequent orders see those reported in (1999) 7 SCALE 222, (2000) 5 SCALE 353 and (2001) 7 SCALE 487.
- ⁴² *Unnikrishnan*, *supra* note 26.

- ⁴³ *M.C.Mehta v. Union of India* (1998) 9 SCC 589.
- ⁴⁴ *Paschim Banga Khet Majoor Samity v. State of West Bengal* (1996) 4 SCC 37.
- ⁴⁵ *Vineet Narain v. Union of India* (1996) 2 SCC 199 at 200-01.
- ⁴⁶ *PUCL v. Union of India*, *supra* note 25.
- ⁴⁷ *BALCO Employees' Union v. Union of India* (2002) 2 SCC 333.
- ⁴⁸ See generally, Ashok Desai and S.Muralidhar, "Public Interest Litigation: Potential and Problems" in B.N.Kirpal et al (eds.), **Supreme but not Infallible: Essays in Honour of the Supreme Court of India**, Oxford (2000) 159.
- ⁴⁹ *Supra* note 24.
- ⁵⁰ *Supra* note 26.
- ⁵¹ *Supra* note 44.
- ⁵² *Supra* note 25.
- ⁵³ *S.Jagannath v. Union of India* (1997) 2 SCC 87.
- ⁵⁴ *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647.
- ⁵⁵ *In Re; Bhavani River- Shakti Sugars Ltd.* (1998) 6 SCC 335.
- ⁵⁶ *Buffalo Traders Welfare Association v. Maneka Gandhi* 1994 Supp (3) SCC 448.
- ⁵⁷ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664 and 7644.
- ⁵⁸ Chief Justice Bharucha, in a speech delivered at a seminar organised by the Bar Council of India in December 2001 pointed out that: "It is in the overweening public interest that the courts should not pass orders that they cannot enforce. Orders that cannot be enforced bring the judiciary into disrepute for the citizen jeers: 'here is an order that a Court has made, and what has happened? Nothing,'"
- ⁵⁹ See generally the orders in *M.C.Mehta v. Union of India* (1997) 11 SCC 227, 312 and 327.

