Judicialisation of rights

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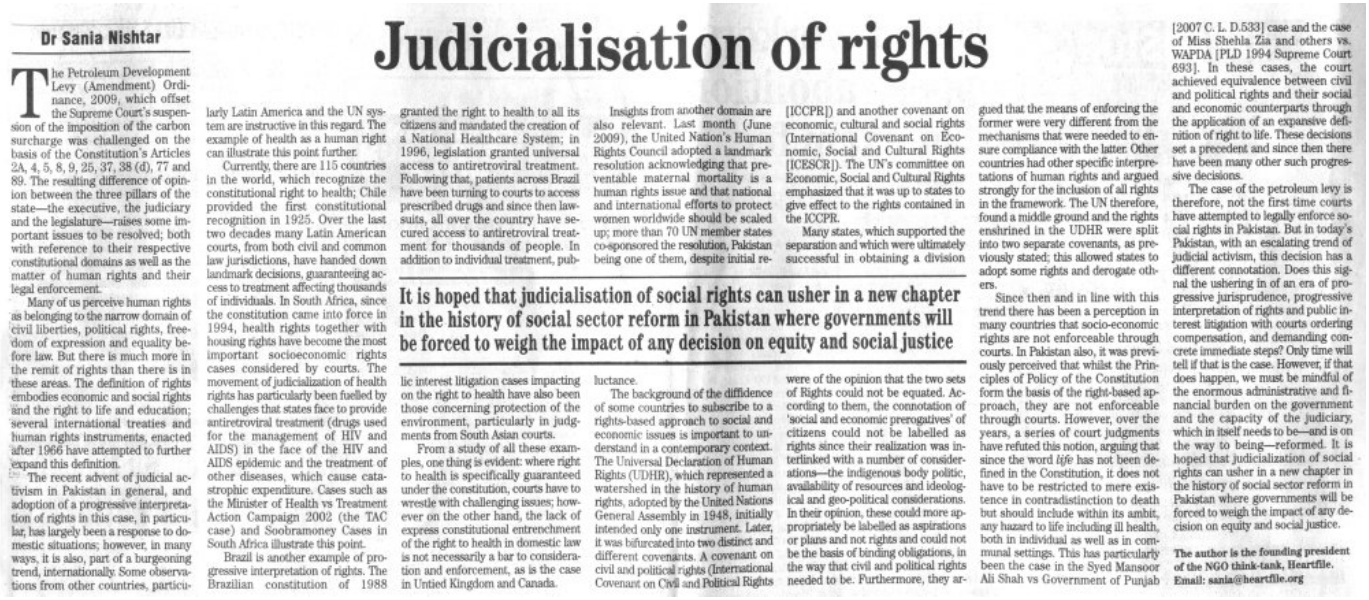

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The Petroleum Development Levy (Amendment) Ordinance, 2009, which offset the Supreme Court's suspension of the imposition of the carbon surcharge was challenged on the basis of the Constitution's Articles 2A, 4, 5, 8, 9, 25, 37, 38 (d), 77 and 89. The resulting difference of opinion between the three pillars of the state—the executive, the judiciary and the legislature—raises some important issues to be resolved; both with reference to their respective constitutional domains as well as the matter of human rights and their legal enforcement.

Many of us perceive human rights as belonging to the narrow domain of civil liberties, political rights, freedom of expression and equality before law. But there is much more in the remit of rights than there is in these areas. The definition of rights embodies economic and social rights and the right to life and education; several international treaties and human rights instruments, enacted after 1966 have attempted to further expand this definition.

The recent advent of judicial activism in Pakistan in general, and adoption of a progressive interpretation of rights in this case, in particular, has largely been a response to domestic situations; however, in many ways, it is also, part of a burgeoning trend, internationally. Some observations from other countries, particularly Latin America and the UN system are instructive in this regard. The example of health as a human right can illustrate this point further.

Currently, there are 115 countries in the world, which recognize the constitutional right to health; Chile provided the first constitutional recognition in 1925. Over the last two decades many Latin American courts, from both civil and common law jurisdictions, have handed down landmark decisions, guaranteeing access to treatment affecting thousands of individuals. In South Africa, since the constitution came into force in 1994, health rights together with housing rights have become the most important socioeconomic rights cases considered by courts. The movement of judicialization of health rights has particularly been fueled by challenges that states face to provide antiretroviral treatment (drugs used for the management of HIV and AIDS) in the face of the HIV and AIDS epidemic and the treatment of other diseases, which cause catastrophic expenditure. Cases such as the Minister of Health vs. Treatment Action Campaign 2002 (the TAC case) and Soobramoney Cases in South Africa illustrate this point.

Brazil is another example of progressive interpretation of rights. The Brazilian constitution of 1988 granted the right to health to all its citizens and mandated the creation of a National Healthcare System; in 1996, legislation granted universal access to antiretroviral treatment. Following that, patients across Brazil have been turning to

courts to access prescribed drugs and since then lawsuits, all over the country have secured access to antiretroviral treatment for thousands of people. In addition to individual treatment, public interest litigation cases impacting on the right to health have also been those concerning protection of the environment, particularly in judgments from South Asian courts.

From a study of all these examples, one thing is evident: where right to health is specifically guaranteed under the constitution, courts have to wrestle with challenging issues; however on the other hand, the lack of express constitutional entrenchment of the right to health in domestic law is not necessarily a bar to consideration and enforcement, as is the case in Untied Kingdom and Canada.

Insights from another domain are also relevant. Last month (June 2009), the United Nation's Human Rights Council adopted a landmark resolution acknowledging that preventable maternal mortality is a human rights issue and that national and international efforts to protect women worldwide should be scaled up; more than 70 UN member states co-sponsored the resolution, Pakistan being one of them, despite initial reluctance.

The background of the diffidence of some countries to subscribe to a rights-based approach to social and economic issues is important to understand in a contemporary context. The Universal Declaration of Human Rights (UDHR), which represented a watershed in the history of human rights, adopted by the United Nations General Assembly in 1948, initially intended only one instrument. Later, it was bifurcated into two distinct and different covenants. A covenant on civil and political rights (International Covenant on Civil and Political Rights [ICCPR]) and another covenant on Economic, Cultural and Social Rights (International Covenant on Economic, Social and Cultural Rights [ICESCR]). The UN's committee on Economic, Social and Cultural Rights emphasized that it was upto states to give effect to the rights containted in the ICCPR.

Many states, which supported the seperation and which were ultimaltey sucsessful in obtaining a division were of the opinion that the two sets of Rights could not be equated. According to them, the connotation of 'social and econonomic prerogatives' of citizens could not be labled as rights since their realizaition was interlinked with a number of considerations—the indigenous body politic, availability of resources and idealogical and geo-political considerations. In their opinion, these could more appropraitely be labelled as aspirations or plans and not rights and could not be the basis of binding obligations, in the way that civil and political rights needed to be. Furhtermore, they argued that the means of enforcing the former were very different from the mechanims that were needed to ensure compliance with the latter. Other countries had other specific interpretations of human rights and argued strongly for the inclusion of all rights in the framework. The UN therefore, found a middle ground and the rights enshrined in the UDHR were split into two separate covenants, as previously stated; this allowed states to adopt some rights and derogate others.

Since then and in line with this trend there has been a perception in many countries that socio-economic rights are not enforceable through courts. In Pakistan also, it was previously perceived that whilst the Principles of Policy of the Constitution form the basis of the right-based approach, they are not enforceable through courts. However, over the years, a series of court judgments have refuted this notion, arguing that since the word *life* has not been defined in the Constitution, it does not have to be restricted to mere existence in contradistinction to death but should include within its ambit, any hazard to life including ill health, both in individual as well as in communal settings. This has particularly been the case in the Syed Mansoor Ali Shah vs. Government of Punjab [2007 C. L. D.533] case and the case of Miss Shehla Zia and others vs. WAPDA [PLD 1994 Supreme Court 693]. In these cases, the court achieved equivalence between civil and political rights and their social and economic counterparts through the application of an expansive definition of right to life. These decisions set a precedent and since then there have been many other such progressive decisions.

The case of the petroleum levy is therefore, not the first time courts have attempted to legally enforce social rights in Pakistan. But in today's Pakistan, with an escalating trend of judicial activism, this decision has a different connotation. Does this signal the ushering in of an era of progressive jurisprudence, progressive interpretation of rights and public interest litigation with courts ordering compensation, and demanding concrete immediate steps?

Only time will tell if that is the case. However, if that does happen, we must be mindful of the enormous administrative and financial burden on the government and the capacity of the judiciary, which in itself needs to be—and is on the way to being—reformed. It is hoped that judicialization of social rights can usher in a new chapter in the history of social sector reform in Pakistan where governments will be forced to weigh the impact of any decision on the grounds of equity and social justice.

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