Third World Legal Studies

Volume 3 Article 13

1-13-1984

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Patrick McAuslan

URBAN LAND LAW, DEVELOPMENT AND THE ECONOMICALLY WEAKER SECTION IN INDIA.

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On the 31st March 1983 the Supreme Court of India commenced hearing appeals in two most important cases concerning the human rights and living conditions of the economically weaker sections (EWS) of the country. In the first case, the Bombay municipal authorities were appealing against a judgment of the Bombay High Court which had held that pavement dwellers had a right to dwell on their particular piece of the pavement and their dwellings could not be demolished and they could not be moved unless and until suitable alternative accommodation was made available to them. In the second case, members of the EWS in Madras were appealing against a decision of the Madras High Court which had held that where the Tamil Nadu Slum Clearance Board had provided temporary alternative accommodation for slum-dwellers pending the completion of a housing scheme, the Board was entitled to demolish that temporary accommodation once the permanent accommodation was available for occupation; the argument for the appellants being that a right to live implied a right to a livelihood and once they moved to a new housing estate away from the centre of the city, their livelihood would to a large extent depend upon their being able to let the temporary accommodation to other slum-dwellers.

It would be difficult to think of two more apt cases to raise a host of issues relating to human rights and development in the Third World. First and foremost, the question of the role of the courts may be addressed. Approaching Indian legal matters for the first time after more than two decades of work in and study of legal matters in various African countries, one was very forcibly struck by the central role that the courts play in, at least, the urban development process; whether in regulating the manner of compulsory acquisition of the amount of compensation, the exercise of powers by planning and building control authorities or by public land development authorities or by policing the implementation of the Urban Land (Ceiling and Regulation) Act. Equally, despite the standard complaints of the urban administration that the courts are unsympathetic to their efforts to ameliorate the lot of the EWS and over sympathetic to demands of landowners for maximum compensation for the compulsory acquisition of their land, the cases indicate a different story as the two cases described above suggest. Generalisations are hazardous in respect of the hundreds of judicial decisions in the broad area of urban administration and development in India, but my impression after surveying cases from 1979 onwards is that many courts have a lively appreciation of the housing needs of the EWS and of the need to enforce planning and building codes, and are not obstructive of correct, careful and lawful action by administrators; they are on the other hand willing to strike down action which is the reverse of that.

Two excellent illustrations of this position come from a contrasting pair of cases in the area of building controls. The first case is Ram Awatar v. Calcutta Corporation AIR 1982 Cal. 315, the Calcutta High Court decision in the unauthorised 14 storey building case recently confirmed by the Supreme Court. In that case it was clear that the Corporation had served all the relevant notices correctly; had made repeated attempts, supported by the police, to stop the unauthorised building and arrest the people engaged in the construction work; that all the tenants who moved into the building (the whole of which was an unauthorised structure) did so after a demolition order had been served and knowing full well that the whole building had been erected in flagrant violation of the law. The courts in other words supported the correct, vigorous and repeated efforts of the administration to uphold the law.

Contrast with this Gupta v. Special Officer, Madras Municipal Corporation (1980) (2) MLJ 39. In this case officers of the Madras Corporation had, as found by the High Court of Madras, managed to delay granting a building permission for seven years and in doing so were motivated by bias and personal animosity towards the petitioner because they disapproved of the granting to him by the Special Officer of a lease of the land on which he wished to build. Again the court found that the officers of the Corporation were acting under powers of the Madras city Municipal Corporation Act which set out specific grounds on which a building permit could be refused yet were purporting to deny a permit on town planning grounds contained in the Town and Country Planning Act. This was something they could not do. The decision of the Corporation was quashed.

The decision of the courts then are not necessarily obstructive. Even in the area of compensation for compulsory acquisition which has given rise to much constitutional anguish over the years[1] the courts are not noticeably and obviously out of step with the Constitution as amended from time to time as opposed to politicians' and administrators' wishes. Nor have they set about emasculating the Urban Land (Ceiling and Regulation) Act, passed in and for the States during the Emergency, an act designed to limit speculation and hoarding in urban land "with a view to bringing about an equitable distribution of land in urban agglomerations to subserve the common good" (pre-amble) although the marked lack of enthusiasm with which the Act is being implemented in some States may account for this; relatively few cases on the Act have been reported so far.

It is not the decisions but the use of the courts, which raises more issues from our perspective. Given the inordinate delay in the legal system, a challenge to an administrative decision can delay action for up to three years, sometimes longer. Several challenges on different aspects of a housing agency's operation may effectively bring the total operation of the agency to a halt. Equally, a request, usually granted, for a temporary stay of execution of e.g. an order to desist erecting a building alleged to be in contravention of the planning or building

regulations allows a developer to continue to erect the building; it is much more difficult to justify pulling down a completed building than preventing the erection of it in the first place though as Ram Awatar's Case shows the courts are not rigid on the matter. Thus the legal system at one and the same time appears to facilitate the private developer's anti-social activities yet hinder the public developer's social activities. Does this not place human rights as seen by the courts - the right to private property, the right to a fair hearing - in opposition to development as seen by most liberal and social democratic commentators - providing a better life for the EWS?

Put in that way, the contrast seems stark and the conflict unavoidable. But is that the way to regard the problem? As the Bombay case shows, some courts are quite willing to extend the right to property to the slums of the EWS in order to protect them and give them a bargaining position against an impersonal bureaucracy. A right to a fair hearing is likely to be exploited by those with the wealth to hire lawyers, but the absence of the possibility of using the courts to challenge the decisions of administrators rarely redounds to the benefit of the EWS while the wealthy and the elite will always find ways of overcoming or side-stepping inconvenient administrative decisions.

Another point is worth making. Too often discussions of judicial control of administrative action in the Third World take the form of discussions of judicial control versus administrative action - I have been guilty of that approach myself - and certainly in some countries in Africa, Colonial judicial quietism did seem to be replaced, on occasions, with judicial activism after independence which gave rise to an appearance of judges - often expatriate - against governments. But, as has been pointed out earlier with reference to the two cases on building regulations, courts are usually concerned to stop illegal administrative action and the remedy lies in the hands of administrators. Equally it is not impossible to build into administrative programmes allowances for delays brought about by use or even misuse of the legal system. Since I was in Tamil Nadu State in an official capacity as a consultant to the Madras Metropolitan Development Authority, it would be inappropriate for me to name names, but in talking to officials from different agencies concerned with land use development and controls, I was struck by the very different attitudes taken towards the use of and decisions by the courts. On the one hand, one found some officials who had virtually thrown in the towel - 'nothing could be done, the courts blocked everything, only in the Emergency did things get done' -; on the other hand, one found officials who were full of vigour, willing to press on, regarding the activities of the courts with a certain amount of resignation but not letting them stop implementation of programmes; they were something one had to live with and adjust to. This latter attitude is surely the appropriate one to adopt.

The role of the courts in upholding traditional human rights does not then necessarily pit them against any new rights to develop. Indeed the

influential ILO publication of 1977 - The Basic Needs Approach to Development - stated that:

> "...The satisfaction of an absolute level of basic needs ... should be placed within a broader framework - namely the fulfilment of basic human rights which are not only ends in themselves but also contribute to the attainment of other goals."

Having said that, however, it is also necessary to recognize the courts are not and never have been neutral computer-like interpreters of human rights or law establishing programmes of positive public developments. Courts have policies - this has long been accepted in the USA amongst both practitioners and commentators and in the U.K. increasingly amonst commentators even if some people still prefer to avert their gaze from the obvious - and at least in the common law world still over-reliant on English precedents, these policies when applied to programmes of public and collectively organised action e.g. public housing, public transport, rates, have a tendency to cause courts to see issues too readily in terms of an individual and his/her property rights versus the public bureaucracy which is organising the collective consumption of a public good, instead of seeing the issue in terms of the rights of many individuals versus the rights of a few or one.[2] Judicial policies of individualism may well need to be rethought in the context of a right to develop, but here too, my admittedly rather superficial survey of Indian cases suggested that there was an awareness of the existence of an alternative philosophy to that of an individualism based au fond, on property rights.

It would seem to me to be impossible to draft legislation creating a right to develop or requiring development issues to be taken into account when considering questions of human rights and spelling out the basic philosophy which should guide both courts and administrators when making decisions. Directive Principles of State Policy already exist in some Commonwealth constitutions and these could be built on. Admittedly, where governments are not prepared to accept any controls on any of their actions whatsoever, a discussion of how to draft legislation protecting and advancing new types of rights is somewhat otiose but the assumption behind this paper and indeed, it is assumed, this conference, is that we are discussing ways and means in which law, lawyers and legal institutions can be used to encourage governments to be more responsive to their peoples' needs for development, in the context of human rights and vice versa, so that the focus is likely to be on courts, drafting and the like.

One important matter has been assumed throughout the discussion so far. This is that individuals will be able to take action against government agencies. This is assumed without question in India and it could be argued that it was this unspoken and widely accepted belief that individuals have rights and these rights should be protected, however

imperfectly in practice this is accomplished, that ensured that the Emergency in India would in the end be overturned, not by a coup but by elections. Apart from Nigeria, it would be fair to say that few countries in Commonwealth Africa accept both in theory and practice individual challenges to exercises of state power; can anyone envisage a challenge in the courts or even to the Permanent Commission of Inquiry in respect of Tanzania's 'crackdown' on economic saboteurs, and in neighbouring Kenya, the government and the courts paid scant regard to individuals' human rights in the aftermath of the attempted coup of August, 1982. The alternative to an individual in his/her own right or groups of individuals or a representative individual acting on behalf of a group activating human rights machinery is state agencies set up to protect and advance human rights. Can such agencies successfully substitute for an individual complainant? The experience of the Commission for Racial Equality in the U.K. does not suggest that state agencies are likely to be very effective in a hostile political environment, especially when they are dependent for their funds on a less than enthusiastic government. American experience is similar. I doubt very much whether the slum-dwellers in Bombay and Madras would have got as far as they have done if the highly traditional process of litigation had not been available to them; that is that there were lawyers willing to take their cases and a political climate of tolerance that such cases could be litigated. A concern with a right to develop or to marry up development with human rights will almost certainly involve allowing or facilitating individuals to question or challenge governments or participation in the planning and execution of projects to a greater extent than most governments are prepared to concede.

This paper may be thought excessively court orientated, based as it is, loosely, on decisions in Indian courts. Reference to participation can serve to remind us that there are other avenues by which human rights can be taken into account in programmes of development. The programmes of slum-clearance challenged in Bombay and Madras were typical top-down programmes, conceived and executed by state agencies funded with state, national and international funds, following bureaucratic procedures and processes. The relevant Tamil Nadu legislation had no provision in it for consultation with the intended beneficiaries of slum-clearance or for taking account of their preferences in any rehousing programmes; the legislation in fact following fairly closely the relevant parts of the English Housing Act 1957 as unamended though with less provision for inquiries. It could be argued that had a process of preaction participation been followed, the EWS who finally resorted to the courts might not have done so because there would have been no need to; differences of opinion and perceptions would have been ironed out beforehand. From the perspective of development, one could argue that traditional rights of free expression or free speech should be interpreted to include a right to express an opinion on a programme of development which is likely to affect one, and a correlative duty on government to take account of such opinions and construct administrative procedures to facilitate the expression of such opinions. In this

respect there are few countries which measure up to the required standards, too many making the mistake of assuming that a member of the EWS, because he/she is poor, ill-educated, badly dressed, has nothing to contribute to discussions on development.

Finally, and briefly, the two cases outlined at the beginning of the paper raise important and difficult substantive questions. What are the answers? Will development in the interests of the EWS be hastened or retarded by the Supreme Court's finding against the Bombay authorities? Can the courts fashion a remedy which will compel the authorities to build alternative accommodation and provide a livelihood for the EWS rather than just cause programmes of slum-clearance altogether? Might there not be on the statute book in each state more draconian legislation which gives even fewer rights to the EWS than the legislation under challenge to which resort could quite legally be had - if these challenges succeed? There certainly is in Tamil Nadu State: the T.N. Prevention of Dangerous Activities of ... Slum-grabbers Act 1982 which provides for the preventive detention for up to 12 months of, inter alia, slum-grabbers; persons who act as leaders in organised squatting. If the right to life includes the right to a livelihood, should that secondary right embrace the exploitation of the poor by the poor? To what extent should courts substitute their own views on the proper balance between different facets of any particular programme of development for the views of administrators and elected politicians, and what kinds of information and evidence should be placed before the courts to enable them to make informed decisions on these matters? I cannot pretend to have the definitive answers to these questions but they do seem to me to be the kind of questions, alongside those that have been discussed in this paper, which must be faced up to in any discussions of the inter-relation of human rights and development, if those discussions are to inform and assist practitioners of development, be they administrators, lawyers, consultants or the subjects of development - the EWS.

FOOTNOTES

1. See H. Merillat, Land and the Constitution in India (1970), for a good discussion of the first two decades of the matter.

2. This is particularly so in England as to which see my "Administrative Law, Collective Consumption and Judicial Policy", (1983), 46 M.L.R. 1.

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