



HUNGER AMIDST PLENTY: REFLECTIONS ON LAW, POVERTY AND GOVERNANCE

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I Introduction

THE MAGNITUDE of poverty in today's world is indeed alarming. *Human Development Report 2000* indicates that about 1.2 billion people continue to live below poverty line on less than \$1 a day; more than 2.4 billion people are without basic sanitation; about 100 million people are homeless, about one billion adults are illiterate, nearly 100 million children live or work on the streets. From 1995, by introducing the gender related development index (GDI) and gender empowerment measure (GEM) the human development reports are also highlighting the fact that poverty is very gender- biased and affects girls and women much more than boys and men. According to *Human Development Report 2005*, it will still take over 100 years for India to catch up with high-income countries despite sustained economic growth. Even as India appears to be at the forefront of economic growth it continues to lag in quality of life as measured by human development index; it remains unchanged at a low 127 among 177 countries. Fifty percent of India's children are still afflicted by malnutrition. India continues to be a land of mass poverty and despite various poverty alleviation schemes, the disparity between the rich and the poor is widening day by day and more so in the aftermath of economic liberalization.¹ This paper argues that right to subsistence such as right to adequate nutrition, health care, housing, education and work cannot be realized just by judicial enunciation of these rights as aspects of human rights but by a set of public policies, political planning, and participation of civil society to enhance the capabilities of the poor and disadvantaged people. Such policies should try to reconcile economic liberalization with equity so that the poor are not left at the mercy of market forces. In India there is no paucity of funds with the state and there are numerous welfare schemes but due to bad governance the benefits of the schemes never reach the intended beneficiaries.

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1. *The Hindu* September, 2005 (<http://www.hinduonnet.com/2005/09/09/stories/200509090151500.htm>)



II Human right against poverty: International scenario

Human right to basic necessities has been recognized in various international instruments. The United Nations Declaration of Human Rights, 1948 states:² “everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food...” Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 provides for right to food, clothing and housing and an adequate standard of living. This article articulates freedom from hunger calling upon the states to take measures to provide adequate food, clothing and housing and to the continuous improvement of living conditions. The human rights committee of ICESCR has published general comment on the right to food. General comment 12 affirms the link between the inherent dignity of the human person and the right to food and expresses the view that the root of the problem of hunger and malnutrition are not the lack of food but lack of access to available food.³ The committee states the obligation of the state parties to respect and fulfil the right to food, accounting for immediate and long-term measures to achieve its progressive realization.⁴ Implementation at the national level requires the creation of a national strategy, allowing for a margin of discretion in the means by which this will operate. Such strategies must be supported by a legal framework, mechanisms to monitor progress and means of access to effective remedies for violations.⁵ Thus right to food is invisibly linked with the inherent dignity of the human person and is indispensable for the fulfilment of other human rights. The general comment also states that any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial remedy or other appropriate measures both at national and international level. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation satisfaction or guarantees of non-repetition.⁶

Article 24 of the Convention on the Rights of the Child (which came into force in 1990) recognizes the right to nutrition and states, “States parties recognize the right of the child to the enjoyment of

2. Art. 25(1).

3. Committee on Economic, Social and Cultural Rights, General Comment 12. Right to Adequate Food (twentieth session 1999), UN Doc. E/C12/1999/5(1999) para 4 available at http://www1.umn.edu/humanrts/gen_comm./escgenam12.htm

4. *Id.*, para 15-16.

5. *Id.*, para 29-30.

6. *Id.*, para 32.



highest attainable standard of health ...” and shall take appropriate measures “to combat disease and malnutrition...through the provision of adequate nutrition foods, clean drinking water and health care.” Article 27 obligates the state parties to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

The World Food Summit held in Rome in 1996 called upon the U.N. High Commissioner for Human Rights to better define the rights related to food in article 11 of the covenant and to propose ways to implement and realize these rights. A series of expert consultations, conferences and studies clarified the meaning of the human right to food.⁷ The most accepted definition of right to food was put forth thus:⁸

The right to adequate food is realized when every man, woman, and child alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.

The core content of right to adequate food implies the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.⁹ Thus every state is obliged to ensure to everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.¹⁰

III Extensive human deprivation in India

About two decades ago in a seminal and pioneer study on law and poverty Upendra Baxi substituted the word ‘poverty’ with ‘impoverishment’ and the word ‘poor’ with ‘impoverished’ for the simple reason that the words ‘poor’ and ‘poverty’ “normalize what ought to be centrally problematic”.¹¹ He insisted, “people are not naturally poor but are made poor, and that impoverishment is a dynamic process of public-decision making in which it is considered just, right, and fair that some people may become or stay impoverished.”¹² Impoverishment of the people, according to him, is a matter of conscious planning by those who are not impoverished. The point is that people are impoverished due to bad governance rendering the powerless people incapable to protest and resist the sites of dominations and exploitation. Even after

7. *Id.*, para 5.

8. *Id.*, para 6

9. *Id.*, para 8.

10. *Id.*, para 14 .

11. Upendra Baxi, “Introduction” in *Law and Poverty: Critical Essays* vi (1988).

12. *Ibid.*



more than five decades of independence, India remains a land of mass impoverishment and social neglect. Baxi's assertion made long ago that "poverty alleviation programmes, even when they show some concern for the 'poor', are largely directed to meet the needs of political regimes; and the gap between the rhetoric on war against poverty and reality in terms of changing the life conditions of the poor, is often a function of coherence of political ideologies, ways of organization of party cadres, and the leadership styles,"¹³ remains true even to this day.

The persistence of human deprivations amounts to denial of social and economic rights. Malnutrition, illiteracy, hunger, starvation, social exclusion, ill health and lack of public participation constitute a set of unfreedoms resulting in human poverty. Poverty makes a person vulnerable and helpless victim deprived of social, cultural and political freedom. Poverty is not just 'low income' or 'low consumption' but a multiple deprivation causing premature death, chronic undernourishment, illiteracy, illness, and social exclusion. The realization of social and economic rights, which are necessary for the survival of a person as a biological entity, therefore, is closely linked with the notion of human development, which means enlarging choices, expanding human freedoms and assuring human rights. According to National Commission to Review the Working of the Constitution (NCRWC), "human development involves enhancing capabilities to live long and healthy and productive life, the capability to acquire knowledge, and the capability to lead a decent life. Human development consists of promoting freedoms—freedom from ignorance, freedom from hunger, and freedom to participate in decision-making. It entails assuring to every citizen freedom from discrimination and exploitation, and the freedom to lead a life of dignity and freedom to be free of traditional social restraints and to achieve full potential so as to lead a life of dignity."¹⁴

According to *Human Development Report 2005* India is one of the most undernourished countries of the world. The proportion of undernourished children in India is higher than 53%.¹⁵ The low levels of life expectancy, high rates of infant mortality and maternal deaths reflect poor health status of India. More than 90% of the rural population and some 50% of urban population does not have proper sanitation facilities.¹⁶ This is despite the fact that the country has achieved remarkable expansion in food production and has built a good safety

13. *Id.* at xii.

14. "Pace of Socio-Economic Change under the Constitution: A Consultation Paper" by the National Commission to Review the Working of the Constitution iv and 51-52 (2001).

15. See *supra* note 1.

16. *Supra* note 11 at 34.



stock of food grains. In India, the percentage of low birth weight babies is 33%. The percentage of such babies is only 9% in China, 8% in South Korea, 6% in Indonesia and 6% in Thailand.¹⁷ In India, 54 % of married women in reproductive age between 15-49 are suffering from anaemia — 46% in urban area and 54% in rural area.¹⁸ Close to 74% children below the age of three suffer from anaemia—71 % in urban area and 75% in rural area. Easy access to quality health care remains a distant dream for millions of Indians.¹⁹ Large segment of the population of the country remain without access to safe drinking water. The opening of new schools and new clinics and developing new farming techniques have little significance for those who cannot think beyond finding food for their family.²⁰ Elementary education is far from being universal despite the constitutional promise of providing free and compulsory education for all children below the age of fourteen by 1960. Nearly half of the Indian women are unable to read and write and the proportion is quarter for men.²¹ Roughly speaking, about 350 million people in India cannot even read and write.²² There is serious under-provisioning and overall shortage of good quality and affordable social services.²³ India's record of ending poverty has not been very impressive. Today more than 260 million people live below poverty line. These people have neither the resource nor energy to benefit from economic development.²⁴ Female wage rate in unorganized sector is lower than that of males. Anti-female bias is very strong everywhere resulting in large scale female infanticide and female foeticide.²⁵ Despite enjoying sustained growth, the level of human development in India has remained very low.

IV Human right to food: Lack of political will or resources?

In 1980, in *Kishen Patanayak*,²⁶ the Supreme Court disposed of a food petition on the empty assurance of Orissa government that steps

17. *Id.* at 28.

18. *Id.* at 29.

19. *Ibid.*

20. *Id.* at x.

21. *Id.* at xi.

22. *Id.* at 37.

23. *Id.* at xv.

24. *Id.* at 34.

25. *Id.* at 41-42.

26. *Kishan Patanayak v. State of Orissa*, AIR 1980 SC 677. For a critique of this case see, B. B Pande "The Constitutionality of Basic Human Needs – An Ignored Area of Legal Discourse" (1989) 4 SCC (Journ) 1; B. B. Pande "When They Came to the Courts Seeking Basic Needs: Alternatives to "Flawed Response" 30 *JILI* 368 (1989).



would be taken to prevent starvation deaths, but nothing was done. After more than two decades a food petition was again filed in 2001 which has spurred a national campaign on the right to food.²⁷ In *PUCL v Union of India*²⁸ a petition was filed before the Supreme Court in response to the large number of starvation deaths arising from drought in Rajasthan, Madhya Pradesh, and Orissa, despite the availability of surplus food stocks. The petitioners alleged the complete breakdown of public distribution system and asked for proper implementation of various poverty alleviation schemes of the government. B.N. Kirpal and K.G. Balakrishnan JJ broadened the scope of the petition to include the entire country. The food petition raised three major questions. First, starvation deaths have become a national phenomenon while there is surplus stock of food grains in government granaries. Does the right to life mean that people who are starving and who cannot afford to buy food grains should be denied food grains free of cost by the state from the surplus stock of the state particularly when it is lying unused and rotting? Second, does the right to life under article 21 of the Constitution of India include the right to food? Third, does the right to food imply that the state has a duty to provide food especially in situations of drought to those who are not in a position to purchase food? The court lamented that plenty of food was available but distribution of the same amongst the very poor and the destitute was scarce and non-existent leading to malnourishment, starvation and other related problems.

On 28th November 2001 the Supreme Court issued various directions to be complied by all the state governments and union territories by January 2002. These directions included completion of the identification of families below poverty line (BPL) and issuance of ration cards to them, distribution of 25kg of grain per family per month, supply of grain to the poorest of the poor at Rs. 2 per kg under the *Antodaya Anna Yojana* (AAY), supply of cooked mid-day meal in all schools with a minimum content of 300 calories and 8-12 grams of protein on each day of school for a minimum of 200 days and so on. Between 2001 and the present day the Supreme Court has issued various directions²⁹ for implementation of its 2001 orders. It was brought to the notice of the court that midday meal scheme introduced in 1995 has not even started in many states. It has been fully implemented only in Tamil Nadu. Ration shops remained closed despite specific orders of the court and large scale diversions of grains continued unabated. Integrated child development scheme (ICDS), which aims at providing nutrition to

27. See S.M. Dev, "Right to Food in India" (Centre For Economic and Social Studies Working Paper No.50 August 2003) available at <http://www.cess.ac.in>.

28. (2001) 7 SCALE 484.

29. *PUCL v Union of India*, (2003) 9 SCALE 835 at 840; (2004) 5 SCALE 484.



children, is in disuse.³⁰ The funds for poverty alleviation programmes largely remained unutilized. *Annapoorna* scheme has been discontinued in M.P., Haryana, Arunachal Pradesh, Punjab, Chhattisgarh, Gujarat, Kerala, Uttar Pradesh and Uttaranchal.³¹ With a view to ensuring adequate food to the poorest the court in March 2002 asked all the states and union territories to respond to an application seeking the framing of wage employment schemes such as the *Sampoorna Gramin Rozgar Yojana* ensuring the right to work to adults in rural areas. The states were also asked to provide fund utilization certificate before money was released for use. Apparently the court asserted its power to enforce right to food, asking for the strict implementation of the already formulated schemes and making the state accountable to the entitlements of the poor and hungry. According to a commentator:³²

These orders of the Supreme Court bear great relevance for social rights jurisprudence – it not only shows once again the indivisibility of rights but also that the courts do have the authority to order positive action by the State which has financial/budgetary implications. Pleas on financial constraints did not seem to have affected the Court in making this order for enforcement of the right to food of the thousands of people starving in the drought-struck States and the Court took the opportunity to be truly activist.

The court had appointed commissioners to monitor the implementation of poverty alleviation schemes and to provide redress on behalf of the court, in respect of complaints arising from these schemes. The reports submitted by the commissioners to the court revealed startling facts. It was found that the States of Bihar, Jharkhand, Uttar Pradesh, Andhra Pradesh, Assam, West Bengal, Chattisgarh, and Gujarat had not given reasons for the failure of public distribution system resulting in denial of food entitlements to the needy. The report gives various instances of lack of political will of the states in eliminating hunger and starvation.

During the year 2002-2003, 60 million tons of food grains were lying in the stock of the government, yet in many pockets of the country people were dying of hunger and starvation not because of lack of funds but because of bad governance and institutional disarray. What can the

30. For example, in Bihar 160 lakh children were found to be under-nourished.

31. These figures are based upon the report of the commission appointed by the Supreme Court in this case to monitor the implementation of court orders. For the court orders and the report of the commission see Colin Gonsalves, Vinay Naidu, P. Ramesh Kumar and Aparna Bhat (Ed.), *Right to Food* (2004).

32. Jayana Kothari, "Social Rights and the Constitution" (2004) 6 SCC (Journ) 32 at 39.



court do in such a setting except issue directions? Locating the right to nutrition in right to life the court observed:³³

Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families, which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to article 47 which *inter alia* provides that the state shall regard the raising of level of nutrition and of the standard of living of its people and the improvement of public health as among its primary duties.

The annual absorption of food grains per head between the early 1990s (when economic reforms began) and at present (taking three years average) has come down from 177 kg to 155 kg.³⁴ This steep and unprecedented fall in the food grain absorption in the last five years has entailed a sharp increase in the number of people in hunger, particularly in rural areas and for very many it has meant starvation. Therefore, reports of starvation, farmer suicides and deepening hunger should cause little surprise when we see the recent trends in official data on food grain output and availability.

According to Colin Gonsalves³⁵ the commitment to globalization, the enslavement to multinational corporations and resistance to welfare of the poor people cannot be changed by Supreme Court orders. He states that when the food petition was filed in 2001 before the Supreme Court the government responded to the orders of the court with “stealth, guile, ruthlessness” and “it set about sabotaging the already fragile system of food security in the country.”³⁶ First it dealt with the excess food stocks not by using them for appeasing hunger in the food-for-work schemes but by exporting the grain. In the two years between 2000-2002 the Government of India exported 20 million tons of grain to East European countries much of it for cattle feed, at prices below BPL price. Second, the government proposed a slashing of the BPL families from the list on a false justification that the poverty in India had declined from 37% to 27%. If the calculation of poverty made by Utsa Patnayak

33. *PUCL v Union of India*, *supra* note 29 at 836.

34. Utsa Patnayak, “The Republic of Hunger” a public lecture on the occasion of 50th birthday of Safdar Hashmi organized by Sahmat, on April 10, 2004 at New Delhi reproduced in *Right to Food supra* note 31 at 280-309; K.B.Mahabal, “Enforcing Right to Food in India-Impact of Social Activism” 5(1) *ESR Review*(March 2004) available at <http://www.community law centre.org.za/ser/esr2004/2004 march.india>

35. *Right to Food*, *id.* at 311.

36. *Id.* at 18.



is to be believed then if one takes BPL cut off line fixed in 1979 at an intake of 2400 calories per person per day then today 80% population of India should be below the poverty line. Even if the cut off was taken at 1800 calories per person per day, 40% population should fall below poverty line. Third, while exporting grain, the Government of India imported genetically modified grain, thus capitulating to the grain transnationals, giving them not just a toe-hold, but allowing them a stranglehold of the Indian grain market.

The National Human Rights Commission has also acknowledged that “the starvation deaths reported from some pockets of the country are invariably the consequence of bad governance resulting from the acts of commission and omission on the part of the public servants.”³⁷ According to the commission, the prevalence of extreme poverty and hunger is unconscionable in this day and age, for not only does it militate against respect for human rights, but it also undermines the prospects of peace and harmony within the state. Poverty and hunger constitute an affront to human dignity and worth of human person.³⁸

The directions issued by the Supreme Court in the food petition is likely to pressurize the governments to adopt a right-based approach to food security. It is interesting to note that a nationwide right to food campaign has emerged in India to pressurize the government to address the issues of nutritional deficiencies, hunger, and starvation deaths. The right to food campaign is stressing the food need as an aspect of fundamental right to food and to be free from hunger. The campaign has adopted significant strategies such as initiating public hearings, action-oriented research as well as active participation in the proceedings of the food petition. Even the limited success of the campaign will affirm the contributing role of the civil society in eliminating hunger, malnutrition and starvation deaths.

V Poverty jurisprudence of the Indian Supreme Court

In India rights to basic needs have been enshrined as non-justiciable directive principles imposing an obligation on the state to realize them subject to availability of resources. It is true that the Supreme Court has overcome the question of justiciability of these rights by giving an expansive meaning to right to life guaranteed as a fundamental right.³⁹

37. Case no. 37/3/97, Proceedings of the NHRC dated 17. 3. 2003: Coram J.S.Verma J (Chairman), Sujata V. Manohar J, and Virendra Dayal at 12-13.

38. *Ibid.*

39. See S.Muralidhar, “Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of Indian Judiciary”(IELRC Working Paper 2002) available at <http://www.ielrc.org/content/0202.pdf>.



It is also true that right to life has been held to include right to nutrition, shelter, health care, education and so on. A judge may indulge in judicial populism and talk of right to life as including right to food, education, health, and shelter and so on without exactly determining who has the duty and how it can be enforced. It must be remembered that one has social rights to material needs only if one can demand that the state gives one the minimum resources necessary to lead a decent life. It would make no sense to hold that people have a right to nutrition, food, minimum income, work, housing, health care, minimum education and so on and then impose a duty upon the state. The result is that the declaration of social rights becomes illusory on the ground of limited economic resources or low levels of economic development. The cases discussed below would lead us to believe that the general reluctance of the judiciary to enforce social rights is based on the argument that judicial interference would impose financial burdens on the executive for which the judiciary is in no position of authority or expertise.⁴⁰

In *Bandhua Mukti Morcha*⁴¹ the Supreme Court observed that the right to live with human dignity enshrined in article 21 “derives its life breath from the Directive Principles of State Policy, ... and therefore it must include protection of health, and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.”⁴² The content of social rights has been derived by the court from the directive principles.⁴³ Since the directive principle are not enforceable in a court of law, “it may not be possible to compel the state through judicial process to make provisions by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the state providing these requirements...the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the state in securing implementation of such legislation would amount to denial of the right to live with human

40. For a brilliant analysis of the importance of social rights in rights discourse see, Mahendra P.Singh, “Statistics and Dynamics of Fundamental Rights and Directive Principles—A Human Rights Perspective” in S.P.Sathe and Satyanarain (eds) *Liberty, Equality and Justice: Struggles For a New Social Order* 45-58 (2003).

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

42. *Id.* at 183.

43. For example, Art. 39(a) requires the state to direct its policy towards securing adequate means of livelihood for its citizens. Art. 47 spells out the duty of the state to raise the level of nutrition and the standards of living of its people. Art. 41 spells the duty of the state to secure to the people right to work to education, public assistance in cases of unemployment, old age, sickness and disablement.



dignity”.⁴⁴ In *Olga Tellis*⁴⁵ the Supreme Court interpreted article 21 as embodying all graces of human civilization including right to means of livelihood and right to work and indicated that even though right to means of livelihood and right to work and housing are parts of right to life these social rights cannot be enforced through judicial process in the absence of some existing welfare policies or laws. In *D.D. Horticulture*⁴⁶ the Supreme Court realized that it is probably false to proclaim that right to means of livelihood, work and other social rights are matters of enforceable rights when P.B.Sawant J held:⁴⁷

This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles, Article 41 of which enjoins upon the state to make effective provision for securing the same within the limits of its economic capacity and development.

Even the judiciary has to rely upon the executive to assign minimum basic amenities to the populace, which enables them to remain free from hunger, disease and physical sufferings. The judges cannot ask the government to open more hospitals, more schools, more distribution of nutritional needs, more provision for housing and so on. They can simply express basic human needs in the language of human rights, which can be realized only through political action. Thinking of human needs as human rights thus provides resources for public campaign to force the executive to be responsive to human rights. This is why the new claims based upon the right to life have only led to the disillusionment and frustration among the deprived sections of the society as the courts have generally been reluctant to provide positive social goods and services by affirmative judicial action.⁴⁸

44. *Supra* note 41 at 183-84. For early cases on right to live with human dignity, see *Francis Carolie Mullin v. U.T. of Delhi*, (1981) 1 SCC 608; *PUCL v. Union of India*, (1982) 2 SCC 235.

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

46. *D.D. Horticulture Employees' Union v. Delhi Administration*, AIR 1992 SC 789.

47. *Id.* at 795.

48. In *Chameli Singh v. State of UP*, (1996) 2 SCC 541, the court observed that right to life guaranteed by any civilized society includes right to food, water, decent environment, education, medical care, and shelter. In *Shanti Star Builders v. Narayan*, (1998) 1 SCC 520 the court said that basic needs of man have traditionally been accepted to be three, food, shelter and clothing. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746 at 753 the Supreme Court held, “We think that the right to life includes right to live with human dignity and all that goes along with it, namely bare necessities of life such as adequate nutrition, clothing, and shelter over head....”



In a case where the Supreme Court had to deal with the case of a seriously ill man who was refused entry into seven hospitals the court found that the government hospitals were duty bound to extend medical assistance for preserving human life. Failure on part of a government hospital to provide timely medical treatment results in violation of right to life.⁴⁹ In another case concerning the occupational hazards faced by the workers in the asbestos industry the court explicitly recognized right to health as an integral facet of a meaningful right to life under article 21 read with articles 39(e), 41 and 43.⁵⁰ The state, according to the court, has an obligation to provide emergency medical services and also to create conditions necessary for good health, including provisions for basic curative and preventive health services. In another case the court prohibited smoking in public places in the entire country on the ground that smoking is injurious to the health of passive smokers and issued directions to the Union of India, state governments and the union territories to take effective steps to ensure prohibition of smoking in all public places. In a very interesting public interest petition the Supreme Court has issued several directions to the central and state governments to control noise pollution created by loudspeakers, firecrackers, public address system, or any other noise source. The court recognized right to freedom from noise as an integral aspect of right to life guaranteed by article 21 of the Constitution.⁵¹ This is, however, another matter that the orders prohibiting smoking in public places or use of loud speakers or use of firecrackers during festivities have very little effect and are rarely enforced. The judicial rhetoric on health care has no effect on the status of health in India. Prime Minister Manmohan Singh, while launching National Rural Health Mission, admitted that the government has not paid adequate attention to this dimension of development and our health system is “guilty of many sins of omissions and commissions and we have grievously erred in the design of health care delivery that fragments and dissipates energy.”⁵²

In *Unnikrishnan v. State of Andhra Pradesh*,⁵³ the Supreme Court ruled that right to education is a part of right to life under article 21 but

49. *Paschim Bigha Khet Majdoor Samity v. State of West Bengal*, (1996) 4 SCC 37. Also see *Vincent Panikulangara v. Union of India*, (1987) 2 SCC 165; *Murli S. Deora v. Union of India*, (2001) 8 SCC 765; *M.C.Mehta v. Union of India*, (1999) 6 SCC 9; ‘X’ v. *Hospital ‘Z’*, (2003) 1 SCC 500 and *Parmanand Katara v. Union of India*, (1989) 4 SCC 286.

50. *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42.

51. *Noise Pollution (V), In re, with Forum , Prevention of Environmental & Sound Pollution v. Union of India*, (2005) 5 SCC 733.

52. *Hindustan Times*, Delhi, April 13, 2005 at 7.

53. (1993) 1 SCC 645. Also see *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 where right to education as a fundamental right was reaffirmed.



added that a citizen can call upon the state to provide educational facilities to him within the limits of its economic capacity. The court clarified that it was not transferring the directive principle in article 41 to fundamental rights chapter but was merely relying on article 41 to illustrate the content of right to education flowing from article 21 and that the limits of economic capacity was a matter within the subjective satisfaction of the state. Even the insertion of article 21-A in 2002 (by a constitutional amendment) creating a fundamental right to education for providing free and compulsory education for all children of six to fourteen years has been made dependent upon the enactment of a legislation. Unfortunately, right to education has remained just on paper with no further legislative action by the state.⁵⁴

It is thus clear that the realization of proclaimed social rights depends upon the limits of economic capacity and development of the Indian state. If there are public policies and welfare schemes for realizing social rights, it is open for anyone to move the court to implement these schemes and policies. It is, however, beyond the judicial function to compel the state to adopt a particular policy or scheme for the effective realization of these rights.

In *Olga Tellis*⁵⁵ the court recognized the right to means of livelihood and right to work as aspects of right to life but it contradicted itself by saying that these rights could be taken away by the state by following reasonable procedure.⁵⁶

The State may not by affirmative action be compelled to provide adequate means of livelihood or work to its citizens. But any person who is deprived of his right to livelihood except according to just and fair procedure established by law can challenge the deprivation as offending right to life conferred by Article 21.

Accordingly, the court upheld the action of the municipal corporation demolishing the slum and pavement dwellings on public land holdings. It held that no one has a right to make use of public property for a private purpose without requisite authorization and therefore the slum and pavement dwellers have no right to encroach upon public land by constructing dwellings thereon. The court viewed the existence of

54. Art. 21A states that state shall provide free and compulsory education for all children of the age of six to fourteen years in such manner as the state may by law determine. Arts. 45 and 51A have also been amended. For Art. 45 the following has been substituted: "The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years." In Art. 51 A after clause (j) the following clause has been added: "(k) who is a parent or guardian to provide opportunities for education to his child or as the case may be, ward, between the age of six and fourteen years."

55. *Supra* note 45.

56. *Id.* at 573.



pavement dwellings as a “source of nuisance to the public, at least for the reason that they denied the use of pavements for passing and re-passing.”⁵⁷ This is why the court held that “pavement and slum dwellers should be given, though not a condition precedent to their removal, alternative pitches”⁵⁸ This observation of the court that the dislocated people may be allotted alternative sites gave rise to a feeling that the court recognized right to housing as aspect of right to life under article 21.

However, that the judicial view in *Olga Tellis* on right to housing was a tentative one became clear in *Almitra Patel v. Union of India*.⁵⁹ Here the court showed total lack of sensitivity towards the poor when it commented adversely upon the government’s policy to rehabilitate the slum dwellers. Insinuating criminality on the slum dwellers the court remarked:⁶⁰

Establishment or creating slums, it seems appears to be good business and is well recognized. The number of slums has multiplied in the last few years by geometrical proportions. Large areas of public land in this way are usurped for private use free of cost.... The promise of free land at the taxpayers cost, in place of *jhuggis* is a proposal, which attracts more land grabbers. Rewarding an encroacher on public land with free land alternative site is like giving reward to a pick pocket.

It is clear that the Supreme Court leaned in favour of public property rather than protection from homelessness of urban poor. In dealing with forced eviction the court has thus failed to take into account the economic compulsions that gives rise to pavement and slum dwellings and restricted the examination of the issue from purely a statutory point of view rather than from a human rights perspective. The policy makers fail to realize that the problems of migrant rural labour can be solved more by creating new opportunities of employment in rural sector than by forcible eviction of slum and pavement dwellings. These people migrate from rural areas to metropolitan cities for small jobs to nurse the city. About half of the population in these metropolitan cities lives in these slums, which are unsanitary urban wastelands where poor people huddle in ill-lit shabby

57. *Id.* at 579.

58. *Id.* at 589.

59. (2000) 2 SCC 679.

60. *Id.* at 685. Earlier, in *Ahmedabad Municipal Corporation v Nawab Khan*, (1997) 11 SCC 123 the Supreme Court held that though no person had a right to encroach and erect structures or otherwise on footpaths, pavements, or public streets or any other place earmarked for a public purpose, the state had a constitutional obligation to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.



structures lacking all amenities. These slums constitute a hindrance to the development projects for modernizing and renovating big cities of India.⁶¹ According to U.N. Commission on Human Rights forced evictions constitute a gross violation of human rights.⁶² Forced eviction, according to Committee on Economic, Social and Cultural Rights, affects directly the right to life, the right to security of person, the right to non-interference with privacy, family and home and the right to peaceful enjoyment of possessions.⁶³ The committee is of the view that eviction should not result in individuals rendered homeless or vulnerable to the violation of other human rights and the state party must provide adequate alternative housing, resettlement or access to productive land.⁶⁴

Apart from this there are few judgments where the Supreme Court has overlooked the rights of the poor while allowing the construction of mega construction projects like dams and power projects. For example in *Narmada Bachao Andolan v. Union of India*⁶⁵ the court virtually ignored the impact of continued construction of Sardar Sarovar Project dam on hundreds and thousands of tribal people of Narmada valley who had been displaced without adequate rehabilitation and resettlement options when it ruled that the displacement of tribals and other persons would not *per se* result in the violation of their fundamental or other rights. The court by majority, on the other hand, venerated the virtues of big dam projects for bringing green revolution in the country. The court also made disparaging remarks against Narmada Bachao Andolan as an anti-development organization.⁶⁶ The court's ideology tended to subordinate environment to development.⁶⁷

61. The Committee on Economic, Social and Cultural Rights has determined that the right to housing must be read in the widest sense, not just to provide shelter but to strive to secure the right to live somewhere in security, peace and dignity. It has described right to housing as of central importance for the enjoyment of all economic, social and cultural rights. General Comment 7 of the committee holds that forced evictions are *prima facie* incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights, 1966. See, Committee on Economic, Social and Cultural Rights, General Comment 7, Forced Eviction and the Right to Adequate Housing (Sixteenth Session, 1997) U.N.Doc. E/1998/22 annex, iv at 113(1998) para 1.

62. U.N. Commission on Human Rights, Resolution 1993/77.

63. *Supra* note 61 at para 3-4.

64. *Id.* at para 16.

65. (2000) 10 SCC 664.

66. In a strong dissenting judgment Bharucha J took the stand that Sardar Sarovar Project was proceeding without a comprehensive environmental appraisal and without necessary environmental impact studies.

67. Also see *Narmada Bachao Andolan v. Union of India*, AIR 2005 SC 2994 for directions for the rehabilitation of the oustees affected by submergence by reason of raising the height of dam. The court said that in the matter of rehabilitation no distinction should be drawn between permanently and temporarily affected families.



Again in *N.D. Jayal v. Union of India*⁶⁸ the Supreme Court by majority gave a green signal to Tehri Dam Project pointing out the virtues of developmental projects like large dams despite the fact that the government's own expert committee - Hanumantha Rao Committee - had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance to the project had been given by the Ministry of Environment. Dharmadhikari J in his dissenting judgment emphasized the need for an independent expert committee on whose green signal alone the construction of the dam could proceed. The dissenting judge stated that the government could very well utilize natural resources for common good but could not be allowed to exploit or virtually plunder it in a manner to deprive those presently sustaining their lives on those natural resources and deprive the coming generations who have also a right of living on those resources. He observed:⁶⁹

Ours is a constitutional democracy and we are called a welfare state. Welfare does not mean that we have only to strive for fulfilment of political theory "greatest good of greatest number". Our motto is *Sarv Jan Hitay Sarv Jan Sukhay* (benefit of all and happiness of all).

Advancing non-utilitarian argument, Dharmadhikari J observed that when a multi-million big dam project is undertaken to generate electricity and for providing water for irrigation we should not leave those living by the side of the river for generations to a suffering by displacement to a far off place which could deprive them of their life and life style, and "in the march of progress humblest and the weakest should not be left behind."⁷⁰ He said that all efforts should be made so that the displaced or oustees who were hitherto getting benefits from the river for their survival are adequately compensated by minimum possible disturbance to their life sources and life style.

The above analysis of cases on development issues makes it clear that the court's ideology has leaned in favour of economic liberalism and utilitarianism, which looks at pleasure, happiness, and desire fulfilment and seeks to achieve greatest good of greatest number without any regard to those whose social and economic opportunities have been taken away by these mega developmental projects. The inherent importance of the lives of the people displaced or ousted by these development/slum clearance projects hardly merits the attention of an utilitarian so long as these projects are designed to serve the common

68. AIR 2004 SC 867.

69. *Id.* at 897.

70. *Ibid.*



good. Why should the utilitarian metric of pleasure, happiness, desire or fulfillment be considered relevant for measuring people's quality of life? If social and economic rights are the entitlements of the people such rights cannot be allowed to be traded off to promote general welfare or common good.

VI Poverty and globalization

The question that is quite often raised in India is whether the new philosophy of trade would promote the realization of human right to subsistence needs. Overwhelming faith in privatization and liberalization involving reduction in state subsidies on social services such as food, education, transport, rural employment and poverty alleviation programmes, would increase the demands of the vulnerable sections of the society because of inflation and costly living. The state's obligation to provide basic amenities and satisfy basic human needs will be transferred to the market forces in the hands of private players signalling the retreat of welfare state. People, therefore, argue that both 'market' and introduction of 'global finance' should be guided from the standpoint of employment generation and extensive prosperity rather of intensive accumulation by the few. The negative aspect of globalization, it is argued, is that the limited gains of economic growth have been cornered by upper classes and upwardly mobile middle classes while the masses remain impoverished and suffer from human deprivations. Opponents of economic liberalization point out that in India the new philosophy of trade would increase unemployment, lead to a model of modernization that will push the people to the brink of disaster, erode worker's rights and further depress the conditions of migrant, bonded and child labour.

Be that as it may, globalization is now a reality that cannot be wished away. The basic ideology of globalization is that efficient markets will make the welfare schemes more efficient and sustainable. But for good governance, market solutions are justified only if they are efficient means of achieving social justice such as eradication of hunger, malnutrition, premature deaths, illiteracy, homelessness and social exclusion. Market ideology wants freeing up of markets, protecting property rights, removing labour market rigidities and removing all barriers to wealth generation. Even if one is an ardent believer in pro-market reforms, it would be foolish to shut one's eyes to the enormous challenges occasioned by India's economic successes that will require state intervention for regulating the market for achieving the goals of social justice. An interventionist state is indispensable for realizing social rights. Markets also need government in order to function properly.



VII Concluding remarks

The human rights approach of the Supreme Court in interpreting right to life enables the people to formulate their claims in the language of rights. It also enables people to formulate social goals to be realized by positive state action in terms of rational public spending in social welfare. The court's judgments on the right to school mid-day meals, effective implementation of poverty alleviation schemes, obligation of hospitals to provide medical treatment to the needy, and payment of salaries to the starving employees of public sector undertakings who were denied their salaries for a long time,⁷¹ are some of the positive achievements of an activist court. The judicially recognized right may also be used as legal resource to mobilize public campaign and public action to force the state to realize social rights or rights to survival.

It is seen that the satisfaction of subsistence needs depends upon the levels of economic development in a given society. But staying alive is a pre-condition for biological existence of human beings and therefore everyone is entitled to a right to subsistence as a matter of human rights. Opponents of social rights or rights to subsistence maintain that since these rights are rights to scarce resources and opportunities requiring positive duties of assistance and support, they conflict with one another and, therefore, they cannot be entrenched as enforceable human rights in a Constitution. On the other hand, civil rights or negative rights such as freedom of speech, freedom from torture, freedom from arbitrary coercion and so on impose duties of non-interference and therefore they do not conflict with each other. Hence they can be constitutionalised. Hence, the argument for rejecting social rights is misleading. In India people have a right to physical security as aspects of right to life and personal liberty. As a negative right it imposes a negative duty on the state to refrain from interfering in one's freedom. But this right also imposes a positive duty on the state to protect people by providing for police force, criminal courts, human rights commission, police training institutes, lawyers and so on. Funds are allocated by the state for meeting the expenses for maintaining law and order. The demand for protection of personal liberty is not simply a demand that one should be left unhindered but a demand that everyone should be adequately protected against the violation of right to life and personal liberty.

Cecile Fabre defends social rights on the ground that these rights promote the autonomy and well-being of individuals and should,

71. *Kapila Hingorani v. State of Bihar*, (2003) 6 SCC 1; *Kapila Hingorani v. State of Bihar*, (2005) 2 SCC 262. In these cases the Supreme Court directed the States of Bihar and Jharkhand to deposit money with their high courts for disbursement of salaries to the employees of public sector undertakings.



therefore, be constitutionalized.⁷² According to him, individuals have an equal fundamental interest in having a decent life for which autonomy and well-being are two privileged conditions.⁷³ Autonomy consists of the capacity to frame, revise, and pursue a conception of the good. Well-being is the absence of physical suffering.⁷⁴ A person who is hungry and sick will lack capacity to choose between different kinds of life and therefore not be autonomous. Only that person is autonomous who has access to scarce resources and opportunities society offers to everyone. Satisfaction of social rights to nutrition, minimum income, housing, education and so on, is minimally necessary for people to be autonomous. Similarly, a person's well being can be promoted by keeping him free from physical suffering. Fabre offers a strong moral argument for constitutionalising social rights and for creating an obligation of the state and society to enhance human capabilities. Even if one agrees that in India social rights have been recognized through judicial interpretation, adequate public spending on social sector should match enunciation of these rights. If people have social rights to nutrition, employment, health care, education and so on the state has an obligation to invest in basic human capabilities—in primary health care, nutrition, rural employment, essential physical infrastructure such as housing, electricity, roads and so on. It should also be ensured that the money reaches the people it is meant to serve. There is need to have an independent evaluation of the outcome. In India people are poor not because the state lacks funds but they are poor due to lack of accountability and lethargic performance of the bureaucracy with regard to proper implementation of various welfare schemes.

The role of civil society is indispensable in promoting and protecting right to basic human needs. The participation of institutions of civil society will have a significant effect in social mobilization inducing public pressure on the political executive to satisfy human needs. It must be remembered that the right to food, health, education and all other social rights are interdependent. For example, providing sufficient food to address the problem of under-nourishment will not help one to

72. Cecile Fabre, *Social Rights Under the Constitution* (2000). According to Joseph Raz, 'the ideal of personal autonomy is the vision of people controlling to some degree, their destiny, fashioning it through successive decisions throughout their lives.' J. Raz, *The Morality of Freedom* 369(1986). John Rawls describes personal autonomy 'as the ability to frame, to revise, and to pursue a conception of the good and to deliberate in accordance with it.' J. Rawls, *Political Liberalism* 72 (1993). Amartya Sen defines well-being as freedom from physical suffering, freedom from disease, hunger, malnutrition and so on. A. Sen, "Well-Being, Agency and Freedom" 82 *Journal of Philosophy* 169-221(1985).

73. *Cecil Fabre, id.* at 8.

74. *Id.* at 12-13.



recover from ill-health. Provision for health care is necessary and at the same time people should have access to education and information.

Social empowerment can be possible only by creating social opportunities for the people by political planning and public policies for the expansion of the capabilities of the people. The National Rural Employment Guarantee Act, 2005 and the Right to Information Act, 2005 will be a helpful step in the direction of tackling extreme poverty and development within the rights framework. The National Rural Employment Guarantee Act, 2005 recognizes a right to be employed by guaranteeing 100 days of employment per year for at least one adult in every household, entitling a person to receive minimum wages for casual manual labour within 15 days of application failing which he/she shall be entitled to daily unemployment allowance. The Act creates a legal obligation to provide employment and a sophisticated mechanism for implementing that obligation. The national launch of the Act on February 2, 2006 by Prime Minister Manmohan Singh has identified 200 districts for implementation of NREGA in the first phase. *Panchayati Raj* institutions will have a principal role in planning and implementation of this scheme and transparency, accountability, social audit and people's participation is ensured through institutional mechanism. This is indeed a welcome move of the government for social empowerment. The Right to Information Act, 2005 seeks to ensure that the country's development empowers its people. Right to information may have a dramatic effect on corruption and bureaucratic lethargy and lack of accountability. The Act provides that if any public information officer delays or withholds information without reasonable cause beyond the stipulated period of 30 days he/she will be fined Rs. 250 daily. People's right to demand information would inevitably create the possibility of building a wider alliance against injustice, corruption and arbitrariness in governance. The right to information law may be used both by middle classes and the poorer sections of the society to ensure that country's impressive GDP growth rate is truly benefiting the disadvantaged sections of the society. Transparency and accountability in governance is expected to put the decision making in the public domain. However, everything will depend upon how the people make use of this Act for social empowerment.⁷⁵

75. The central government has announced plan to spend Rs.1 lac crores on urban renewal to be called the Jawahar Lal Nehru National Urban Renewal Mission which would be geared towards the development of urban infrastructure and services covering 60 cities. The scheme will have a component for special emphasis on provision of basic services to urban poor including housing, water supply, sanitation, slum improvement, community toilets/baths and so on. Earlier this year the government had announced two mega projects for rural infrastructure development—Bharat Nirman and Rural Employment Guarantee Scheme. See *Hindustan Times* November 22, 2005 at 1.



One may conclude by referring to the capability approach to development articulated by Amartya Sen⁷⁶ in his economic analysis of famines, poverty and developmental problems. According to Sen, development should focus on expansion of people's capabilities to achieve different valuable functionings. The crucial question that should be asked is: what are the social and personal conditions that facilitate or hinder the individual's ability to transform resources to different functionings? Paying attention to nutrition, health, literacy, self respect, and political participation and promoting them through coherent policies is a matter of justice. The advantage of thinking of human development as an expression of human capabilities and human freedoms is that it addresses the problems of malnutrition, hunger, premature mortality, illiteracy, and social exclusion. According to Sen, "creation of social opportunities makes a direct contribution to the expansion of capabilities and the quality of life."⁷⁷ Development requires "removal of major sources of unfreedoms: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive States."⁷⁸ Capability as a target of public policies is in essence the characteristic of good governance. The development of a country should not be judged by its gross national product or rise in personal income or rapid industrialization or technological advancement but by development of the well-being of the people. Social rights to food, education, health, shelter, and so on recognized by the Supreme Court as human rights will have little meaning in the absence of sufficient public spending to realize these rights by coherent and properly implemented public policies along with transparency in governance.

76. A. Sen, *Development as Freedom* 3-12 (2000)

77. *Id.* at 144.

78. *Id.* at 5.