THE GENERATION THEORY OF HUMAN RIGHTS AND ITS DICHOTOMY: THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS WITH SPECIAL REFERENCE TO THE CONSTITUTIONAL GUARANTEES IN INDIA

Abstract

This paper makes an endeavour to impeach the historically thrived prevalent approach of generation theory that intended to revise the horizontal linkage of human rights by undermining the legal protection of economic, social and cultural rights, thereby establishing a vertical and hierarchical relationship between the civil and political rights and economic, social and cultural rights. The 'Rights-Based Approach' has been proposed as evidence-based tool to support the concept of justiciability of the human rights irrespective of any kinds. The trend of incorporation of socio-economic rights under the fundamental guarantees in the Constitution has been instrumental to justify the justiciability of economic, social and cultural rights. The case of countries like India has been exemplary.

I Introduction

"The rights of every man are diminished when the rights of one man are threatened." - John F. Kennedy

HUMAN LIFE cannot be imagined if the inherent nature and inalienable and indivisible characters of human rights are not intrinsically connected with every individual irrespective of any grounds, status and acquired conditions. The intrinsic value of human necessitates respecting each and every individual's dignity and worth simply by virtue of being human. Deprivation of human rights results in disadvantageous condition rendering human life subjected to injustice. The idea of advantages is associated by and large with that of right including claim. The condition of human life is objectively shaped. Human rights are thus objective phenomena rather than perception or assumptions. This hypothesis surrounds within particular as matter inclined with objective allotments. Human rights are not concede by anyone but inherited by nature and thus are not the choice of rulers. Justice P. N. Bhagawati correctly marked that 'human rights are as old as human society, for they derive from person's need to realize his/her sine qua non-humanity. They are not temporary, not changeable with time, spot and fate. They are not the commodity of the philosophical notion or political buzz'. Unfortunately, the drafters of international human rights documents while classified the norms and phenomenon did not count the experiential attestation but are seen highly affected by primal western philosophical notion and transnational politics that counted only civil and political rights as human rights. The perpendicular normative evolution of transnational human rights measures also gave

rise to the hypothetical based inference of 'generations of human rights' discussed below. The category of human rights was apprehended merely "to those rights that exceed, and are safeguard against, the exercise of political command".[1]

This piece of writing represents a number of stories of victims and sufferers who have mislaid and lost their life in search of their essential minimum brink fettles of life and such cases are neglected by the state and non-state actors. The eloquent apportion of writing is contentious to secure the socio-economic rights as "justiciable human rights", notwithstanding, proposes the conjunction of all human rights as requisite methodology bridging tool to justify the right to life with standard as quality of life including the standard of living.

II Historical antecedents

The human rights motion developed after the World War. Notwithstanding the term human rights was not definitely coined by the League of Nations, its beneficiation in the development of human rights generally on the rights to/at work and right against slavery is out of the way. The first universal human rights institution, the International Labour Organisation (ILO), has guaranteed workers' rights in a wide compass of human rights since 1919. Its Constitution apprehends that 'universal and lasting peace can be established only if it is based upon social justice'.[2] In 1919, social justice at work was of leading importance because wide-ranging social threatened the peace substantiate at the end of World War I and made compelling the task of upgrading working conditions. The preamble also recognises that one nation's delinquency to enhance working conditions not only detriments own people but also preclude other States from succeeding in their efforts to enhance condition.[3] The proliferation of first world welfare model welfare to include the "right to work, right to development, right to social service, right to sufficient health were taken questionable as socialist docket and thus was evaded for political causes.

The UDHR (Universal Declaration on Human Rights), a 'common standard of achievement',[4] esteemed as an International Bill of Rights, ultimately, stood first to recognize the individual's rights, including duty with the unequivocal 'recognition of

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1 Johan D. van der Vyver, 'Foundations of Law: Morality, Human Rights, and Foundations of the Law" *Emory Law Journal* 188 (2005).

2 See Preamble to the Constitution of the International Labour Organisation 'Constitution of the International labour Organisation' (ILO 1919).

3 Declaring that the Organisation and its members will implement the ILO's constitutional mandate based on the four strategic objectives of the strategic objectives of the Decent Work Agenda toward the universal aspiration for social Justice; See also ILO Declaration on Social Justice for a Fair Globalization (adopted 30 June 2008) ILO Conference Session 97.

4 The phrase 'A common standard of achievement' was incorporated in the preamble of the UDHR signifies the universal character of human rights with the notion of "the rights everywhere of all countries".

the constitutive quality and of the equal and inalienable rights of all members of the human lineage'[5] supervened by the contents of economic, social and cultural rights and civil and political rights. The inclusion of social and economic rights in the UDHR was originality at the time. It has been contended that this was a result of constrain from Eastern Europe and in particular, the USSR. The Soviet bloc took part very lively in discussions on social and economic topics, while the United States (US) chased to eliminate economic rights from the binding substantiate. The US and its associates put pressure to then Commission on Human Rights to remove economic, social and cultural (ESC) rights from the list of the brewing covenants.[6]However, the international community concurred to include these rights in the declaration. The UDHR includes the ESC rights as

- the right to work, to just and fair fettles of employment, and to safeguard against unemployment
- the right to form and join trade unions
- the right to a standard of living sufficient for health and well-being, including food, clothing, housing, medical care and social services, as well as ammunition in the event of loss of livelihood, whether because of unemployment, sickness, disability, old age or any other reason
- the right to education, which shall be free and compulsory in its "elementary and fundamental" stages

Article 25 of the UDHR is landmark and has not only recognized a guarantee to the basic means of existence, but also provides a scope for social justice through the annuity to the special care and abetment to motherhood, childhood and widowhood respectively.[7] Unlike the 'economic and social rights' the notion of 'cultural rights' however is seen more complex.

III The contradiction of human rights and generation theory

The threefold analysis of generation theory of human rights created contradiction of human rights by categorically presenting civil and political rights as first generation, economic, social and cultural rights as second generation and the collective or solidarity rights as the third generation of rights. Notwithstanding, the notion of three generations has been said firstly put forward by Keral Vasak in 1979 and is followed by many others, this is an outcome of historical western inheritance of different degree and

5 UDHR, preamble, para. 1.

6 IliasBantekas and Lutz Oette, *International Human Rights Law and Practice* 401 (Cambridge University Press, 2nd edn., 2016).

7 UDHR, art. 25(2).

interest dividing human rights into a perpendicular or asymmetrical order. His separations follow the three countersigns of the French Revolution: Liberty, Equality and Fraternity.[8]The etceteras of civil rights- those that are elemental to the subsistence of the individual within the body politic and which deduce their material from the station in life of a person as a citizen of the state- was acquainted into the paradigm of human rights thinking by the French legal philosopher, Jean-Jacques Rousseau (1712-1778). Rousseau pleaded that the individual, by entering into political neighbourhood, actually penalty his or her natural rights (life, liberty and equality) in substitute for a bunch of civil rights (liberty, equality, life and property).[9] The core contents under the Magna Carta, 1215,[10] Petition of Rights 1628, English Bill of Rights, 1689, American Declaration of Independence, 1776 and French Declaration on Man and Citizen. The notion of rights declared in both American and French societies were found articulated by the social contract theorist giving account to the individuals and their freedom to trace their own ends and urges. The philosophy of individual rights and freedoms and the subsistence and power of the state argued in the social contract theories in fact were far from the converse of socio-economic rights of the peoples.

The critics of the generation theory also hit upon the philosophic inscriptions of political figures and came in to determination that theoretically, 'the first generation of human rights was acclimated by liberalism, exemplified in the inscriptions of Rousseau, Locke, and Kant, though cradled much more deeply in the thought of Aristotle. The second and third generations of rights were in distinctiveness impressed by Marx, Engels, Lenin, and Mao'. These doctrine misgivings hostilely contributed in category of human rights into the generation theory.

As per the generation theory, the first twenty articles of the UDHR: free speech, religious liberty, the right not to be tortured, and the right to a fair trial, the right to vote, and so forth related to civil and political rights inherited later by ICCPR[11] are called as first generation rights, from article 22-27 of the UDHR listed socio-economic rights such as the right to work, the right to fair pay, the right to food, shelter and clothing, the right to education etc as second generation rights and the collective or

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8 See Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights" (UNESCO, 1977); Eide and Rosas (n19) 4.

9 Marika Mc Adam, Freedom from Religion and Human Rights Law 190 (Routledge, 1st edn., 2017).

10 Ch. 29 of the 1215 charter broadened and replaced Ch. 39 of King John's charter and provided: 'No freeman shall be taken, or imprisoned, or be diseased of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by law of the land. We will sell to no man, we will not deny or defer to any man either justice or right'.

11 See David Weissbrodt (ed), *Civil and Political Rights at Encyclopaedia of Human Rights* 309 (Oxford University Press 2009).

solidarity rights such as right to self determination and right to development the third generation rights. The third generation rights are rather inexplicit and broad as group and collective rights such as right to development, environment, and natural resources and so on.

The notion and the contents dignify in the UDHR are prevailingly reaffirmed by the ensuing instruments, however in irregular political manner. Eventually, the exquisite ideology dissolution of the time led to the adoption of two separate covenants, one on economic, social and cultural rights and the other on civil and political rights. Differing path were taken in each. It is often denounced that the contents of administer guaranteed by the ICCPR are far better than ICERCR as the latter even dearth having its monitoring body at the very incipience.[12]Additionally, out of all primary treaties, only the monitoring body for ICCPR is named as 'Human Rights Committee" (hereinafter HRC) as if other issues are not human rights.

IV Dichotomy of the generation theory

Rights without remedies and legal implementation are not rights but the above hypothesis do not account the so-called second and third generation rights as rights at all. The World Conference on Human Rights opposed the Excellency between civil and political rights and economic, social, cultural rights that annunciate 'all human rights are universal, indivisible, and interdependent.[13] More precisely, the conference adopted that 'there must be a collaborated exertion to assure recognition of economic, social and cultural rights at the national, regional and international levels'.[14] Despite this devotion, the generation theory of human rights perpetual both in empathetic and operation.

The consequence of legal enforcement has been the primary hindrance hampering the development of socio-economic rights since their commencement in the UDHR. The civil and political rights, which have not met with the same defiance, have almost globally been upgraded to an implement status in national law. Yet it may be, as many commentators have recently indicated, "matters with implementing socio-economic rights have been exaggerated and have even been used to disguise ideological misgivings. Such intimations are endorsed by an accelerated body of case law emerging from a number of administrations, which has arguably put the issue of legal implementation "beyond question". Without legal implementation, it is broadly accepted that socio-economic rights will stick around inefficacious as legal existent. The disagreements

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12 ICESCR, art. 16 provided the initial mandate to the ECOSOC. The committee of ICESCR was established by the resolution of ECOSOC in 1985.

13 See Vienna Declaration and Program of Action (1993) para.1, para.5.

14 *Id.,* para II, para 98.

give the valid ratiocination that the "different treatment" of rights might be the issue of 'ideological differences' rather than 'differences between the rights themselves'.[15] These all arguments establish the so-called generation theory as political notion of rights.

The presumptions listed above are inaccurately assessed and dissatisfactory terminated the ESC rights as non-justiciable. If it is an effect of global politics prioritising the civil and political rights, either from the perspectives of instrumental guarantees or the execution mechanisms, this cannot be accepted as a valid excuse by any means.

The absence of 'availability of resources' has been extremely drawled to excuse the generation theory, which is very much desultory. Some people have asserted that economic rights had a place in the global human rights administration longer than civil and political rights. American President Franklin D. Roosevelt characterized the 'economic rights' as the "freedom from want", which embrace the right to useful profitable job, the right to earn enough to stipulate satisfactory medical care and the right to satisfactory safeguard from the economic troubles of old age, health issues, accident, lack of employment and the right to good education.[16] Additionally, ESC rights bear not only the economic rights but also the social and cultural rights that take, 'social guarantees' without looking much on 'material resources'. Even the economic rights could be made 'justiciable' by 'taking reasonable steps' following three ways of production, storage and distribution with all compulsory intercedes at state level.[17] In the use of accessible expedient, due precedence shall be given to the ascertained of rights apprehended in the covenant, apprehensive of the need to console to everyone the gratification of existence requisite as well as the provisions of the requisite services. [18]

The presumptions that civil and political rights are negative incumbency inaccurately impaired the implement by inducing dichotomy of State incumbency drawing a customary proposition that 'Socio-economic' rights are 'positive rights'. This necessitates the state to develop resources to supply a remedy, whereas civil and political rights are 'negative rights', which simply necessitate the state to burden from unjust fetter with individual preference.[19] It is to be prominent that no human rights are righteously

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15 See Paul Hunt, "Reclaiming Social Rights: International and Comparative Perspectives" *Otago Law Review* 53-54 (Dartmouth, 1996).

16 Eleventh Annual Message to Congress on 11th January, 1944 (cited at Fred L. ed., 1966).

17 The case on right to food observed by Supreme Court of India is worth mentioning is a later discussion.

18 See Limburg Principles, paras 25-28. *Available at*: escr-net.org/recources/liubing priciples-implementation (last visited on May 30, 2019)

19 See Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' *American University International Law Review* 46 (Washington College of Law, American University, 2006).

negative or positive but the combination of both. Even the implementation of civil and political rights necessitates resource disbursement, and as such, these rights are adequately positive.

Similarly, the etceteras 'achieve progressively' has not been presented. The concept of progressive realisation necessitates reading this articulate in the light of the general objective which is substantive clear imperatives for state parties to move as promptly as possible concerning the ascertaining of these rights.[20]

The presumption of non-justiciability is also thrived by the domestic Constitutions that have placed ESC rights not within the 'Fundamental rights framework' but under the Directive Principles and State Policies (DPSP) the legalists accept that Courts have no jurisdiction to execute something that is not certainly substantiated by the law as a legal right that additional accumulated the presumptions of generation theorists specified above that:

- Socio-economic rights are barely common interest of people which are not competent of execute by the courts.
- Rights are products of law, thus their subsistence is expansion concerns of society instead the matters for judicial intercede.
- Socio-economic rights are communal interests of the people, so that would be impossible for a single individual to affirm or enforce them.

In response to the above arguments, Professor Ghai invites for a *bona fide* discussion on the theory of rights and practical approaches of execution, specifically focusing the issue of justiciablity.[21]

In relation to the civil and political rights, it is generally taken for granted that judicial remedies for violations are necessary. It was also argued that 'because civil and political rights only comprehend that the state abstain from action, it is rational to expect comprehensive and instantaneous deference; while such an anticipation would not be reasonable concerning social and economic rights, which necessitate the state to positively undertake anonymous actions'.[22]

V Justiciability of economic, social and cultural rights under Indian Constitution

Part III of the Indian Constitution guarantees "fundamental rights" to all citizens, and some of are, like the right to life (article 21) and the right to equality (article 14), to all

20 See for details General Comment No. 3 (1990) and the Report of the Committee on ICESCR, UN Doc. E/1991/23, 83-87. See also, Ben Soul *et.al*, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials* 134 (Oxford University Press 2014).

21 YashGhai and Jill Cottrell (n 46) 6.

22 See Dias and Honwana (n 70) 230.

persons. The fundamental rights are implementing in the high courts and the Supreme Court. In writ petitions before these courts, a person or a citizen can seek implementation of fundamental rights and indemnification for their breach. Judicial reappraisal of administrative action as well as of legislation and judicial and quasi-judicial orders is apprehended as part of the "basic structure" of the Constitution which cannot be taken away even by an amendment to the Constitution. The Supreme Court has the final word on the interpretation of the Constitution, and its orders, being law, are binding and implement by all authorities—executive, legislative and judicial.

The DPSP are retrained in part IV, articles 36 to 50, of the Indian Constitution. Many of the provisions write to the provisions of the ICESCR. For example, article 43 provides that the state shall attempt to secure, by competent legislation or economic association or in any other way, to all the workers, work related to agriculture, work related to industry or otherwise, work, a living emolument, conditions of work guarantee a virtuous standard of life and full possession of decompression and social and cultural occasion, and in particular the state shall attempt to upgrade cottage industries on an individual or communal basis in rural part of the society. This corresponds more or less to articles 11 and 15 of the ICESCR. Nevertheless, some of the ICESCR rights, for example, the right to health (article 12), have been elucidated by the Indian Supreme Court to form part of the right to life under article 21 of the Constitution, thus making it straightway executable and justiciable. As a party to the International Covenant on Economic Social and Cultural Rights, the Indian legislature has enacted laws giving induce to some of its treaty commitment and these laws are in turn executable in and by the courts.

Article 37 of the Constitution enunciates that the DPSP "shall not be executable by any court, but the principles therein laid down are notwithstanding fundamental in the administration of the country and it shall be the duty of the state to pertain these principles in making of laws for the Country." It is not a mere concurrency that the ostensive supremacy that is drawn by scholars between the ICPR rights and ESC rights holds good for the supremacy that is drawn in the Indian contexture between fundamental rights and DPSP. Thus the exclude to justiciability of the DPSP is construe in some sense in the Constitution itself.

Nevertheless, the Indian judiciary has conquered this ostensive limitation by a inventive and construction exercise. In what contexture that transpired and how what is suggested to be questioned in this case study. After concisely tracing the development of this elucidation exertion through case law in the first three decades of the working of the Constitution, I propose to examine the reaction of the judiciary in the ambient of justiciability and executable of specific ESC rights.

Fundamental rights versus DPSP

When the conflict for primacy between fundamental rights and DPSP came up before the Supreme Court first, the court said, "The directive principles have to consist to and run subsidiary to the council on fundamental rights."[23] Later, in the fundamental rights case (referred to above), the generality opinions imaged the view that what is fundamental in the administration of the country cannot be less revealing than what is eloquent in the life of the individual. Another judge comprising the majority in that case said: "In building up a just social order it is sometimes mandatory that the fundamental rights should be overpowered to directive principles."[24] This view, that the fundamental rights and DPSP are correlative, "neither part being imperious to the other," has held the field since.[25]

The DPSP have, through consequential constitutional amendments, become the criterion to seclude legislation enacted to achieve social intentions, as recited in some of the DPSP, from attempts of abrogation by courts. This way, legislation for attaining agricultural reforms, and particularly for attaining the goals of articles 39(b) and (c) of the Constitution, has been immunized from dispute as to its breach of the right to equality (article 14) and freedoms of speech, expression, *etc.* (article 19).[26] Notwithstanding, even here the court has reserved its authority of judicial review to check if, in fact, the legislation is betrothed to attain the purposes of articles 39(b) and (c), and where the legislation is an amendment to the Constitution, whether it breach the basic construction of the constitution.[27] Further, courts have used DPSP to defend the constitutional coherent of statutes that ostensibly assess conditions on the fundamental rights under article 19 (freedoms of speech, expression, association, residence, travel and to carry on a business, trade or profession), as long as they are stated to attain the purposes of the DPSP.[28]

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23 *State of Madras* v. *Champakam Dorairajan* (1951) SCR 525.

24 Mathew, J. in the Fundamental Rights case, note 1 above, SCC para. 1707, at 879.

25 V.R.KrishnaIyer, J. in *State of Kerala* v. *N. M.. Thomas* (1976) 2 SCC 310 at para. 134, at 367.

26 Constitution of India, 1950, Art. 39(a) and (b) provide that: The State shall, in particular, direct its policy towards securing:- (a) that the citizens, men and women equally, have the right to an adequate means to livelihood. (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; art. 31B and 31C of the Constitution were introduced by the 1st and 25th amendments to the Constitution. In fact the Fundamental Rights case concerned the constitutional validity of Article 31C of the Constitution.

27 *Minerva Mills* v. *Union of India* (1980) 3 SCC 625; *Waman Rao* v. *Union of India* (1981) 2 SCC 362.

28 For instance art. 43 dealing with living wages and conditions of work has been relied upon to sustain the reasonableness of the restriction imposed by the Minimum Wages Act, 1948. *Chandra Bhavan* v. *State of Mysore* (1970) 2 SCR 600.

The DPSP are seen as aids to construe the Constitution and more significantly to provide the basis, scope and limit of the content of a fundamental right. To quote again from the Fundamental Rights case:

"Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV".[29]

The *Maneka Gandhi* case and thereafter

Coextensively, the judiciary took upon itself the task of enduing into the constitutional provisions the spirit of social justice. This it did in a series of cases of which *Maneka Gandhi* v. *Union of India* was a landmark.[30] The case convoluted the refusal by the government to allotment of a passport to the petitioner, which thus contained her liberty to travel around the world. In answering the question whether this non-acceptance could be nurtured without a pre-decisional hearing, the court proceeded to construe the scope and content of the right to life and liberty. In a departure from the earlier view, the court affirmed the doctrine of significant due process as integral to the chapter on fundamental rights and evolving from a collective understanding of the conspire underlying articles 14 (the right to equality), 19 (the freedoms) and 21 (the right to life). The power the court has to strike down legislation was thus broadened to comprehend hypercritical examination of the substantial due process components in statutes.

Once the court took a wide view of the scope and satisfied of the fundamental right to life and liberty, there was no looking back again. Article 21 was construed to comprehend a bunch of other accidental and definite integral rights, many of them in the characteristics of ESC rights.

Right to work

Article 41 of the Constitution provides that "the State shall within the limits of its economic complement and evolution, make operative provision for protecting the right to work, to education and to public assist in cases of unemployment, old age, health issues and disablement, and in other cases of undeserved want. Article 38 states

29 See note 1, SCC para. 1714, at 881.

30 1978 AIR SC 597. Until the decision in Maneka Gandhi, the court stuck to the view it first took in *A.K. Gopalan* v. *State of Madras* 1950 SCR 88, that art. 21, which stated that "No person shall be deprived of his life or personal liberty except according to the procedure established by law," meant that as long as there was a law made by the legislature taking away a person's liberty, such law could never be challenged as being violative of fundamental rights.

that the state shall strain to upgrade the welfare of the people and article 43 states it shall endeavour to secure a living wage and a decent standard of life to all workers. One of the contexts in which the problem of enforceability of such a right was posed before the Supreme Court was of large-scale abolition of posts of village officers in the State of Tamil Nadu in India. In negating the contention that such an abolition of posts would fall foul of the DPSP, the court said, It is no doubt true that article 38 and article 43 of the Constitution insist that the State should endeavour to find sufficient work for the people so that they may put their capacity to work into economic use and earn a fairly good living. But these articles do not mean that everybody should be provided with a job in the civil service of the State and if a person is provided with one he should not be asked to leave it even for a just cause. If it were not so, there would be justification for a small percentage of the population being in government service and in receipt of regular income and a large majority of them remaining outside with no guaranteed means of living. It would certainly be an ideal state of affairs if work could be found for all the able-bodied men and women and everybody is guaranteed the right to participate in the production of national wealth and to enjoy the fruits thereof. But we are today far away from that goal. The question whether a person who ceases to be a government servant according to law should be rehabilitated by being given an alternative employment is, as the law stands today, a matter of policy on which the court has no voice."

But the court has since then felt freer to interfere even in areas which would have been considered to be in the domain of the policy of the executive. Where the issue was of regularizing the services of a large number of casual (no permanent) workers in the posts and telegraphs department of the government, the court has not hesitated to invoke the DPSP to direct such regularization. The explanation was, Even though the above directive principle may not be enforceable as such by virtue of article 37 of the Constitution of India, it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. It is urged that the state cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. And such denial might amount to exploitation of labour. The government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable . . . It is true

that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of those rights the question of security of work is of utmost importance.[31]

In *Bandhua Mukti Morcha* v. *Union of India*, [32] a PIL by an NGO highlighted the deplorable condition of bonded labourers in a quarry in Haryana, not very far from the Supreme Court. A host of protective and welfare-oriented labour legislation, including the Bonded Labour (Abolition) Act and the Minimum Wages Act, were being observed in the breach. In giving extensive directions to the state government to enable it to discharge its constitutional obligation towards the bonded labourers, the court said,[33]

The right to live with human dignity enshrined in article 21 derives its life breath from the DPSP and particularly clauses (e) and (f) of article 39 and articles 41 and 42 and at the least, therefore, it must include protection of the 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. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the DPSP contained in clauses (e) and (f) of article 39, articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the state through the judicial process to make provision 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 basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, 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 dignity enshrined in article 21, more so in the context of article 256 which provides that the executive power of every state shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which

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31 *Daily Rated Casual Labour Employed under P & T Department* v. *Union of India* (1988) 1 SCC 122 at paras. 7 and 9. Similar orders were made in *Dharwad P. W. D. Employees Association* v. *State of Karnataka* (1990) 2 SCC 396; *Jacob M. Puthuparambil* v. *Kerala Water Authority* (1991) 1 SCC 28; *Air India Statutory Corporation* v. *United Labour Union* (1997) 9 SCC 425.

32 (1984) 3 SCC 161.

33 *Id.* at para. 10, at 183. In *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguly* (1986) 3 SCC 227, the court held a hire and fire policy of a government corporation to be untenable as it would be inconsistent with the DPSP.

apply in that state.[34] Thus the court converted what seemed a non-justiciable issue into a justiciable one by invoking a wide sweep of the enforceable article 21. More recently, the court performed a similar exercise when, in the context of articles 21 and 42, it evolved legally binding guidelines to deal with the problems of sexual harassment of women at the work place.[35]

The right of workmen to be heard at the stage of winding up of a company was a contentious issue. In a bench of five judges that heard the case the judges that constituted the majority that upheld the right were three. The justification for the right was traced to the newly inserted article 43-A, which asked the state to take suitable steps to secure participation of workers in management. The court observed:[36]

> It is therefore idle to contend 32 years after coming into force of the Constitution and particularly after the introduction of Article 43-A in the Constitution that the workers should have no voice in the determination of the question whether the enterprises should continue to run or be shut down under an order of the court. It would indeed be strange that the workers who have contributed to the building of the enterprise as a centre of economic power should have no right to be heard when it is sought to demolish that centre of economic power.

Right to shelter

Unlike certain other ESC rights, the right to shelter, which forms part of the right to an adequate standard of living under article 11 of the ICESCR, finds no corresponding expression in the DPSP. This right has been seen as forming part of article 21 itself. The court has gone as far as to say, "The right to life . . . would take within its sweep the right to food . . . and a reasonable accommodation to live in."[37] However, given that these observations were not made in a petition by a homeless person seeking shelter, it is doubtful that this declaration would be in the nature of a positive right that could be said to be enforceable. On the other hand, in certain other contexts with regard to housing for the poor, the court has actually refused to recognize any such absolute right.

In *Olga Tellis* v. *Bombay Municipal Corporation*,[38] the court held that the right to life included the right to livelihood. The petitioners contended that since they would be deprived

34 Art. 42 provides for just and humane conditions of work and maternity relief. Article 39(e) asks the state to direct its policy towards securing that citizens are not by economic necessity forced into avocations unsuited to their age and strength.

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

36 *National Textile Workers Union* v. *P. R. Rama Krishnan* (1983) 1 SCC 249.

37 *Shanti Star Builders* v. *Narayan K. Totame* (1990) 1 SCC 520. In *Bandhua Mukti Morcha* v. *Union of India* (1991) 4 SCC 177, the court recognized the right of rescued bonded labour to accommodation as part of their rehabilitation, but the enforcement of the judgments in relation to bonded labour is still a distant dream.

38 (1985) 3 SCC 545.

of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional. The court, however, was not prepared to go that far. It denied that contention, saying:

No one has the right to make use of a public property for a private purpose without requisite authorisation and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon . . . If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised.

Later benches of the Supreme Court have followed the *Olga Tellis* dictum with approval. In *Municipal Corporation of Delhi* v. *Gurnam Kaur*,[39] the court held that the MunicipalCorporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legal enforceable right. In *Sodan Singh* v. *NDMC*[40] a constitution bench of the Supreme Court reiterated that the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. These cases fail to account for socioeconomic compulsions that give rise to pavement dwelling and restrict their examination of the problem from a purely statutory point of view rather than the human rights perspective.

Due to want of facilities and opportunities, the right to residence and settlement is an illusion to the rural and urban poor. Articles 38, 39 and 46 mandate the state, as its economic policy, to provide socio-economic justice to minimise inequalities in income and in opportunities and status. It positively charges the state to distribute its largesse to the weaker sections of the society envisaged in article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty 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.

Right to health

The right to health has been perhaps the least difficult area for the court in terms of justiciability, but not in terms of enforceability. Article 47 of DPSP provides for the duty of the state to improve public health. However, the court has always recognized the right to health as being an integral part of the right to life. The principle got tested in the case of an agricultural labourer whose condition, after a fall from a running

39 (1989) 1 SCC 101.

40 (1989) 4 SCC 155.

train, worsened considerably when as many as seven government hospitals in Calcutta refused to admit him as they did not have beds vacant. The Supreme Court did not stop at declaring the right to health to be a fundamental right and at enforcing that right of the labourer by asking the Government of West Bengal to pay him compensation for the loss suffered. It directed the government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.[41]

In *Consumer Education and Research Centre* v. *Union of India*[42] the court, in a PIL, tackled the problem of the health of workers in the asbestos industry. Noticing that long years of exposure to the harmful chemical could result in debilitating asbestosis, the court mandated compulsory health insurance for every worker as enforcement of the worker's fundamental right to health. It is again in PIL that the court has had occasion to examine the quality of drugs and medicines being marketed in the country and even ask that some of them be banned.

A note of caution was struck when government employees protested against the reduction of their entitlements to medical care. The court said:

No state or country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizens including its employees. Provision on facilities cannot be unlimited. It has to be to the extent finances permit. If no scale or rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same. The principle of fixation of rate and scale under the new policy is justified and cannot be held to be in violation of article 21 or article 47 of the Constitution.

Right to education

Article 45 of the DPSP, which corresponds to article 13(1) of the ICESCR, states, "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." Thus, while the right of a child not to be employed in hazardous industries was, by virtue of article 24, recognized to be a fundamental right, [43] the child's right to education was put into the DPSP in part IV and deferred for a period of ten years.

The question whether the right to education was a fundamental right and enforceable as such was answered by the Supreme Court in the affirmative in *Mohini Jain* v. *State of*

41 *Paschim Banga Khet Majoor Samity* v. *State of West Bengal* (1996) 4 SCC 37.

42 (1995) 3 SCC 42.

43 *State of Punjab* v. *Ram Lubhaya Bagga* (1998) 4 SCC 117, para. 29, at 130.

Karnataka.[44] The correctness of this decision was examined by a larger bench of five judges in *Unnikrishnan J.P.* v. *State of Andhra Pradesh.*[45] The occasion was the challenge, by private medical and engineering colleges, to state legislation regulating the charging of "capitation" fees from students seeking admission. The college management was seeking enforcement of their right to business. The court expressly denied this claim and proceeded to examine the nature of the right to education. The court refused to accept the non enforceability of the DPSP. It asked:

It is noteworthy that among the several articles in part IV, only article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the state flout the said direction even after 44 years on the ground that the Article merely calls upon it to endeavour to provide the same and on the further ground that the said Article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years—more than four times the period stipulated in article 45—convert the obligation created by the Article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in article 45. It is relevant to notice that article 45 does not speak of the "limits of its economic capacity and development" as does article 41, which inter alia speaks of right to education. What has actually happened is more money is spent and more attention is directed to higher education than to—and at the cost of—primary education. (By primary education, we mean the education which a normal child receives by the time he completes 14 years of age.) Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify; we are not seeking to lay down the priorities for the government- The court then proceeded to examine how this right would be enforceable and to what extent. It clarified the issue thus:

The right to education further means that a citizen has a 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 to education flowing from article 21.We cannot believe that any state would say that 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.

More caution followed. The court's apprehension clearly was that recognition of such a right might open the flood gates for other claims. It clarified:

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44 (1992) 3 SCC 666.

45 (1993) 1 SCC 645.

We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in article 21, it does not follow automatically that each and every obligation referred to in part IV gets automatically included within the purview of article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.

In fact, the court had broken new ground in the matter of justiciability and enforceability of the DPSP. The decision in *Unni Krishnan* has been applied by the court in formulating broad parameters for compliance by the government in the matter of eradication of child labour. This it did in a PIL where it said, Now, strictly speaking a strong case exists to invoke the aid of article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in article 47 relating to raising of standard of living of the population, and articles 39 (e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a healthy manner, for asking the state to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child. This would also see the fulfilment of the wish contained in article 41 after about half a century of its being in the paramount parchment, like primary education desired by article 45, having been given the status of fundamental right by the decision in *Unni Krishnan*. We are, however, not asking the state at this stage to ensure alternative employment in every case covered by article 24, as article 41 speaks about right to work "within the limits of the economic capacity and development of the state".

The very large number of child labour in the aforesaid occupations would require giving of job to a very large number of adults, if we were to ask the appropriate government to assure alternative employment in every case, which would strain the resources of the State, in case it would not have been able to secure job for an adult in a private sector establishment or, for that matter, in a public sector organisation. We are not issuing any direction to do so presently. Instead, we leave the matter to be sorted out by the appropriate government. In those cases where it would not be possible to provide job as above mentioned, the appropriate Government would, as its contribution/grant, deposit in the aforesaid Fund a sum of Rs.5000/- for each child employed in a factory or mine or in any other hazardous employment.[46]

VI Conclusion

This much is clear from the above record—that ESC rights are no less consequential than fundamental rights in the constitutional intrigue. They are enforceable when they

46 *M.C. Mehta* v. *State of Tamil Nadu* (1996) 6 SCC 772, para 31.

are projected as supplying the content of a fundamental rights,[47] but not just by themselves.[48]

The judiciary will not be checked by any ostensive commandment in the Constitution against non-enforceability of the DPSP. It will, on the other hand, pin the state to its obligations towards the citizens by pertaining to the DPSP. Such commitment, the court has explained in the context of right to environment, can confer resembling rights on the citizen:

It need hardly be added that the duty cast on the state under articles 47 and 48-A in particular of part IV of the Constitution is to be read as according a comparable right on the citizens and, thereupon, the right under article 21 at least must be read to carry the same within its amplitude. At this point of time, the outgrowth of the quality of the environment on the life of the occupant is much too obvious to require any emphasis or elaboration.[49]

The ESC rights that the DPSP symbolize can empirical be read as forming part of an enforceable administration of fundamental rights. What then is crucial is the will of the state to execute this constitutional command. The schedule of the state can be shaped to a considerable extent by a creative and activist judiciary. The state has to be constantly reminded of its obligations and duties. The actual ascertain of ESC rights may be a long-drawn amour, but keeping it on the agenda is more than half that effort. The Indian judiciary has through an amalgamation of arrangements done just that.

Amarjeet Ranjan[*]

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47 The DPSP regarding equal payfor equal work (art. 39[d]) has had always to be projected in the context of discrimination under art. 14 to merit recognition and enforceability. See *Randhir Singh* v. *Union of India* (1982) 1 SCC 618.

48 *B. Krishna Bhat* v. *Union of India* (1990) 3 SCC 65. Here the PIL petitioner sought enforcement of a prohibition policy basing his claim entirely on art. 47. The plea was not entertained.

49 *M.C. Mehta* v. *Union of India* (1998) 9 SCC 591 para 6.

* *Assistant Professor of Law, Indian Institute of Legal Studies, Siliguri*