Constitutional Right To Access To Basic Amenities:
Perspectives On Limits Of Law In Social Empowerment

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This article calls into question the excessive faith placed in purely legal responses to human suffering in the Indian context. The author seeks to determine the extent to which law, in both its institutional and doctrinal forms, can address social ills in India. The article also discusses international context and various human rights instruments to draw parallels with the Indian experience. The author critically analyses the responses the Indian Supreme Court has made to questions of addressing basic rights under the framework of Article 21 and the Right to Life of the Indian Constitution. The author concludes by saluting the ‘rights’ based discourse introduced by the Indian Supreme Court to economic development narratives in the era of globalization, while also advocating a stronger ‘positive duties’ based approach for the legislature and executive.

INTRODUCTION

The weakening political and social economy, the increasing incidence of political and even judicial corruption, the growing frustration and disillusionment among the masses due to mass poverty, mass unemployment and mass violence is throwing up more and more predicaments in which people of India find themselves affected by remote actors where there is no leverage to control their actions. Masses are bewildered by dramatic increase in lawless violence and standardless use of force both by agents of the government and dominant elements. Trust in law and legal methods is fast declining. The governors of the people are unable to control the corrupt, the oppressors and the violators, and are believed to be susceptible to all kinds of illegitimate pressures. For the poor and the victimized, the state, law and its agents are present as oppressors. Promise of emancipation is seen as empty. Enduring loyalties to Anglo-Saxon adversary jurisdiction, colonial structure of bar, bench and police, shocking instances of administrative deviances and growing decline in political morality have remained the pervasive feature of the Indian public life.

The question is: Is law the only effective instrument for basic transformation of values and attitudes or there are other agents of social transformation far more crucial than law? When we employ law as a means of social transformation and social empowerment we somehow tend to think of law as autonomous and self sufficient force upon which the rest of the social order depends.

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Thus, we oversimplify the nature of law and exaggerate its power. But law is neither autonomous nor self-sufficient but is heavily dependent upon other social institutions to accomplish its tasks. We rely heavily on formal structures of law composed of the documents i.e. constitution, statutes, and precedents, the apparatuses i.e. legislatures, courts, executive departments and the personnel i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social transformation would automatically be translated into corresponding social actualities.

This is, however, a mere delusion. We exaggerate the power of law because we have inadequate notion of both what law is and how it acts. We tend to ignore that positive law supervenes upon an established social order which is supported by prior facts such as caste, familial ideology, morality, habits, attitudes, beliefs, emotions and traditions. Law has to perform the task of repairing the deficiencies in the social order. For instance, law and legal action tries to eliminate social and economic inequalities, social oppression, gender discrimination, untouchability, corruption, child marriage, dowry, sati, bonded and forced labour, caste prejudices, infanticide, foeticide, to name a few. These deficiencies in social order are rooted in various social, economic and religious institutions which law seeks to repair. Traditionally the most conspicuous and important of these institutions have been family, education, and religion which perform the crucial role in transforming human nature. These institutions exert a powerful influence upon the attitudes and behavior of the people. The effective operation of law as an agent of social change depends largely upon the support extended by other social institutions. If the institutions of family, religion, and education have not been doing their job properly, law will be missing support from them and all our attempts at social construction and social empowerment through law will be thwarted or delayed. Law and legal action may not be able to provide the conditions of cultivation and socialization of a sense of obligation, responsibility, sympathy, fellow feeling, and other factors that mould human character in definite ways. These undertakings have to be undertaken by other social agencies because they lie within the province of morality rather than law.

The question is: to what extent law can solve social problems and achieve social goals? It is refreshing to recall here what Dean Roscoe Pound had observed in his Mahlon Powell Lectures delivered in 1942. Recognizing the limits of reach of law he remarked:

When we have got so far we must pause to inquire how far, after all, the law in any of its senses can achieve this purpose (of harmonizing human demands, maintaining a social order, and furthering the course of civilizations). We must ask how far social control through politically organized society, operating in

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an orderly and systematic way by a judicial and administrative process applying authoritative grounds or guides to decision by an authoritative technique, can stand by itself and equal by itself to the maintaining and furthering civilization. Thus we are brought to consider the limits of effective legal action, the practical limitations which preclude our doing by means of law for everything which ethical considerations or social ideals move us to attempt.

Dean Pound then proceeds to cite various ‘sets of limitations’ that weaken the force of legal action for social reform. The first limitation of the legal action is that redress of grievance through legal proceeding is limited by ‘the necessity of appealing to individuals to set law in motion’. Thus, the redress of grievance depends on individual initiative and sustained legal action. This ‘rugged individualism’ of the common law and Anglo-American legal tradition prevalent in the days of Roscoe Pound has to some extent been diluted in India by liberalizing the rules relating to locus standi, but the fact remains that the redress of grievances of the poor and the victimized through the devise of Public Interest Litigation has not brought about any notable social change. The second set of limits, in Pound’s analysis, arises from the difficulty of ascertaining the facts at issue. Despite relaxed standards of evidence and procedure, the legal process still insists on legal formalism and adherence to accepted rules of evidence and procedure. Third and final limitation pointed out by Pound, relates to the inability of law and legal apparatus to enforce duties even by a well disposed judiciary. Here, he refers to ‘intangibleness of many duties which are of great moment but defy legal enforcement’. He gives example of gratitude, benevolence, and obligation to help those in distress which cannot be enforced by law. Then there are certain rights and interests that are often infringed in ways that are so subtle and difficult to establish that the law and courts cannot protect against such infringements and violations. Alienation of affection, domination and invasion of privacy fall under this category.

Dean Pound refers to the inability of law to inculcate moral righteousness. Legal machinery, according to him, cannot remedy many phases of human conduct and human relations. Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies like family, religion, education and, professional and economic organizations to instill in men and women the habits and attitudes, the modes of behavior and mutual respect and cooperation. It is beyond law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men and women and to make them accomplished social persons.
A sense of responsibility is indispensable if we have to live and work together. Responsibility again is a social virtue, a trait of character and there is very little that law can do in inculcating moral virtues. Law can, of course, make people accountable for their outward actions that violate legal rights of others. This is done by creating legal duties and imposing sanctions for violating the rules of behavior. Inculcating moral virtue of responsibility is the work of other social institutions which help to make people good. What would happen if family, culture, education, morality and religion fail to perform their work and their hold on individuals is weakened? The inevitable result would be that defiance of law will increase and law would lose its effectiveness.

It must, therefore, be acknowledged that law operates at a distance far removed from the people whose lives it governs. The other social institutions like family, school, religion, and morality are in more intimate touch with human emotions and thus, mould human character. Therefore, unless more intimate institutions are strengthened to prepare people to be law abiding citizens with a sense of responsibility to social values, law can never be an effective instrument of social change.

The effectiveness of legal action in achieving the goals of social justice is also affected by the political economy. The economic policies of liberalization and privatization being pursued by the Indian State have failed to augment wealth in a manner which would eliminate poverty, generate growth with justice and eliminate social and economic inequalities. How can courts achieve social justice in such a setting, by simply acknowledging new positive human rights such as right to means of livelihood, health care, food and shelter etc. Spreading of the norms and values and creation of elaborate institutional mechanisms for generating humane, equalitarian, and rationalistic social climate and elimination of pre-capitalist feudal or semi-feudal modes of exploitation and oppression is the task of the political executive and social and economic institutions and professional organizations, not of the judges.

Unfortunately the political economy emerging in globalizing India has resulted in the formation of new social classes of land owning farmers, traders, money lenders, politicians and bureaucrats which are controlling social and economic institutions as well as cultural networks and are also promoting the capitalist path of development. The policies of liberalization have provided enormous resources as well as legal and normative value system favorable to the new social classes. The much applauded and publicized judicial activism has not succeeded to check the growing frustration among the exploited and the oppressed. Mass production of rights through judicial activism has only resulted in heightened expectations from the judges that they are available to provide relief from all miseries and personal misfortunes. But when the gap between what has been promised and what has been performed would become too wide, the outcome will be only confusion, frustration and disenchantment.
The courts might then lose persuasive power, draining away the credibility of judicial institutions.

As stated earlier, it is beyond the judges to instill in men and women, the habits and attitudes, the modes of behavior, the mutual respect and cooperation that are indispensable to a decent life. They can undoubtedly intervene to correct any form of exclusion, discrimination, exploitation and institutional abuses. The judges have performed this task in a commendable way. They have unmasked the repressive realities of the State and law by providing access to justice to the poor and the victimized people. But the law and legal action can achieve something of real value if other social, economic, professional, religious and cultural institutions, besides law, also perform their function in an efficient way in the formation of human character to make men and women acceptable social members.

I. SUMMARY OF THE ARGUMENT

The Directive Principles of State Policy enshrined in the Constitution of India may justly be described as the precursor to the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Akin to the “progressive realization” interpretation of ICESCR, the directive principles are seen as being attainable if “States endeavour to implement them with a high sense of moral duty”. However, over the years the Indian Supreme Court has through its numerous decisions expanded the meaning of Right to life as including right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing, shelter, health care, education, means of livelihood, and so on. The expansion of fundamental right to life allowed the Supreme Court to overcome the question of justiciability and to address economic, social and cultural rights as aspects of fundamental rights. The work of the Indian Supreme Court firmly establishes the notion that all human rights are indivisible, interdependent and interrelated.

This paper argues that the right to basic amenities such as right to adequate nutrition, health care, housing, education and work and so on 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 and rampant corruption, the benefits of the schemes never reach the intended beneficiaries.

India has witnessed constant economic growth ever since the economic reforms were introduced in 1991 but wealth generation has benefited only top
ten percent of India’s upper middle income groups and has not percolated to the vast majority of the populace who are still living in abject penury and poverty. Internationally, an income less than $1 per day per head of purchasing power parity is defined as extreme poverty. By this estimate about 45% of population of India is extremely poor. Income based poverty lines (starvation lines) consider the bare minimum income to provide basic food requirement. Tenth Five Year Plan (2002-2007) has applied 13 parameters for identifying the population below poverty line (BPL) in rural areas based upon the degree of deprivation. These are landholding, type of house, clothing, food security, sanitation, consumer durables, literacy status, labour force, means of livelihood, status of children, type of indebtedness, reasons for migration etc. BPL for urban areas is based upon degree of deprivation in respect of 7 parameters—roof, food, water, sanitation, education level, type of employment and status of children in house.

It is, however, disturbing to note that number of poor in India remains controversial and indeterminate. The National Commission for Enterprises in the Unorganized Sector, in its latest report submitted in 2007 has estimated that 77% of India’s population lives below poverty line on less than Rs. 20 per day.4 Dr. N.C. Saxena (the Commissioner appointed by the Supreme Court to monitor the compliance of its orders in the food petition) states that half of the country’s population of 1.15 billion is BPL which he defines as per monthly capita income of Rs. 700 in rural areas and Rs.1000 in urban areas. The World Bank’s figure based on 2005 data finds 42% of India’s population to be BPL. In December 2009 the Suresh Tendulkar Committee in its report submitted to the Planning Commission has estimated that 37% of India’s population is living below poverty line and that more than 50% of population of States like Orissa, Bihar, Madhya Pradesh, Chhattisgarh, and Jharkhand are still living in abject poverty and are not able to secure their basic necessities of food, health, and education.5

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; its position remains unchanged at a low of 127 among 177 countries. 50 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.

II. INTERNATIONAL PERSPECTIVE

Human rights of the poor have been recognized in various international instruments. The United Nations Declaration of Human Rights 1948 states in Article 25(1) that “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 for 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 roots of the problem of hunger and malnutrition are not the lack of food but lack of access to available food. The Committee states the obligation of the State parties to respect and fulfill the right to food, accounting for immediate and long term measures to achieve its progressive realization. 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 framework of law to monitor progress and means of access to effective remedies for violations. Thus, right to food is invisibly linked with the inherent dignity of the human person and is indispensable for the fulfillment 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 at both 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.

Article 24 of The Convention on the Rights of the Child (which came into force in 1990) recognizes the right to nutrition and states that the “States parties recognize the right of the child to the enjoyment of highest attainable standard of health…” and shall take appropriate measures “to combat disease and malnutrition … through the provision of adequate nutritious foods and clean drinking water” (paragraph 2c). Article 27 obligates the State parties to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

7. Id. at ¶¶ 15-16.
8. Id. at ¶¶ 29-30.
9. Id. at ¶ 32.
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 which is reflected in paragraph 5 of the General Comment 12 mentioned above. Paragraph 6 gives the most accepted definition of right to food:

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.

According to paragraph 8 the core content of right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. 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 (paragraph 14 of the General Comment 12).

III. PERSISTENCE OF HUMAN DEPRIVATION

The persistence of human deprivation 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, illnes, and social exclusion. The realization of social and economic rights which are necessary for the survival of a person as a biological entity is, therefore, closely linked with the notion of human development which means enlarging choices, expanding human freedoms and assuring human rights. According to the 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.”

According to the National Commission to Review the Working of the Constitution, India is one of the most undernourished countries of the world. The proportion of undernourished children in India is higher than 53%. 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 the urban population do not have proper sanitation facilities. This is despite the fact that the country has achieved remarkable expansion in food production and has built a good safety stock of food grains. In the country the percentage of low birth weight babies is 33%. The percentage of such babies is only 9% in China and in South Korea it is 8%, in Indonesia it is 6% and in Thailand it is 6%. In India 54% of married women in reproductive age between 15 and 49 are suffering from anemia—46% in urban area and 54% in rural area. Close to 74% children below the age of three suffer from anemia—71% in urban area and 75% in rural area. Easy access to quality health care remains a distant dream for millions of Indians. Large segment of the population of the country remains without access to safe drinking water. The opening of new schools, new clinics and developing new farming techniques have little significance for those who cannot think beyond finding food for their family. Elementary education is far from being universal despite the constitutional and statutory promise of providing free and compulsory education for all children below the age of fourteen years by 1960. Nearly half of the Indian women are unable to read and write and the proportion is quarter for men. Roughly speaking about 350 million people in India cannot even read and write. There is serious under-provisioning and overall shortage of good quality and affordable social services. India’s record of ending poverty has not been impressive. Today more than 260 million people live below poverty line. These people have neither the resource nor energy to benefit from economic development. Female wage rate in unorganized sector is lower than male rates. Anti-female bias is very strong everywhere resulting in large scales of female foeticide.

11. Supra note 1.
12. Supra note 6, at 34.
13. Id. at 28.
14. Id. at 29.
15. Id.
16. Id. at x.
17. Id. at xi.
18. Id. at 37.
19. Id. at xv.
20. Id. at 34.
21. Id. at 41-42.
IV. LIMITS OF JUDICIAL INITIATIVES

A. General Observations

As stated above, right to basic amenities has 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.\textsuperscript{22} 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, shelter and so on without exactly determining who has the duty and how such a duty to provide social and economic assistance 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 to impose a duty upon the State which is too vague and imprecise that the declaration of social rights become 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 right to basic amenities 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.\textsuperscript{23}

In Bandhua Mukti Morcha\textsuperscript{24} 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”.\textsuperscript{25} The court acknowledged that the content of social and economic rights has been derived by the court from non-justiciable directive principles.\textsuperscript{26} The Court,


\textsuperscript{25} Id. at 183.

\textsuperscript{26} For example Art. 39(a) requires the state to direct its policy towards securing adequate
however added that 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 dignity.27

In *Olga Tellis*28 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*29 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 wherein Justice P. B. Sawant held:30

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 to the people minimum basic amenities which enable 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

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30. *Id.* at 795.
the courts have generally been reluctant to provide positive social goods and services by affirmative judicial action.\textsuperscript{31}

\textbf{B. Access to Food}

Way back in 1980 in \textit{Kishan Patnaik} \textsuperscript{32} the Supreme Court disposed of a food petition on the empty assurance of Orissa government that steps 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.\textsuperscript{33} In \textit{PUCL v. Union of India}\textsuperscript{34} a petition was filed before the Supreme Court in response to the large number of starvation deaths arising from droughts 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. The Bench comprising Justice B.N. Kirpal and K.G. Balakrishnan broadened the scope of the petition to include the entire country. The food petition raised three major questions. First, starvation deaths had 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 are poor 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 all the state governments and union territories to be complied with by January

\textsuperscript{31} In Chameli Singh v. State of UP, (1996) 2 SCC 541, the court observed that right to live 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 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...."


\textsuperscript{34} (2001) 7 SCALE 484.
2002. These directions included completion of the identification of BPL (below poverty line) families and issuance of ration cards to them, distribution of 25 kg 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 directions for implementation of its November 2001 orders. It was brought to the notice of the Court that Midday meal scheme introduced in 1995 has not been 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 children is in disuse. For example, in Bihar 160 lakh children were found to be undernourished. 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 Uttarakhand.

With a view to ensure 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 one commentator:

> 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

36. 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. The court orders and the report of the commission has been published by Human Rights Law Network, in Right To Food, (Colin Gonsalves, Vinay Naidu, P. Ramesh Kumar, and Aparna Bhat, eds., 2004).
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, Chhattisgarh 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 tonnes 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 court do in such a setting except issuing directions for timely compliance of its directions? Locating right to nutrition in right to life the court observed:38

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 directions issued by the Supreme Court in the Food petition are likely to pressurize the governments to adopt a right-based approach to food security. From time to time the court is lashing some state governments for not implementing the centrally sponsored poverty alleviation programmes. It is interesting to note that a nationwide right to food campaign has emerged in India to pressurize the governments 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.

On June 4, 2009 President Pratibha Patil announced that the National Food Security Law will ensure each BPL family to get 25 kg of food grain per month at Rs. 3 per kg and provide a statutory basis of right to food. Soon the National Food Security Bill triggered controversy on many counts. Apprehensions have been expressed that the sustainability of this law would be at peril if India faces lower agricultural production due to poor harvest or drought. In that case the government would have to rely on food imports or food aid to ensure right to food. It is alleged that the implementation of food security law would

involve huge financial burden. There are possibilities that food subsidies would amount to Rs. 70,000 crore per annum if the Bill becomes the law. On July 6, 2011, Congress President Sonia Gandhi sent the proposed National Food Security Bill to the government on behalf of the National Advisory Council (NAC). The Bill seeks that subsidized rations be provided to at least 90% of rural population, and 50% of urban India. It urges the government to ensure that at least 46% and 28% rural and urban Indian population, respectively, become ‘priority’ beneficiaries who should get rice at Rs. 3, wheat at Rs. 2 and millets at Rs. 1 per kg. Rest of the beneficiaries would get the food grains at half the minimum support price for the year offered to farmers while buying their produce.39

C. Access to Health Care

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.40 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 43.41 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 prohibiting 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.42 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.

In my view the judicial rhetoric on health care has no effect on the status of health in India. On April 12, 2005, while launching National Rural Health Mission, Prime Minister Dr. Manmohan Singh 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.”

D. Access to Elementary Education

In Unnikrishnan v. State of Andhra Pradesh, the Supreme Court ruled that right to education is a part of right to life in Article 21 but 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. The insertion of Article 21A in 2002 (by the Constitution (Eighty-Sixth Amendment) Act, 2002) created a fundamental right to education for providing free and compulsory education for all children of the age six to fourteen years. More than seven years after the Constitution was amended the historic Right to Free and Compulsory Education Act 2009 was enacted for universalization of elementary education in India. The right to elementary education has become a reality as this right has become effective from April 1, 2010. It has been reported that Sarva Shiksha Abhiyan will be used to the push right to education.  

E. Access to Shelter Needs

In Olga Tellić 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 right could be taken away by the State by following reasonable procedure:

The State may not by affirmative action be compellable to provide adequate means of livelihood or work to its citizens. But any person who is deprived of his right to livelihood except according

43. HINDU TIMES (Delhi), April 13, 2005 at 7.
44. (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 rights was reaffirmed.
45. THE TIMES OF INDIA (January 29, 2010).
46. Supra note 36.
47. Id. at 573.
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, holding that no
one has a right to make use of a 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 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”. This is why the court held that “pavement and slum
dwellers should be given, though not a condition precedent to their removal,
alternative pitches.” 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.

That the judicial view in Olga Tellis on right to housing was a tentative
one became clear in Almitra Patel v. Union of India. Here the Court showed a
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:

Establishment or creating slums, it seems and 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. Regarding
an encroacher on public land with free land alternative site is like giving
reward to a trick pocket.

On 9th May 2006 the Supreme Court categorically ruled that the slum
dwellers have no right to encroach upon public land and must be removed and
they have no fundamental right to live in such dwellings. Poverty or economic
compulsions cannot be a justification for encroachment. By one stroke of pen
the Supreme Court has effectively marginalized millions of slum and pavement

48. Id. at 579.
49. Id. at 586.
51. Id. at 685. Earlier, in Ahmedabad Municipal Corporation v. Nawab Khan, (1997) 13 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.
dwellers across the country. In my view, on the issue of forced eviction the Supreme Court has 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 give 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. Even the policy makers have not realized that the problems of migrant rural labour can be solved more by creating new opportunities of employment in rural sector and then 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 structures lacking all graces and amenities. These slums constitute a hindrance to the development projects for modernizing and renovating big cities of India.

According to U.N. Commission on Human Rights, forced evictions constitute a gross violation of human rights. Forced eviction, according to Committee on Economic, Social and Cultural Rights, directly affects 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. 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.

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 the court virtually ignored the impact of continued construction of Sardar Sarovar Project dam on hundreds and thousands of tribal people.

52. The Times of India (May 10, 2006).
53. 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).
55. Supra note 52, at ¶13-4.
56. Id. at ¶16.
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's 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. The court's ideology tended to subordinate environment to development.

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 fulfillment 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 a utilitarian so long as these projects are designed to serve the common good. Why should the utilitarian metric of pleasure, happiness, desire fulfillment be considered relevant for measuring people's quality of life? If social and economic rights are the entitlements of the people such rights can never be allowed to be traded off to promote general welfare or common good.

V. Access To Basic Amenities And Neo-Liberal 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 signaling 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 than intensive accumulation by a 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

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38. In a strong dissenting judgment Justice Bhruacha took the stand that Sardar Sarovar Project was proceeding without a comprehensive environmental appraisal and without necessary environmental impact studies.

39. Also see Narmada Bachao Andolan v. Union of India, A.I.R. 2005 SC 2904, 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.
impoverished and suffering 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 brinks of disaster, erode workers’ rights and further depress the conditions of migrant, bonded and child labour.

Be that as it may, globalization is now a reality and cannot be washed 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 most 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 in order to achieve the goals of social justice. An interventionist state is indispensable for realizing social rights. Markets also need government in order to function properly.

Two recent judgments of the Supreme Court delivered in July 2011 point to the ill-effects of neo-liberal globalization. In Nandini Sunder v. State of Chhatisgarh60 the Supreme Court ordered the disbanding and disarming of Special Police Officers (SPOs) comprising of ill-trained, uneducated and poor tribal youths deployed in combat operation against Naxals. Naxal insurgency according to the Court was caused by social inequalities exacerbated by neo-liberal globalization. In the same vein, in Ram Jethmalani v. Union of India61 the court attributed the hoarding of black money in foreign banks and rampant corruption to the limitless greed spawned by neo-liberal globalization.

CONCLUSION

The judicial recognition of the right to basic amenities has not resulted in the creation of a general regime of positive rights. The courts have provided relief or devised judicial remedies on a case to case basis. When a court holds that a person facing medical emergency has a fundamental right to health care and therefore cannot be refused treatment at a hospital, the court is not creating a general right of the citizens to free health care or medicine. Similarly, the right to means of livelihood of a slum dweller or pavement dweller or a street hawker who is thought to be illegally encroaching upon public space is protected by asking the public authorities to give him adequate notice before eviction. Through activism the judiciary cannot force the government to provide free

60. WP(C) NO. 250/2007.
61. WP(C) NO. 176/2009.
health care, work, loan waivers and housing to the deprived sections of the society. If there are public policies, social legislations or welfare schemes for realizing social rights, it is open for anyone to approach the court to implement these measures or allege discrimination in their implementation. It is, however, beyond the judicial function to compel the state to adopt a particular policy or scheme for the effective realization of the newly proclaimed social rights. These rights have budgetary implications and cannot be implemented without allocation of resources and it is beyond the judicial function to evaluate or monitor the allocation of resources.

Realization of right to basic amenities is closely linked with the notion of human development which involves the expansion of capabilities of the poor by a set of public policies and political planning ensuring adequate public spending on social sector. India’s record of ending poverty has not been impressive, despite the fact that the country has achieved remarkable expansion in food production and has built a huge safety stock of food grains. The reports of starvation deaths and farmer suicides and deepening hunger in India are not due to a lack of food but due to lack of access to available food due to bad governance and corruption.

The development of a country or its economic growth should not be measured by increase in per capita income but by the positive impact of economic growth on the poor and the deprived sections of the society in terms of employment generation, extensive prosperity, quality of lives lived rather than intensive accumulation by a few. In India the limited gains of economic growth are being cornered by the upper classes and upwardly mobile middle classes, while the masses remain impoverished and neglected. A welfare state’s obligation to provide basic amenities should not be allowed to be transferred to market in the hands of private players, or multinational corporations. Economic globalization should not result in an increase in unemployment nor should it lead to a model of modernization that will push the poor people to the brink of disaster, erode workers’ rights and further depress the conditions of migrant, bonded or child labour.

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 celebrated ‘activist’ judgments on the right of 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, are some of the positive achievements of the Supreme Court.

The judicially recognized right may also be used as a legal resource to mobilize public campaign and public action to force the State to realize social
rights. If people have right 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 a need to have an independent evaluation of the outcome.

In India people are poor not because the State lacks funds; 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 the right to basic human needs. The participation of institutions of civil society will have a significant effect in social mobilisation inducing public pressure on political executive to satisfy human needs.

It must be remembered that the right to food, health, education and all other social rights are interdependent. In order to consume some basic food one needs a certain minimum income. Such income can come only through some economic activities. For satisfying food need one needs resources such as land, technologies, skills, funds, employment and so on. At the same time, providing sufficient food to address the problem of under-nourishment will not help one to recover from ill-health and illiteracy. Provision for health care and education is also necessary.

The most appropriate way to secure these rights is through legislation and developmental schemes besides judicial-law making. The laws like the National Rural Employment Guarantee Act 2005 and Right to Education Act 2009, and proposed National Food Security Law if implemented in right earnest will go a long way in the direction of tackling extreme poverty, health care, illiteracy and development within the rights framework. The government should increase funding in social and rural development schemes such as Indira Awas Yojana, Pradhan Mantri Sadak Yojana, National Rural Health Mission, Jawahar Lal Nehru National Urban Renewal Mission, and Rural Loan Waiver schemes.

Finally, unless people have easy access to a whole range of information about their entitlements, the question of accountability and performance will remain elusive. Under the Right to Information Act, 2005, people’s right to demand information would create the possibility of building a wider alliance against injustice, corruption and lethargy in governance. Transparency and accountability in governance are expected to put the decision making in the public domain in order to ensure that the country’s economic growth rate is truly benefiting the poor and the marginalized sections of the society.