

OF DIGNITY AND SUSTENANCE

**A SOCIO-LEGAL ANALYSIS OF EMPLOYMENT GUARANTEE
MECHANISMS AS A FURTHERANCE OF RIGHT TO FOOD**

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ABSTRACT

The summers of the 2005 witnessed an important move in Constitutional jurisprudence with the Parliament of India allowing its citizens a justiciable claim of guaranteed hundred days of employment. In doing so, the legislature of the nation categorically articulated the fundamentals of capability development based model of poverty eradication, reaching out in its bid to the lowest stratum of the societal hierarchy. The work here analyses this same model of alleviating deprivation and want from the perspectives of right to food and the relationship so developed between employment and its role in make claimable the otherwise non-justiciable standards of food access. The work argues the necessity of capability development as the fundamental pre requisite of all growth models and its utility in contextualising issues like lack of access to life resources. In doing so, the paper puts forward a view of the term work and the concomitant of employment distanced from their usual appreciation as essentially a market driven enterprise. The paper argues the need of situating within the definitional contours of the term work, such aspects that render its statutory guarantee in the form of employment guarantee schemes as measures of capacity building and enabling in securing the fundamental right to food.

I. INTRODUCTION

Law's failure in reconciling the competing claims of distributive justice reveals its inherent limitation as a social instrument. The structured artifice as it exists, its role as a facilitator for socially efficient outcomes remains stunted by its constraints as a created assemblage. In ensuring to its abiders, a set of justiciable means, "rights", all it does is to adopt for detours that evade the significants of morality and justice. Allowing fundamental minima to all therefore stands much as matter of speculative trade off, where the premise remains more as an attempt to ward off alien incursions into personal spaces rather than as recognitions of the human inherent.

Determinative forces for our entitlements therefore, exist not as natural constants, but rather as catalytical means for societal expediency. The rule of law therefore exists as nothing more than as a pretension for presumed for the society.

The greatest impediment created by this restricted nature of law as a phenomenon is its limited ability for self-execution. All legal guarantees need external sets of enforceable mechanisms to effectuate them. This paper builds upon this argument of need of justiciability of entitlements as a fundamental prerequisite for achieving the accepted norms of social progress. The case in hand would be the analysis of the human right to food, its relationship with the notions of employment, and the vitality of the latter in fructification of the former. The fundamental argument put forward is the need of distancing right to food from the hallowed circles of inviolable essentials and put it on the sounder and more practical grounds of societal functionality. This, the author argues can best be achieved by instruments like employment guarantee schemes that aim at capacity development of the individual, thereby making his self capable of claiming his the just for his entitlements.

The talk on right to food has had troubled times navigating through choppy waters. Criticisms, especially in the wake of unrelenting indeterminacy, and divided comprehensions have abounded. Different perceptions as regards its definitional ambit, and the concomitant lack of coercive sanctions have led popular appreciation relegate the issue to the fringes of realpolitik and a preferable indulgence of content scholars. The paper therefore starts off with an attempt to contextualise the right to food, not as an unenforceable *jus cogens* norm for indifferent stakeholders, but rather within the recognized contours of municipally enforceable rights and more so as a positive obligation on the states.

Having so situated itself, the paper moves forward to lay down substantive aspects for existence of denial of food, and the methods to render this otherwise positive obligation into a set of justiciable negative claim against the state.

The final bit of the paper establishes the relationship of the concept of work and employment with the substantive needs of capacity building and right to food, and argues forward the way in which right to food stands vindicated by such instruments as employment guarantee schemes, especially NREGA.

II: NEGATIVE LIBERTIES AND POSITIVE OBLIGATIONS: DEFINING THE RIGHT TO FOOD

For the purpose of this paper, we take as assumed the significance of the right to food. Innumerable justifications, both socio-economic as well political abound emphasizing the need for food. The present analysis distances itself from this indulgence of re-establishing the right to food.

What however needs to be re-looked is the significance rather than content of this right. Courts all over the world have interpreted constitutional provisions to include right to food as an extensions and the integral part of the right to life. In Indian context, the pronouncement of the Supreme Court of India has emphasized upon the incompleteness of the rights guaranteed as fundamental in the Constitution without the entitlements of shelter and food.¹ The Federal Supreme Court of the United States of America in its momentous decision of *Munn v. Illinois* as early as 1877 stressed the inescapable identity of such factors as adequate and decent food to the larger definition of right to life².

There exist however important differentia that render to the right to food special significance.

There exist strong differentia, however that impart the right to food a special place in the larger human rights debate. The genesis of the modern day rights discourse lay in the recognition of the negative claims against the possible infractions of the state in the personal spaces of the individual. In fact the idea of their incorporation into such written instruments as the constitutions of the bills of rights emanated as a means against the till then dominant idea of a parenting superstructure. The world experiences, especially in the aftermath of the of the Russian Revolution and then the Second World War mandated the severance of the sovereign from the positive encumbrances that may very well be utilized as tools for invading with the spaces of the individual. The rights discourse therefore developed in an era of and as an answer to the disruptively interventionist state- be it in the form of the colonial supremacy of Britain or the ideological hegemony of the Fascists.

The conception of the right to food that we argue, however presents a remarkable departure. In effectuating the claims against the state, it places a positive obligation on the government for ensuring the minimal support needed by the constituting populace so as to check the incursions of and place onus on the same state.

These instruments of positive obligation are not new, and have been actively utilized in the constitutions all over the world to situate responsibility with the state mechanisms. From the burdens placed on the Swiss Cantons, to the principles of Irish constitutionalism, and from the interpretative leeway of the due process of the American example to the Directive Principles of India, constitutions all over the world have talked of enabling measures as imperatives

¹ M/s Shantistart Builders v. Khimalal Totame, (1990) 1 SCC 250, Chameli Singh v. State of Uttar Pradesh (1996) 2 SCC 549

² [(1877) 94 US 113]

for the governments. The structure of these positive obligations has been such so as to situate within the ambit of constitutionalism such aspects of governance that otherwise lay beyond the justiciability of legal claims.

In the Indian case they have been portrayed as guidelines for the conduct of the state in effectuating the negative mandate of the Fundamental Rights. On the lines of the Swiss and Irish example, the Indian Supreme Court has stated these positive obligations as means to secure the larger constitutional ends³.

The concept of right to food that we argue about exists as an amalgamation of these two mutually interdependent constitutional understandings, albeit with a more prominent impression of the positive role of the state than that of the negative claim.

But even within this structure of the positive obligations, the right to food holds a distinct place largely due to the structure and the nature of the right itself. In contrast to other aspects of state responsibility such as striving for minimum educational standards for all, or promotion of democratic institutions or inculcation of national spirit, aspects related to right to food stand apart due to the indeterminacy of their content and texture. While it exists as matter of objective appreciation whether there exist sufficient number of primary schools with the prescribed curricula and a minimal enrolment, or whether or not there exist sufficient overlap in the functioning of the three organs of the state; similar understandings of right to food fail. Because right to food does not merely means presence of a certain minimum tonnage of grains in the stocks of the nations. As is sought to be explained, right to food is more of an issue of access and consumption than mere availability. Therefore, before we move any further, it becomes imperative upon our part to define what right to food should mean, and then try and situate it as a claim for entitlements.

The right to food we talk of is an attempt to cull a many-headed monster. It is a right against hunger, and more; for starvation in itself is a result of many factors ranging from socio-political to biological. Contrary to popular constructs, it certainly does transcend the mere availability of food. The understanding that needs to be adopted therefore should exist at the more fundamental levels of entitlement and capacity.

Hunger that needs to be eradicated is not merely a function of lack of food. Apart from the aspects of adequate nutritional intake, hunger is as much a social phenomenon as it is economic. More often than not, in most situations including such patent ones like famines that are most forthrightly referred to as arising out of geological and environmental failures, hunger and starvation are direct products of lack of access to the material resources⁴ of the community. In fact,

³Minerva Mills Ltd. and Others v. Union of India and Others (1980) 3 SCC 625. Instructive is the statement of Y. V. Chandrachud, C.J. in paragraph 62 of the judgment where he calls Directive Principles as means to secure the ends sought in Part III. The Court, speaking through the learned judge goes onto elaborate on the relationship of Part III with Part IV and pronounces the harmonious exchange between the two as the Basic Structure of the Constitution.

⁴ Instructive in this regard is the usage of the term “material resources of the community” in Article 39(a) of the Constitution of India. As a continuation of the mandate of the promotional social responsibility that the Constitution undertakes Article 38 onwards, it stands as significant to see the constitutional recognition of the problem of the access to the life resources.

hunger exists amidst plenty. Characteristic examples of this can be the Bengal famine of 1940s where the leading grain producers of the country suffered the greatest of hardships, not because there was any shortage of the food supply; rather anomalous was the social security net that allowed for seepage of food resources into the hands of the select few.

In other words, the problem is not of what exists, but rather who commands the existing.

III: THE NOTION OF POSITIVE ENTITLEMENTS AND THE NEED OF CAPACITY BUILDING

Right to food however, is not mere doing away of hunger. Plain eradication of undernourishment or malnutrition yields little and can be achieved easily. In fact, as is sought to be argued, hunger eradication has often been mistakenly viewed as an issue of nourishment for the poor; the result of which has been the wrongly emphasized programmes of targeted public distribution system, and governmental rationing. These in themselves achieve little, for what is gained is temporary eyewash of asset transfer. What however required is creation and sustenance of such mechanisms that enable people develop capacities to combat the externally inflicted want of food. Right to food then transcends itself beyond the mere constraints of food intake, but also involves issues of capacity building and sustenance.

The capacity building so argued needs to be understood as one that would enable people create newer and better avenues of effectuating their justiciable ends. The capacity building so talked about is a broad notion that encompasses in itself such means that contribute to the over all development the people, thereby stretching it beyond into improvement of the life chances⁵. This comprehension helps us situate the role of such instruments as law into the contexts of public action including the fight against hunger. As Amartya Sen argues, this would happen only if the entitlements of the people are made exchange worthy and productive. An entitlement of an individual is the set of possessions he or she claims ownership to by means of production or labour, and exchanges in lieu of such other essentials that are fundamentals for his or her well being. The entitlement of a farmer is his agricultural produce, while that of an artisan is his craft. Sen argues that as long as these entitlements to which the individual fundamentally exercises ownership upon find favourable exchange rates, his capacity to meet his ends exists. His existence faces jeopardy when the dominant market trend fails to

⁵ The idea that has been espoused throughout the paper is essentially contractarian in nature. Social instruments act as facilitators in effectuating smoother transactions of the society. And central to this smooth functioning is the ability of all the stakeholders in making informed decisions about their life chances. Instructive in this regard especially from constitutional perspective is the idea of the constituent power of the masses and the concomitant determinative holds in the purposive functioning of law. Noteworthy however is the deliberative omission of the Rawlsian framework, as its discussion stands beyond the scope of the present work.

appreciate or accommodate his entitlements, leading to a situation of zero exchange. Sen's argument in fact, stands in denial to two hundred years of classical economics that emphasizes the processes of free trade and unhindered exchange as the prerequisite and essential to the most efficient of outcomes. In contradiction to Adam Smith's formulation of the supply stepping in to meet up the increased demand, Sen argues that supply often is directly proportional to strength of the entitlement. With one's greater purchasing power one can lay greater inputs from the supply. In other words market demands are not reflection of biological or psychological needs, but instead of exchange entitlement relations. If one does not has much to exchange, one cannot demand much, and thus may loose out in competition with others whose needs may be a good deal less acute by whose entitlements are much stronger.

The proprietary value of entitlement is what makes law as the foremost currency of capacity building. Entitlement as an aspect of market forces operates through balance of legal rights. Titles, exchanges, contractual obligations, all have an important bearing in developing the consumption capacities of individuals.

Crucial to our comprehension is the recognition of the fact that a group's ability to command controls of life resources and chances, and its comparative economic power vis-à-vis other groups is central to the functioning of the market economy. It helps us understand that why it is always a given section of the society that almost always faces the brunt of food insecurity whereas there are some whose entitlements always keep them in a position to dictate. It is a matter of little wonder that in economies, especially those of the South, members of the institution of wage labour, or those of the farming community are always are at receiving end of the societal insecurity.

IV:THE PRODUCTIVE POWER OF WORK

A logical extension to the this observation is to comprehend the vulnerabilities of these groups and the appreciation of the fact that capacity building for them needs to result from means of sustained employment.

Pursuance of this thought however mandates the unshackling of the term employment off the strictured confines of remunerative facets of market forces, and associate it with the deeper significance of the 'work'. To conceive of work as merely an activity securing monetary consideration is to conflate the idea with its market appraisal. Undoubtedly all kinds of works do seek ton secure remunerative benefits, the argument proffered here goes a step beyond in establishing work as not merely what the market appreciates it to be, but as a synonym of industry and enterprise that creates valuable assets. In following this reasoning, even though the idea holds limited significance for the purpose of this paper, we broaden and perfect our scope so as to include such labours as that largely go unpaid. Chief among these are the works of the households, voluntary vocations, and such roles as played primarily by the women of the house in providing for and sustaining emotional and other daily needs of the family.

Work therefore, and it's concomitant of employment⁶ should primarily be seen as asset creating functions that afford both the society as well as the worker the opportunity to grow.⁷ The capability enhancement so achieved on the worker's part is in this case directly related to the significance of his contribution to the society. In other words the value of his entitlement, that is the productive labour expended increases as his or her contribution to the society stands recognized. Having established this relationship between the capability enhancement of the worker, and the appreciation of his contribution to the society, we come back to establish relations between the value of these entitlements and the right to food. A constant observation, unaltered in its blatancy has been the existence of those expending physical labour including seasonal farmers, and landless hands as the worst hit by lack of food. This has been primarily because of the following reasons:

- a) Coupled with unemployment due to unprecedented technological development in agricultural sector, the population boom has caused labour force in low-income countries to grow more rapidly than any other period in history.
- b) Pressure on land increases as it becomes more and more scarce to cater to ever-burgeoning demand for urban and other infrastructural development.

Capability enhancement for them therefore takes massive proportions of market restructuring and employment creation. And herein lies the utility of such instruments as NREGA, or the earlier EGS that seek identification and development of asset creating opportunities as means for due appreciation of the entitlements of these sections of the population. The provisions of the enactment itself and also the direct result of it in terms of better access to life resourcesⁱ, uproots the concept of right to food from its indeterminacy of positive obligation and situates it into the realms of justiciability. The efficiency of the system lies in the fact that it translates the issues of positive obligation into justiciable claims, effectuating into reality what essentially exists as the essence of constitutionalism. This association however confronts us with some very pertinent criticisms. Foremost is the nature of the instruments like NREGA that guarantee employment on demand. Undoubtedly there exists a by and large consensus on the ends sought as being those of poverty alleviation. The contentions however, that arise question the means adopted rather than the ends:

- a) The implementation of NREGA as it achieves little for what comes out is nothing more than a bunch of extremely low

⁶ Work stands differentiated here from employment in that the latter exists as the institutional and economic extension of the former. Curiously enough, and as already mentioned, our limited understanding shows the frustratingly narrowed scope of our thought that precludes other as useful activities from the ambit of economically gainful activities.

⁷ The understanding espoused here is similar to the one that finds its expression in Article 16 of the Indian Constitution. The reasoned approach of a capacity enhancing employment is not to simply harp upon between securing life chances, it rather is the capability of all to avoid deprivations engendered due to the lack of the former.

paying jobs that hardly affect the purchasing power of the beneficiaries

- b) The direct affect is a creation of innumerable low end jobs that allow little and virtually no scope for improvement.

In other words employment guarantee stands accused of creating an army of unskilled labourers who have been at best offered temporary subsistence. The answer to either of the criticisms lies in the vindication of these programmes as means for securing right to food. The critics perhaps fail to appreciate the fact that the usual beneficiaries of the programme are those for whom the real issues in life is making their two ends meet rather than a vertical movement up in the societal stratum. In fact most of the beneficiaries intended are those belonging to the lowest of the caste hierarchies and the outcasts who for centuries have existed as labour-mendicants. Hundred days of guaranteed employment without any gender bias would go a long way in altering conventional households that for centuries have existed as stooped in illiteracy and ignorance.

CONCLUSION

The paper has sought to present the importance of justiciability of our fundamental rights not merely as negative claims, but as positive capabilities that ensure the execution of those same negative claims. The argument assumes significance when viewed from the perspective of those for whom even securing the square meal of the day is an issue of struggle. The solution to this abject deprivation however is not in mere income transfers, as proponents of minimum income entitlement or targeted distribution would have, for that in effect exists as nothing but a transitory phase of asset transfer. The sustenance of one's self therefore can be executed only through a sustained process of capacity building that allows for slow but steady access to life resources that allow for dignity of the self as well as a sustainable development of resources and their access.

ⁱ Better purchasing power, larger food basket