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Should the duties of the state to provision food as social protection be embodied in law, and be justiciable in a court of law?

Despite the **global consensus** on the equal intrinsic worth and dignity of every human being, the idea of embedding in constitutions and in law the state duty to provision food and other socio-economic rights has been highly debated in the past. Liberal democracies have tended to focus on civil and political rights, while socialist countries have focused on social and economic entitlements.

In the Indian Constitution (1950), only civil and political rights were recognized as enforceable fundamental rights, while socio-economic rights were included as moral rather than legal claims on the state.

India's Supreme Court: In the context of **Art. 21's right to life** ("no person shall be deprived of his life or personal liberty except according to procedure established by law"), the right to food was recognized as a core fundamental right, because life without dignity is impossible without food and nutrition.

1. Food and social protection programmes were converted into legal rights, broadened, and universalized.
2. An independent mechanism for the enforcement of these rights was created.

ARGUMENTS IN FAVOUR

- Socio-economic rights – including the right to food – should be both mandated and enforced by courts, because state failures constitute violations of the fundamental right to life
- The law would create pressure for it to invest and perform

ARGUMENTS AGAINST

- The law should not encroach on the jurisdiction of the executive when deciding tax and budget policies
- Limited state capacity to deliver these entitlements

Today, India's political consensus seems to support a law to ensure food security.

India's journey towards a law embodying state duties to provision food involved a mixture of civic activism, political engagement, significant court rulings expansively interpreting India's Constitution, and relevant international covenants.

The starting point for this discussion is the wide acknowledgment globally of the equal intrinsic worth and dignity of every human being, regardless of where they are born; their gender, wealth or social standing; their colour, caste or ethnicity; what they produce; and whether they fit the norm. This ethical and political global consensus is reflected in the Universal Declaration of Human Rights adopted by the General Assembly in 1948,¹ and in the non-discrimination principle (Article 2) of the ICESCR.²

Being equal in human dignity, all human beings merit certain rights. However, the predominant view which held sway in liberal democracies through the second half of the 20th century was to treat legally enforceable civil and political rights, and not socio-economic rights, as constitutionally guaranteed. In other words, many opposed the idea of embedding in constitutions and sometimes in law the duty of the state to provision food and other social and economic goods. But it is important to underline that even without clear constitutional provisions, many liberal democracies established social security and social protection legislation, providing for unemployment benefits, free primary education, health services, pensions that were both contributory and non-contributory, and other welfare legislations where entitlements were legally guaranteed.³

Even today, some oppose state food provisioning altogether, as discussed in the opening chapter. There are others who accept that the state may provision food as a part of social protection, but still oppose its inclusion in law because they are convinced that the law should not encroach on the



jurisdiction of the executive, which is tasked with deciding the scale of revenues and what they should be spent on. Still others do not oppose the principle of the law, but are more concerned about the limits of state capacity to deliver these entitlements, given its rampant corruption and leakages.

Those opposed to embedding duties (such as provisioning food) in statutes object on the grounds of the finite availability of fiscal resources, and also the limits of state capacity. They believe that decisions regarding the amount of tax that should be imposed, on whom these burdens should fall, and how these resources are to be invested, should legitimately be political decisions of the executive. For a long period, the Courts and constitutions tended to concur: although they sometimes advanced these rights, it was with the careful caveat that rights involving substantial state expenditure should be progressively realized only to the extent (and at the pace) that was considered fiscally feasible by the elected government of the day.

1 Available at <http://www.un.org/en/documents/udhr>

2 Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

3 See for instance: Gough, I. 2008. *European Welfare States: Explanations and Lessons for Developing Countries*. Paper presented at World Bank Conference on New Frontiers for Social Policy: Development in a Globalizing World, December 12–15, 2005 (available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gough.rev.pdf>).

When the Indian Constitution was written in the late 1940s, it accepted that civil and political freedoms alone, like protections against illegal detention and freedoms of expression and association, should be enforced through the courts. It listed these in a chapter on fundamental rights. It reserved another chapter called Directive Principles of State Policy⁴ for social and economic rights, which were morally but not legally binding.

What this meant in practical terms to me if I was an impoverished citizen was that if my brother died because he was tortured in a police station, public officials would be held criminally liable for his death. But if my daughter died from starvation because the government did not take steps to ensure that I could find work with decent wages, that food was locally available at affordable costs, that she was treated in a functioning local hospital for malnutrition, and so on, the public officers responsible could not be punished for crimes under existing law in most countries. This is what is meant in technical language when it is asserted that liberal democracies believe that civil and political rights should be enshrined in constitutions and enforced in courts of law, but social and economic rights are mainly morally binding; some are backed by specific statutes but without the overarching weight of the constitution. Socialist countries, on the other hand, uphold social and economic entitlements, but refuse to guarantee civil and political rights. A human being is forced to choose, as it were, between bread and freedom.

India's Supreme Court upheld the alternative side in this debate by declaring that socio-economic rights – and in particular the right to food – could be both mandated and enforced by the courts. In a ground-breaking petition demanding a legally enforceable right to food, the court converted food and social protection programmes into legal rights, expanded and universalized them, and created an independent mechanism for their enforcement. The basic question the petitioners had raised in the court was whether the right to food should be considered part of the constitutional right to life, as a poor person who suffers from hunger because she does not earn enough to buy food, and who may also be denied cheap rations through the

PDS (owing to incompetence, corruption and discrimination), has little hope of living a dignified life.

India's highest court vastly expanded the frontiers of fundamental rights. Article 21 guarantees that "No person shall be deprived of his life or personal liberty except according to procedure established by law".⁵ By holding that this right is not just a negative right, but also a positive right to all that is required to enable a life with dignity, the Supreme Court recognized several socio-economic rights (including the right to food, right to housing, and right to work) as enforceable rights. Because life is biologically impossible without regular nutrition, the right to food was recognized by implication as a core fundamental right.

5 Available at <http://lawmin.nic.in/coi/coiason29july08.pdf> (p. 10).



4 Available at <http://mhrd.gov.in/directive-principles-of-state-policy>

This also conformed to several international agreements, to which India is party, which recognize and define the right to food. The UN's ICESCR (Article 11, General Comment 12), for example, defines the right in terms of the state's duty to respect, protect, and fulfil (facilitate and provide) the individual's physical and economic right to food.⁶ But much progress in the right to food in India was made possible by human rights principles located in the country's own Constitution, and also by the Supreme Court's interpretation of the right to food as essential in the context of Article 21's right to life.

Debates outside Parliament continued to contest the idea of a law which legally mandated public spending for food provisioning, on grounds discussed in the last chapter. There was also fear that the state machinery lacked the capacity to deliver these entitlements, and therefore the law would remain a dead letter.

It was argued in defence that even though the state may lack capacities to deliver all entitlements initially, the law would create pressures for it to perform, as was observed with other rights-based laws such as the right to information, education and work. From the early drafts, its provisions



were trimmed at various stages of the consideration and passage of the law. But at no point was the *idea* of the law officially contested by any political party. Therefore, in terms of *declared* policy at least, India's political consensus seems to support a law to ensure food security.

6 Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

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