Chapter VI

Adjudication of Socio-economic Rights in India

Adjudication of constitutional socio-economic rights in India has come to exist through the judicial innovation both in terms of substantive and procedural aspects. The recognition of constitutionally enforceable socio-economic rights in India has got to do with the reading of some of the core socio-economic rights within the ambit of Article 21 of the Constitution by the courts in India. One witnesses the absorption of socio-economic rights into fundamental rights by the Supreme Court. For instance the principle of free legal aid to poor as provided under Article 39-A was read into Article 21 in *Madhav Hayawadanrao Hoskot v. State of Maharashtra* in *Francis Coralie Mullin v. Union Territory of Delhi* the Supreme Court recognised the “right to live with human dignity” and consequently the right to have access to basic needs such as food, shelter and clothing. In *Randhir Singh v. Union of India* the objective of equal pay for equal work embodied in the DPSP was read into Article 14 and Article 16(1) of the Constitution.

The Court had followed this interpretative approach in later cases to hold that the right to life includes, inter alia, the rights to education *Mohini Jain v. State of Karnataka*, *Unni Krishnan v. State of A.P.*; right to food in *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001); right to shelter in *Olga Tellis v. Bombay Municipal Corporation*, Gauri

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624 See, Chapter 1.
625 (1978) 3 SCC 544.
626 Supra note 6.
627 (1982) 1 SCC 618.
628 (1992) 3 SCC 666.
629 (1993) 1 SCC 645.
630 (1985) 3 SCC 545.
Shanker v. Union of India\textsuperscript{631}; right to health and medical care in Paschim Banga Khet Mazdoor Samity v. State of W.B.\textsuperscript{632}, Parmanand Katara v. Union of India\textsuperscript{633}. Thus, a range of justiciable socioeconomic rights have been recognised.

6.1 Supreme Court’s interpretive approach

The Supreme Court of India explained the relationship between the fundamental rights and DPSPs in Minerva Mills v. Union of India\textsuperscript{634}. However, the relationship between the two has evolved over a period of time and this evolution can be clubbed under different phases based on the different interpretative approaches being preferred by the Court in relation to this issue.\footnote{635}{In the first phase the judiciary was reading the text of Article 37 literally. It was doing so by putting fundamental rights on a higher pedestal in comparison to DPSPs. The Court was therefore a vocal critic of equating socio-economic rights at par with the civil and political rights.\footnote{636}{The second phase was the phase when the significance of DPSPs was asserted by the Supreme Court, particularly its role in shaping the life of an individual. Such an approach was actually utilised to save such legislations from becoming unconstitutional which apparently were violative of fundamental rights but furthering the principles contained in DPSPs.\footnote{637}{In doing so, the Court read fundamental rights as qualified by the DPSPs; as reasonable restrictions on fundamental rights. The validation of land reform legislations in the State of Madras v. Champakam Dorairajam, AIR 1951 SC 731, See also In re Kerala Education Bill, AIR 1958 SC 956. It is important to note that the amendment in Part III of the Constitution of India was also done with a view to promote the socio-economic goals flowing from the directive principles, particularly the insertion of Articles 31-A, 31-B and 31-C in Part III.}}
The interest of ‘public purpose’ is an ample testimony where legislations giving effect to community interest were validated despite being inconsistent with individual rights *strictu sensu*.\(^{638}\)

The third stage is the approach where the Courts emphasised that fundamental rights and DPSPs are part of the integrated constitutional scheme to attain the goal of welfare for all.\(^{639}\)

The insistence therefore was on a harmonious reading of between the two, wherein, one is ‘fundamental’ right and other is the principles which are ‘fundamental’ in the governance. Compared to the second phase where the directive principles where read as reasonable restrictions on fundamental rights, in the third phase the directive principles where referred with a view to justify and validate legislative measures.\(^{640}\)

The fourth approach is the testimony of the assimilation of socio-economic rights into fundamental rights.\(^{641}\) In this phase the courts have read various socio-economic rights which otherwise would have been the governance imperatives, into justiciable fundamental rights under Article 21. The decisions mentioned in the opening paragraph of Chapter VI clearly reflect this new interpretive approach of the Court which obliterates the literal mandate of Article 37, so far as the non-justiciability of socio-economic rights is concerned but does it by not making provisions of Part IV justiciable on its own, rather by the expansive reading of


\(^{639}\) In *State of Kerala v. N. M. Thomas* (1976) 2 SCC 310 at 367, the V. R. Krishna Iyer J. observed “Kesavand Bharti has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the court must wisely read the collective directive principles of State policy mentioned in Part IV into individual fundamental rights of Part III, neither Part being superior to the other! Since the days of Doarairajan, judicial opinion has hesitatingly tilted in favour of Part III but in Kesavanand Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy.”


\(^{641}\) Id. at 47.
socio-economic rights as the bedrock for the realisation of the right to life and personal liberty emphasising on the attainment of human dignity for all as a guarantee implicit in Article 21.

The correctness of this interpretive approach in the substantive sense was contested in the past and even today despite its establishment as an almost irreversible approach, the contrarian views are very often espoused citing allegedly the flawed reasoning adopted by the court and thereby obliterating the divide between the functions of the different organs of the State. One of the foremost arguments in opposition to the stand of the Court is the fact that despite the clear language in Article 37 stating that directive principles are not judicially enforceable; the right to life was held to encompass access to basic human needs and mainly a right to live with human dignity and human dignity was read in such a way that many of the directive principles were included within its ambit and this therefore is an incorrect way of expanding Article 21 ignoring the constitutional mandate of non-justiciability of directive principles. Interpreting and validating legislations in line with DPSPs is one thing but reading fundamental rights as incorporating socio-economic rights mainly contained in DPSPs is expressly prohibited by the Constitution. But the theoretical inconsistencies in categorising civil and political rights as different from socio-economic rights seems to have prevailed, even ignoring the express constitutional mandate of non-justiciability contained in Article 37 in this regard.

The observation made by Mathew J. in Kesavanand Bharti that State action under Article 37 of the Constitution of India includes judiciary as well, seems to have been accepted by the Courts in India led by the Supreme Court, even in relation to the interpretation and

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642 See Chapter II
643 Supra note 313.
consequent realisation of fundamental rights by the court, by reading fundamental rights to be incorporating socio-economic rights as well. The designation of a formal ‘social justice bench’ in the Supreme Court has perhaps put to rest the scope for any disagreement in the court of law about the justiciability of constitutional socio-economic rights in the courts.\textsuperscript{644} However, delineation of the degree to which the questions related to socio-economic rights are justiciable in the court, principle that must guide the court while adjudicating these rights and the remedial orders that can be passed in relation to such cases, remains to be settled.

\textbf{6.2 Constitutional Socio-economic Rights Adjudication}

The role of courts in the adjudication of socio-economic rights remains an issue where the rhetoric has masked the actual contours of this judicial exercise. So much so, that the rhetorical assertions are often cited as the substantive content of the enforceable socio-economic rights.\textsuperscript{645} While normative debates consider what it means to have a social right, courts may ultimately understand rights very differently.\textsuperscript{646} This is because the realm of normative debate can afford to be prescriptive so far as the content of these rights are concerned but the courts will have the challenge to fix the content of these rights while adjudicating, if it wants that the orders passed by it travel beyond the rhetoric and bring some actual change on the ground. However, the implementability of the orders of the court cannot be the sole criterion for the courts to decide on the enforceable content of the socio-economic rights, as it has to be cognizant of the permissibility of the same in a democratic set-up, wherein, issues of governance are not to be usurped by the judiciary from the executive. The

\textsuperscript{644} Supra note 10, 11, 12 and 13.
\textsuperscript{645} See, Supra note 6, Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608, 618- 619. In this case the Supreme Court observed that this right includes the right to human dignity, which means, access to bare necessaries of life such as adequate nutrition, clothing and shelter.
\textsuperscript{646} Supra note 51 at 739.
task of drawing the line, whereby, the enforceable content of the socio-economic rights is identified in a manner which is reconcilable with the democratic conception of judicial role and yet the enforceable content is real and not a mere rhetoric is a challenge which every court setting out to adjudicate socio-economic rights will have to necessarily grapple with.

6.2.1 Forms of Socio-Economic Rights Adjudication

Madhav Khosla\textsuperscript{647} has argued that the adjudicatory model of socio-economic rights adjudication in India is conditional social rights adjudication. He has also identified two other models of socio-economic rights adjudication which according to him are not prevalent in India, namely, the individualized remedial or minimum core form and the reasonableness form of adjudication. These two forms of adjudication in relation to the adjudication of the socio-economic rights have also been identified by Prof. David Bilchitz.\textsuperscript{648}

6.2.1.1 Minimum Core form of Adjudication

This is the traditional conception of a systematic social right which focuses on minimum core standard and therefore, it emphasizes individual remedies at par with any judicially enforceable civil and political right. This conception of judicial role for socio-economic rights directly corresponds to the normative standard of socio-economic rights as judicially enforceable, by reading it implicit in Article 21 of the Constitution of India. Therefore, as a logical corollary, since Article 21 provides for individual remedy, hence, anything which is read as part of Article 21 has to be provided by way of individual remedy. This logical consistency, though, would be extremely difficult to be realized in practice. This precisely is the reason why the conceptualization of socio-economic rights for the purposes of

\textsuperscript{647} Id. at 741.

\textsuperscript{648} Supra note 30. See also Supra note 36 and 412.
enforcement differs with the normative standards of the socio-economic rights. Nevertheless, the advocates of the minimum core form of adjudication seek to elevate socio-economic rights at par with the civil and political rights for the purposes of judicial enforcement of these rights. However, minimum core form of adjudication may annihilate the doctrine of separation of powers in terms of realisation of socio-economic rights of the people and therefore despite being omnipresent in the rhetorical flourish while the substantive content of the rights is articulated by the courts, it is something which cannot be embraced by way of accompanied remedies in case of violation of substantive constitutional socio-economic rights.

6.2.1.2 Reasonableness Form of Adjudication

The reasonableness form of adjudication of socio-economic rights comes mainly from South Africa in the famous decision of the South African Constitutional Court in the case of The Government of Republic of South Africa & Others v. Irene Grootboom & Others649. The Constitution of the Republic of South Africa, 1996 in its Bill of Rights under Chapter II of the Constitution explicitly provides judicially enforceable right of housing650, health care, food, water and social security651. In Grootboom, a group of extremely poor people (the respondents) have moved onto a vacant land privately owned and earmarked for formal low cost housing. Eviction proceedings were successfully instituted against these people, and the resulting court order was implemented in a manner reminiscent of the apartheid style evictions652 by destroying the property whatever little they had in the process. Thereafter, the respondents landed up on the Wallacedene sports field with only plastic sheets with them.

649 Supra note 50.
650 Supra note 163.
651 Supra note 164.
652 Supra note 50, Yacoob, J. in para 10
which provided very little protection in winter rains. Next day, the respondent’s attorney wrote to the municipal authorities demanding that the municipality must fulfill its constitutional obligation and provide shelter to the respondents. Not satisfied with the response of the municipal authorities they instituted legal action against the government, demanding that the municipality must fulfill its constitutional obligations towards them, which according to them ensures at least basic shelter. The High Court ordered some relief to be granted to the respondents. The government then appealed against the decision to the Constitutional Court. The respondents plea was based on section 26 and 28(1) (c) of the South African Constitution which according to them obligates the government to provide them with basic shelter. The South African constitutional Court in its Certification judgement had already declared that the socio-economic rights contained in the Bill of Rights of the South African Constitution are justiciable in the court of law. In Grootboom case considerable weight was given to the fact that the United Nations Committee on the interpretation and application of the International Covenant on Economic, Social and Cultural Rights has held that socio-economic rights contain a ‘minimum core obligation’ that must be fulfilled by State parties. The Constitutional Court without rejecting the minimum core obligation argument flowing from the Covenant concluded that it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right.

Instead, the Constitutional Court speaking through Yacoob, J. held that the real question in terms of our Constitution is whether the measures taken by the State to realize the right

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653 Every child has the right to basic nutrition, shelter, basic healthcare services and social services.
654 Supra note 167.
655 10 other judges of the Constitutional Court concurred with Yacoob, J.
afforded by section 26 are reasonable? However, the court added that considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent better. It is necessary to recognize that the State has a wide range of options before it to give effect to its constitutional duty. But, a programme undertaken by the State that excludes a significant section of the society cannot be said to be reasonable. Applying this principle to the facts of the case Yacoob, J, found that the State has instituted an integrated housing development policy and medium and long term objectives of the policy are appreciable. However, the housing programme lacked any component for those in desperate need. He found that the absence of such a component was unreasonable and thus concluded that the nationwide housing programme falls short of obligations imposed upon national government by section 26(2) of the Constitution to the extent it fails to recognize that the State must provide for relief for those in desperate need of access to housing.

Interpreting section 28(1) (c) of the Constitution, the court held that the right to shelter for children under this provision is applicable to those who are not in the care of their parent/guardian, i.e. in some alternative care or abandoned. In this case, since the children were in the care of their parents section 28(1) (c) is not applicable. The reasonableness approach adopted by the Constitutional Court in this case is known as the reasonableness form of adjudication of socio-economic rights, which is an offshoot of weak form judicial review. This approach scores heavily on the parameter of legitimacy but the effectiveness of this approach is highly suspect because the same is solely dependent upon the fostering of respect for judicial declarations owing to the absence of the concomitant binding judicial order along with the declaration of unreasonableness.
6.2.1.3 Conditional Social rights Adjudication

In conditional social rights model, the court strives hard to emphasize the importance of socio-economic guarantees. But once we have moved beyond the rhetoric, we notice that the court does not protect any systematic social right, be it weak or strong.\textsuperscript{656} Conditional adjudication simply represents the adoption of a weak remedial model in which the court declares that a right has been violated but recognizes that it can only provide a limited remedy.\textsuperscript{657} The existence of violation of an enforceable right is conditional upon State action. A violation can only occur when the State after having undertaken an obligation does not fulfill it. This undertaking of obligation need not necessarily flow from legislation rather even if a government programme is launched and it is not fulfilling its desired purposes in its entirety, then the actual beneficiaries of those schemes can seek the enforcement of their rights being the actual beneficiaries of the programme. So, if a housing scheme is launched by the government and a person eligible for house under the scheme is denied the housing facility, then, if he knocks the door of the court, the courts would ensure that he gets what he is entitled to under the scheme. In the course of adjudication the courts may widen the scope of adjudication in order to ensure that all those similarly situated like the petitioner, get the desired relief. The petition can originally be also filed by a public spirited person or an organization in the form of public interest litigation on behalf of the actual beneficiaries of the scheme who have been denied their rightful claim under the scheme.

This, however, is different from a minimum core form of adjudication where the court would entertain individual petitions from homeless persons claiming a right to shelter, as being

\textsuperscript{656} Supra note 51 at 749.
\textsuperscript{657} Id. at 751.
without shelter; compromises human dignity. Likewise, this form of adjudication would also not engage with the issue as to whether, the different legislations, programmes or schemes launched by the government are reasonable or not, as it would happen in case of reasonableness form of adjudication. Therefore, the grant of this individual remedy by the courts is conditional upon State after having already undertaken an obligation under some legislative or executive scheme, is not fulfilling it; this, however, is different from an individualized remedy being granted without there being any such obligation undertaken by the State, obligation being purely constitutional, flowing from the right to human dignity as envisaged under the Constitution.

However, in some cases individualized remedy is granted but this is not by adhering to the minimum core approach of adjudication but because of the fact that the petitioner happens to be the beneficiary of the application of conditional social rights adjudication. Therefore, despite there being a need for more houses to be built by the government to cater to the housing requirements of poor, the fact is that the government is not under an enforceable constitutional obligation to ensure that everyone has access to shelter. This is the reason why despite the fact that the Supreme Court in Olga Tellis v. Bombay Municipal Corporation\(^\text{658}\) declared that the right to life includes a right to livelihood which in this case was in issue owing the order of government to deprive slum and pavement dwellers of their humble abode, millions of people in India are still without shelter and they do not have an enforceable right to shelter, whereby, they could be ensured access to shelter.

Prof. Cass R. Sunstein has argued that the reasonableness approach has enormous promise for it requires priority setting on reasonable grounds but ultimately defers to State on how

\(^{658}\) (1985) 3 SCC 545 at 572.
priorities should be outlined and structured.\textsuperscript{659} In a strange way, the conditional social rights approach does the opposite: it requires no priority setting but once priorities are set it plays an important role in their structuring and implementation.\textsuperscript{660}

6.3 Adjudication of Socio-economic Rights under the Indian Constitution

The adjudication of conditional socio-economic rights adjudication in India appears to be weaker than the minimum core approach and reasonableness approach of socio-economic rights adjudication but at the same time it travels beyond the right-remedy paradigm.\textsuperscript{661} However, since the conditional socio-economic rights adjudication is more likely to operate in poorly governed nations, courts would be far more responsive to the legislative and executive inertia paving the way sometimes for stronger remedies.\textsuperscript{662} But the same should not be confused with the systematic socio-economic form of adjudication. This is also very different from asking the courts to scrutinize the reasonableness of the measures adopted by the State to address the issues of socio-economic rights. But a complete account of judicial intervention in India in the realm of socio-economic rights adjudication gives a very chequered description of the approach adopted by the Supreme Court. It includes varied instances, such as, providing stronger remedies beyond what could have been provided in a right-remedy paradigm, making socio-economic rights conditional on legislative or executive initiation of a policy addressing these rights, instances of retreat from enforcing socio-economic rights and even some glimpse of minimum core form of adjudication.

\textsuperscript{659} Supra note 137 at 236.
\textsuperscript{660} Supra note 51 at 765.
\textsuperscript{661} Id. at 759.
\textsuperscript{662} Id. at 754.
6.3.1 Stronger Remedies beyond the Right-Remedy Paradigm

In *Rakesh Chandra Narayan v. State of Bihar*\(^663\) the Supreme Court converted a letter addressed to the Chief Justice of India by two citizens from Patna narrating the absolutely abysmal state of affairs prevailing in a Government run Ranchi Mental Hospital by treating the same as writ petition.\(^664\) The Court being moved by the inhumane conditions in which the patients were living in the Mental Hospital and complete apathy of the administration towards it constituted a new committee to manage the affairs of the hospital comprising the Health Secretaries of three stake holder State governments namely Bihar, West Bengal and Orissa along with Station Officer, Ramgarh Area, Ranchi, Commissioner of Ranchi Division, Deputy Commissioner of Ranchi, District Judge Ranchi, Principal of Ranchi Medical College and Superintendent of the Mental Hospital.\(^665\) The Court also decided to monitor the progress of the work of the committee and for the same ordered the case to be treated as pending before it and gave freedom to the committee and the petitioners to move the court from time to time.\(^666\)

In *Consumer Education & Research Centre v. Union of India*\(^667\) once again the Supreme Court adopted the strong remedial approach.\(^668\) Right to health of worker, while in employment and after the employment was held by the Supreme Court to be the fundamental right under Article 21 of the Constitution of India, read along with articles 39(e), 41, 43 and 48A of the Constitution.\(^669\) The Court in this case found the remedies provided to the workers by the legislations to be inadequate to deal with the health concerns of workers in the

\(^{663}\) (1989) Suppl (1) 644.
\(^{664}\) *Id.* at 645.
\(^{665}\) *Id.* at 654.
\(^{666}\) *Id.* at 655-656.
\(^{667}\) (1995) 3 SCC 42.
\(^{668}\) *Supra* note 51 at 754.
\(^{669}\) *Supra* note 667 at 70.
Asbestos industries because these legislations do not address the needs of workers after the cessation of employment and only provide for compensation while in employment in case of injury or death.\textsuperscript{670} The court incorporated the rules of International Labour Organization (ILO) as applicable to these industries. The court ordered the initial payment of one lakh rupees payable by such factories or industries to the workers, if after cessation of employment he is suffering from occupational health hazard attributable to the industry.\textsuperscript{671}

The State of Gujarat was instructed to check the health conditions of such workers to verify their actual health conditions for the further compensations to follow.\textsuperscript{672} In a futuristic move the court also ordered the industries to “maintain and keep maintaining the health record of every worker upto a minimum period of 40 years from the beginning of employment or 15 years after retirement or cessation of the employment whichever is later.”\textsuperscript{673} This appears to be a case of enforcing beyond what was promised by the State by way of legislations and therefore goes beyond the mandate of conditional socio-economic adjudication but if law has to address health hazard of workers as a whole then it must do so by ensuring protection even after the cessation of employment and if wholesome right to health is the promise, enforcement of such right appears to be covered within the promise.

In \textit{Paschim Banga Khet Mazdoor Samiti v. State of W.B.}\textsuperscript{674} denial of emergency medical treatment by several government hospitals on account of non-availability of beds to a person who after falling from the train had suffered serious head injuries was taken very seriously by the Supreme Court in a petition filed under Article 32 of the Constitution. The Court held the

\textsuperscript{670} \textit{Id.} at 73.
\textsuperscript{671} \textit{Id.} at 74.
\textsuperscript{672} \textit{Ibid.}
\textsuperscript{673} \textit{Id.} at 73.
\textsuperscript{674} (1996) 4 SCC 37.
denial of emergency medical treatment to be the violation of fundamental right as guaranteed under Article 21 of the Constitution of India and ordered the Government of West Bengal to pay rupees 25,000 as compensation to the person.\textsuperscript{675} The Court at the same time ordered certain measures to be taken by the government to improve the efficiency of the hospitals. It was also emphasised by the court that financial constraints cannot be the excuse to not improve the state of affairs prevailing in the government hospitals.\textsuperscript{676}

\textbf{6.3.2 Conditional Socio-economic Adjudication}

The Supreme Court in *Olga Tellis* made it quite clear that there was no positive obligation on the state to provide people with shelter or an adequate means of livelihood to the slum and pavement dwellers. Given the fact that the court was relying on the directive principles and not on a justiciable right, this level of restraint was understandable. However, the court also accepted that the state could demolish dwellings without notice to affected parties in urgent cases. In respect of the pavement dwellers, their eviction was not made conditional on the provision of alternative accommodation. The Supreme Court in this case enforced a government circular of 1976 which stated that the slums which were in existence for long time would not normally be demolished unless the same land is required for public purposes.\textsuperscript{677} The government had also given census cards to certain hutment dwellers promising alternative accommodation. The Supreme Court said that such assurances must be made good.\textsuperscript{678} Therefore, it held that persons who were censused or who happened to be censused must be given alternative accommodation, however, the court did not made this

\textsuperscript{675} Id. at 44.
\textsuperscript{676} Id. at 48.
\textsuperscript{677} Supra note 8 at 587.
\textsuperscript{678} Ibid.
arrangement a condition precedent for their removal. In relation to those slums that are existing for twenty years or more the Court held that the same will not be demolished except when the land is required for public purpose and in such case the alternative accommodation by way of resettlement must be provided for the residents.

In Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan the Supreme Court again, in a way reiterated what it had said in Olga Tellis by holding that being provided with alternative accommodation by the Municipal Corporation in all cases cannot be made the precondition for the ejection of pavement dwellers. The court, however, recognised that the right of being given a hearing to the long time encroachers of public land before their ejection. The court finally ordered that such pavement dwellers that are otherwise eligible for alternative accommodation as per the schemes of the government be offered such accommodation. The court even clarified that it is not encouraging people to abuse the judicial process to avail such remedy by encroaching public property.

In Swaraj Abhiyan v. Union of India, Swaraj Abhiyan an NGO’s petition was filed with a view to ensure that the Government is asked to do what it is constitutionally and legally bound to do, to fight the menace of drought. Drought, certainly is a disaster and reducing the risk of drought is definitely desirable and that too when it is a statutory requirement. Section 47 of the Disaster Management Act which provides for the establishment of NDMF actually

679 Id. at 589.
680 Ibid.
682 Id. at 142.
683 Id. at 143.
684 Ibid.
685 (2016) 7 SCC 498.
uses the word ‘may’ when it talks about the creation of NDMF by the Government but the Supreme Court in its judgment noted the fact that even after 10 years of the passing of the Act, such a fund has not been created which is aimed at reducing the risk of disaster and this amounts to not respecting the mandate of the legislation. In this context the use of ‘may’ in section 47 of the Act was rightly held by the Supreme Court as not giving complete discretion to the Government either to create or not create such a fund, rather it was used only to give the Government some time to establish such a fund. Therefore, the Supreme Court passed the direction to the Central Government to establish a National Disaster Mitigation Fund (NDMF) as per the provisions of the Disaster Management Act, 2005 within three months from the passing of the judgment.  

Apart from the establishment of NDMF, the Supreme Court also directed the constitution of a regular specialist cadre of National Disaster Response Force (NDRF) within six months time. Unlike section 47, section 44 of the Act uses the word ‘shall’ for the constitution of this force, yet even after the elapse of 10 years, the mandate of the provision remains unfulfilled. Similarly, the Court also ordered the preparation of a National Disaster Plan as mandated by section 11 of the Act which again uses the word ‘shall’ for it. However, for the preparation of this plan the Court did not fix any time-line but directed that it should be done at the earliest and with immediate concern. Insisting upon the Government to follow its legislative and other policy commitments appears to be a very constitutional way of not obliterating the boundaries of separations of power principle envisaged under the Constitution and at the same time

686 Commenting on the judgment Finance Minister Arun Jaitley stated in the Rajya Sabha -“Step by step, brick by brick, the edifice of India’s legislature is being destroyed.” He expressed his anguish over the fact that after the Appropriation Bill has been passed by the Parliament, the Government is asked to create a Fund by the Supreme Court which is akin to subjecting budget-making by the Government to judicial review. See, Sagnik Chawdhury, “Judiciary is destroying legislature brick by brick”, 2016, Indian Express, May 12, 2016.
ensuring that the right to a dignified life is not reduced to an empty rhetoric completely at the mercy of the political class.

There are four separate judgments delivered on 11\textsuperscript{th} and 13\textsuperscript{th} May by the two judges' Supreme Court bench comprising of Madan B. Lokur J. and N. V. Ramanna J. on the petition filed by Swaraj Abhiyan dealing with four separate issues. First deals with the drought like situation in few States and the response mechanism of the Government by way of the Disaster Management Act; second deals with the implementation of National Food Security Act, 2013 and Mid-Day Meal Scheme in the areas affected by drought or drought like situations; third relates to the issue of implementation of Mahatma Gandhi National Rural Employment Guarantee Act, (MNREGA) 2005 and the Schemes framed under it and the fourth deals with issues related to poor farmers like crop loss, fodder bank and crop loan restructuring and relief. Bare readings of these judgments reveal that the Supreme Court has been very careful of not encroaching upon the realm of the other organs of the State. For example, in the fourth judgment, the Court refused to pass any direction to the Government except to religiously implement their policies accepting that issues like compensation for crop loss, fodder banks, crop loan restructuring are the policy matters and the court is not competent to examine the efficacy of policies meant to address these problems.

In its second and third judgment also the Court only insisted upon the implementation of the provisions of National Food Security Act and MNREGA and the schemes and rules framed thereunder. The Supreme Court particularly lamented the fact that the authorities required to be constituted under the Acts to oversee the implementation of the Act have not been constituted so far. The Court in its second judgment therefore, ordered that the States before it as respondents must establish the State Food Commission as mandated by section 16 of the
National Food Security Act within two months. All such States were also directed to appoint or designate for each district a District Grievance Redressal Officer as postulated by section 14 and 15 of the National Food Security Act. The Court also directed that the benefits of the Act are not to be denied to households not having Ration Card, any appropriate identity proof acceptable to the Government should be accepted and Mid-Day Meal should be distributed with egg or milk or any other nutritional supplement during summer vacations in the schools also in the respondent States. In its third judgment the Court directed timely release of money by the Central Government to States for the payment of wages wherein, the Court noted the unconscionable delay in the release of funds. The Court further directed that the authority meant to oversee the implementation of MNREGA, Central Employment Guarantee Council as per section 10 of the Act is constituted within 60 days from the judgment and the called upon the Central Government to urge the State Governments to positively constitute the State Employment Guarantee Council as mandated by MNREGA within 45 days from the judgment

Madan B. Lokur J. in the third judgment of the Supreme Court observed - “Social Justice has been thrown out of the window by the Government of India”. It is distressing to observe that the Governments are to be reminded of its statutory obligations by the Courts and that too when those obligations are for the welfare of the marginalised sections of the society. The Governments after enacting and enforcing legislations cannot continue to treat the statutory obligations at par with the obligations flowing from the directive principles of State policy of the Constitution allowing itself the luxury of the defence of the lack of adequate resources and consequent immunity from the judicial scrutiny for its glaring omissions.

687 (2016) 7 SCC 498 at 554.
6.3.3 PUCL Case and the Glimpse of Minimum Core Form of Adjudication

In a landmark interlocutory opinion in the case of People’s Union for Civil Liberties v. Union of India & Others (PUCL) (Right to Food case), Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001 interim opinion), handed down on November 28, 2001, the Indian Supreme Court directly addressed food security in the Indian context and explicitly established a constitutional human right to food in India.688 PUCL stands as one of the few instances of effective national adjudication on the right to food, despite the global food, financial, and environmental crisis that currently make food availability and the right to food increasingly urgent topics.689 The case was filed under Article 32 of the Constitution in the year 2001 on account of the failure of the government in ensuring adequate drought relief and failure of the government to give subsidized food grains to eligible beneficiaries. The petition which was initially filed against the Government of India, Food Corporation of India and six State Governments for their alleged failure in proper distribution of food grains, today includes all State Governments and covers the larger issues of hunger, unemployment and food security.690

The Court in this case affirmed the right to food as necessary to uphold Article 21 of the Constitution of India.691 The Court decreed that all the Public Distribution Shops (PDS) if closed, shall be opened.692 The Food Corporation of India was ordered to ensure that the food

689 Id. at 693,694.
691 Ibid.
692 Ibid.
grains are not wasted. 693 The responsibility of the States in the implementation of the several schemes like Mid-Day Meal Scheme, National Benefit Maternity Scheme for Below Poverty Line (BPL) Pregnant Women, National Pension Scheme for destitute persons of over 65 years, Annapurna Scheme, Antyodya Anna Yojana etc. was reiterated and a serious endeavour of ensuring effective implementation of these schemes was made by the court by telling the governments the ways and means of doing it. 694 For instance, the Court instructed state governments “to complete the identification of BPL families, issuing of cards and commencement of distribution of 25 kilograms grain per family per month latest by 1st January, 2002.” 695 Additionally, it directed the central and state governments to provide “every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days.” 696

The case remained pending in the Supreme Court for more than 14 years and in the meantime 427 affidavits and 71 interlocutory applications have been filed by the petitioner and respondents. 697 The Court also has passed several interim orders in its quest to realize the constitutional right to food. As of 2005, the Court had issued 44 interim orders 698 and appointed two Commissioners 699 charged with monitoring and reporting to the Court on the implementation by the respondents of the various welfare measures and schemes. Supreme Court has heard the matters connected with the petition at regular intervals since 2001. Several interim applications were

693 Ibid.
694 Ibid.
696 Ibid.
697 Supra note 690.
filed before the Court during this time and several interim orders have been passed by the Court on these petitions. For example the Supreme Court has directed the Government of India to:

- Introduce mid-day meals in all primary schools,
- Provide 35 kilograms of grain per month at highly subsidised rates to 15 million destitute households,
- Double resource allocation for the Sapurna Grameen Rozgar Yojana (SGRY), India’s previous rural employment programme prior to Mahatma Gandhi National Rural Employment Guarantee Act, (MNREGA) 2005.

Despite the problem of overseeing the proper implementation of the orders of the Court the petition and interlocutory applications have been central to defining a specific and enforceable right. Providing the data necessary to determine the basic nutritional necessities and expose deprivations of those minimum requisites of life, the case has been critical to setting a legal floor for nutrition and food-related entitlements. The approach adopted by the Supreme Court cannot simply be equated with the conditional socio-economic adjudication, though; the court in this case also has emphasized and tried to ensure the effective implementation of government schemes related to food security and in that sense this may be called an example of conditional socio-economic adjudication but the court in this case apart from ensuring proper implementation of these schemes has also examined the capacity of these schemes to

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701 Supra note 688 at 721-722.
address the cause of right to food and accordingly the court has made necessary changes to make it more effective. In order to achieve this, the court has even directed the governments to increase the budgetary allocations of its schemes. David Bilchitz has observed that the directions of the Supreme Court in this case show the promise that a minimum core approach to socio-economic rights can have even in contexts of massive need.\textsuperscript{702} Rehan Abeyratne says that this is virtually judicial policy making and this sort of judicial policy making calls forth a serious democratic objection.\textsuperscript{703}

However, the right to food case unceremoniously came to an end without a final order on 10\textsuperscript{th} February, 2017.\textsuperscript{704} The Court said so in view of the coming into force of the National Food Security Act, 2013 because of which the Court speaking through Madan B. Lokur J. observed that after the enactment of this Act nothing further survives in this petition and if the petitioners has any grievance in relation to the implementation of the Act, they may approach the Court again. The Court will also not supervise the implementation of the Act. Such an observation suggests that the Court would not take up a matter related to the deprivation of a socio-economic right under Article 32 of the Constitution if there is legislation in relation to such a right meant to ensure the realisation of the right in question. The Court would only be willing to entertain petitions if the grievance is in relation to the faulty or non-implementation of the legislation. The Court would not examine the policy underlying the legislation by way of judicial review however the Food Security Act has never been challenged before the Court as unconstitutional; nevertheless, the fact that despite being seized of the constitutional right to food issue the Court chose to simply accept the legislative wisdom affirms this fact. At the

\textsuperscript{702} Supra note 30 at 242.
\textsuperscript{703} Supra note 24 at 50.
same time the fact that the Court throughout in this case has chosen to evaluate the executive policies or the lack of it further proves an added reverence for legislative acumen and decision making.

However, when the obligation of enabling access to socio-economic rights is also put on private entities by the State by way of legislation the Court has adjudicated on the constitutionality of such legislative measures. In *Society for Unaided Private Schools of Rajasthan v. Union of India*[^705], the Supreme Court upheld the Constitutionality of the provision (section 12(1)(c)) in the Right of Children to Free and Compulsory Education Act, 2009 (RTE), that makes it obligatory for all schools (Government or Private) except private unaided minority schools to reserve 25% of their seats for children belonging to weaker sections and disadvantaged groups. The Court held *per curiam* that the Act shall apply to (a) Government and aided schools (minority or non-minority) and by a 2:1 majority also held that the Act shall apply to unaided (non-minority) schools. The Court for arriving at this finding highlighted the obligation of the State contained in Article 21-A and the fundamental duty of parents contained in Article 51-A(k) in relation to the right to education of children and concluded that the obligation therefore is shared between the State and the civil society. The court also reiterated that what is contained in directive principles under Article 41, 45 and 46 as applicable in this case dealing with education must be read as part of reasonable restrictions under Article 19(1) to 19(6) of the Constitution. Therefore, the right to carry any occupation, trade or business which is subject to Article 19(6) should also be read subject to these provisions under the DPSP. However, in view of the unqualified right of all minorities to

establish and administer educational institutions under Article 30(1) of the Constitution, section 12(1)(c) of the RTE was held to be inapplicable to unaided minority schools.

In *Pramati Educational & Cultural Trust v. Union of India*\(^7\)

\(^7\) (2014) 8 SCC 1.

a constitution bench of the Supreme Court by way of a unanimous verdict decided that RTE, 2009 insofar as it is made applicable to aided or unaided minority schools is *ultra vires* the Constitution being violative of Article 30(1) of the Constitution. The Court also overruled *Society for Unaided Private Schools of Rajasthan* insofar as it held that the Act of 2009 is applicable to aided minority schools. Eventually, the Court held RTE, 2009 to be unconstitutional to the extent it covers aided or unaided minority schools. In this case the Court was asked to give its view on the constitutionality of Article 21-A of the Constitution inserted by the 86\(^{th}\) constitutional amendment. The Court held it to be constitutional as according to the Court it does not abrogate the basic feature of the Indian Constitution.

The Court upheld the constitutional validity of Article 21-A as this provision is directed towards fulfilling the unfulfilled goal of 50 years enshrined under Article 45 of the Constitution as a DPSP. The Court also held that the power of State to make law under 21-A is independent and different from the reasonable restrictions contained under Article 19(6) of the Constitution in relation to the freedom of right to trade, occupation and business under Article 19(1)(g). Therefore, because of this the State can share the obligation of ensuring education of children of poorer, weaker and backward sections of the society with the unaided private schools as well. The Court also upheld the constitutionality of Article 15(5) inserted by the 93\(^{rd}\) Constitutional Amendment enabling reservations in favour of socially and
educationally backward classes and scheduled castes and scheduled tribes in educational institutions whether aided or unaided.

What is important however is that though the Court went into the validity of these laws as aforesaid but the measure to weigh these provisions was traditionally understood civil and political rights. This again reinforces the distinction between the two set of rights, namely, civil and political rights & socio-economic rights. Article 21-A also says that the State shall provide free and compulsory education to all children of the age of six to fourteen years of age in such manner as the State may, by law, determine. Therefore, it appears that this provision gives State the discretion to determine the manner of realising the right to education by enacting a law. That law would be subject to other provisions of Part III but in relation to Article 21-A it must only provide for free and compulsory education; so there cannot be an inquiry by the Court into the question as to whether the legislative policy of such law could have been better, so long as it is consistent with other provisions of Part III. This reality closely resembles the conditional social rights adjudication model recognised and endorsed by Madhav Khosla. So, the onset of legislations governing the area of socio-economic rights, perhaps, would settle the debate around the issue of judicial indeterminacy to a great extent, at least in relation to the issues covered by such legislations, as it has expressly happened in the Right to Food case.

6.4 Inference

A hierarchy in terms of the effectiveness of the different adjudicatory forms to address the cause of socio-economic rights would place the minimum core approach at the top, followed by the reasonableness approach and finally conditional socio-economic rights approach at the
bottom, whereas, a hierarchy in terms of the degree of legitimacy will reverse this order. This
is owing to the fact that in minimum core approach, courts can go to the extent of framing
policies and ensuring its compliance; in the reasonableness approach, policy prescriptions by
the executive or the legislature are to be examined from the point of view of its
reasonableness; whereas, the conditional socio-economic adjudication is aimed mainly at
ensuring compliance of the executive and legislative policies already in operation. The degree
of legitimacy is ascertained on the basis of the proximity of these adjudicatory approaches to
the classical notion of the principle of separation of powers.

However, even the conditional socio-economic adjudication appears to be involving the
reworking of the contours of classical separation of powers in order to derive legitimacy. The
principle of separation of powers cannot be envisioned as drawing boundaries between the
three organs of State with absolute precision. This feature of the separation of powers
principle enables the reworking of the constitutional functions between the organs of the
State, which can be used as a tool to ensure that the socio-economic adjudication becomes
principled and the courts do not oscillate between non justiciability of socio-economic rights
to minimum core form of adjudication. This can only happen if the constitutional limits of
judicial function in enforcing socio-economic rights are debated in the courtrooms as well.
The arguments advanced still debate the very issue of justiciability of socio-economic rights
and therefore the permissible extent of judicial intervention in the realm of these rights
continues to be obscured by the ‘either-or narrative’ of the judicial intervention which masks
the reality.
The constitution of the ‘Social Justice Bench’ by the Supreme Court provides for the perfect opportunity to address the issue of the extent of judicial intervention permissible under the India Constitution because this is an express rejection of the narrative which was in favour of the non-justiciability of socio-economic rights and thereby dispelling the charge of illegitimacy otherwise attributable to socio-economic rights adjudication. The effectiveness of such judicial intervention has seldom been denied and it is a given fact that the judicial interventions perform the catalytic function in realising the goals underlying socio-economic rights. Let us hope, that now the designated ‘Social Justice Bench’ would address the issue of making socio-economic rights adjudication, principled; with a view to strike a perfect balance between the legitimacy and effectiveness of judicial intervention in enforcing socio-economic rights.

707 See, Chapter I.