

CONSTITUTIONAL DIMENSIONS OF SOCIAL SECURITY LAWS IN INDIA

Ishwara Bhat* and Shuvro Prosun Sarker**

ABSTRACT

Various constitutional provisions that are in tune with those embodied in international legal instruments such as the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, etc., help in shaping and streamlining social security laws and policies across jurisdictions. In the Indian perspective, the Constitution empowers the state to protect its citizens by extending social security benefits thereby helping in the promotion of the ideals of a welfare state. In accordance with the constitutional mandates, the state can guarantee social security and assistance in cases of unemployment, old-age, sickness, maternity, disablement, etc. This article tries to know, in view of the emergence of the rights approach in judicial interpretation of Directive Principles of State Policy (DPSP), whether and how much the constitutional provisions especially in the form of DPSP and Fundamental Rights have been effective in ensuring proper implementation of social security laws and policies in India. It strives to identify the constitutional dimensions of social security laws in light of various judgments highlighting the interrelationship between DPSP and Fundamental Rights. The article also seeks to know whether federalism and multi-layered formulation and implementation of social security measures are helpful in ensuring a more stable, robust and economically viable social security system.

* Professor and Vice-Chancellor, The West Bengal National University of Juridical Sciences, Kolkata

** Research Associate, Centre for Regulatory Studies, Governance and Public Policy, The West Bengal National University of Juridical Sciences, Kolkata

Introduction

The constitutional goal of creating a welfare state includes the idea of social security against loss of worker's competence to work. Involving one of the most important social interests,¹ this goal has cascading effect upon the law, administrative action, local initiative and private help to alleviate the pathetic situation. Guarantee of public assistance in case of unemployment, old-age, sickness, maternity and disablement, and in other cases of undeserved want goes a long way in making freedoms real, rendering economic life equitable and socially just, avoiding commodification of labour, and ensuring autonomy to the worker.² It is a kind of libertarian and benevolent paternalism that helps the working class to meet the challenges of inabilities to work, which accrued for no fault of theirs or occurred beyond their control. Social Security as a concept as well as a system requires to be materialised through affirmative action to protect the members of the society from contingencies of life. The concept can be interpreted as a protective framework "by the society to its members through a series of public measures against the economic and social distress that otherwise is caused by the stoppage or substantial reduction in earnings resulting from sickness, maternity, employment injury, occupational diseases, unemployment, invalidity, old-age and death."³ At the same time, social security has become a part of the development process of a country as the labour force through some social assistance will be able to accelerate their contribution to the economy vis-a-vis efficiency and productivity.

¹ Roscoe Pound, 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1-2: Social interests in general security, security of social or economic interests and security of individual interest provide philosophical foundations for the idea of social security. Also see Linus Mac Manaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (1958) 33(1) St. John's Law Review 19-20.

² See for discussion Horacio Specter, 'Philosophical Foundations of Labour Law' (2006) 33 Florida State University Law Review 1119

³ Planning Commission, Government of India, New Delhi, *Report of the Working Group on Social Security for the Tenth Five Year Plan* (2001) p. 15

The constitutional status of social security measures as a part of Directive Principles of State Policy has rested on a weak model as it depends on positive state action and legislative schemes. Along with the increased efficacy of DPSP due to emergence of the rights approach in judicial interpretation of DPSP, and a cluster of statutes on the subject, there is a better environment of social security law. The inspiring principles of the Constitution relating to social security have influenced the legislative measures,⁴ administrative actions⁵ and judicial interpretation⁶ to make the social security scheme, a strong remedial measure. High benchmarks of international standards on social security also persuade for positive action. Most of the social security laws have the syndrome of ‘centralised legislation and federalized administration’. In India, only 6 percent of the workforce is in the organized sector and the remaining is in the unorganised sector.⁷ To include the remaining 94 percent of the unorganised workforce under social security system, the Government enacted the Unorganised Workers Social Security Act, 2008. Ironically it has been observed that “a number of laudable schemes had failed to deliver the desired results because of the complex processes and procedures inherent in the delivery of benefits under such schemes, thereby defeating the purpose of the entire scheme.”⁸ Federalism and multi-layered democracy have been entrusted with responsibilities of making and implementing social security measures.

⁴ Maternity Benefit Act, 1961; Workmen’s Compensation Act, 1923; Employees State Insurance Act, 1948; Provident Fund Act, 1952; National Rural Employment Guarantee Act, 2005; National Food Security Act, 2013

⁵ Pension schemes for the people below poverty line and widows; maternity benefit to the pregnant women who are below poverty line

⁶ See discussion *infra* IIIb

⁷ Ministry of Labor and Employment, Government of India, New Delhi, *Report of the Working Group on Social Security for the Twelfth Five Year Plan (2012-2017)*, (2011) 2

⁸ *ibid*, p 20; Delivery deficit pointed by the Planning Commission of India includes: “(1) lack of delivery infrastructure at the level of state governments, (2) lack of organizational capabilities on the part of delivery agencies, (3) misidentification of the programme beneficiaries due to both type I (exclusion) and type II (inclusion) errors, (4) incidence of corrupt practices, rent seeking by the administration and delivery agencies, and elite capture of the schemes, and (5) lack of awareness on the part of people regarding details of schemes as well as their own entitlements.”

From this backdrop, it is required to inquire into the international and constitutional principles on social security in the light of expansion of right to life and equality. The paper argues that the constitutional aspiration would become realistic only with a pro-labour approach on the part of legal system as a whole and grass root efforts on the part of people at the local level.

I. Right to Social Security under International and Regional Legal Instruments

The Universal Declaration of Human Rights (UDHR) is seen to be progressive in terms of ensuring social and economic benefits to the people at large. Article 22 of the UDHR can be considered as an umbrella provision for economic, social and cultural rights.⁹ This is further elaborated under Article 25 of UDHR.¹⁰ Though UDHR is primarily labelled as an international bill of rights along with the spirit of Article 22 and 25 on economic justice, the progress of civilisation has created insufferable conditions in the life of workers and, thus, it was necessary to venture more on economic and social rights.

Following this venture, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised social security as a right.¹¹ Further to this, the ICESCR extends social security benefits to mothers before and after childbirth,¹² provides special measures for

⁹ Universal Declaration of Human Rights, 1948, Article 22: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

¹⁰ Universal Declaration of Human Rights, 1948, Article 25: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

¹¹ International Covenant on Economic, Social and Cultural Rights, 1966, Article 9: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

¹² International Covenant on Economic, Social and Cultural Rights, 1966, Article 10(2): “Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.”

the protection of children and young people,¹³ and supports the right of adequate standard of living and continuous development.¹⁴ The reporting guidelines of ICESCR further expand the forms of social security which must be extended by the State parties which includes medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivor's benefit.¹⁵ Apart from these, the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁶ International Convention on the Elimination of All Forms of Discrimination Against Women,¹⁷ Convention on the Rights of the Child¹⁸ and International Convention on the Protection of the Rights of All Migrant Workers and their Families¹⁹ contain several provisions on social security to be provided to the target groups as per the need of the Conventions.

The expansion of social security as a right is further reflected in various regional instruments relating to human rights. Both the American Declaration of the Rights and Duties of Man, 1948 and the Additional Protocol to the American Convention on Human Rights,

¹³ International Covenant on Economic, Social and Cultural Rights, 1966, Article 10(3): "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

¹⁴ International Covenant on Economic, Social and Cultural Rights, 1966, Article 11(1): "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

¹⁵ Guidelines on Treaty-specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, Economic and Social Council, E/C.12/2008/2, March 24, 2009

¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 5(d)(iv)

¹⁷ International Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 11(1)(e) and 14(2)(c)

¹⁸ Convention on the Rights of the Child, 1989, Article 26

¹⁹ International Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990, Article 27(1) and 61(3)

1988 recognise the right to social security.²⁰ The European Social Charter, 1996 (revised) elaborately addresses social security provisions such as maintaining a social security system by the state parties,²¹ providing various benefits for women before and after childbirth,²² ensuring medical assistance under social security schemes²³ and promoting workers rights of social security.²⁴ This kind of expansion of the right to social security from international instruments to regional instruments reflects its universality and creates an obligation on the States to respect the provisions and promote social security. Ironically, there seems to be a long way in implementing or attaining the spirit of these provisions in a holistic manner.

As important human rights principles, the above social and economic rights percolate into the domestic legal domain as a matter of explicit and implicit recognition. The State's duty to foster respect to international conventions under Article 51 of the Constitution and the power of the Union government to enact laws for implementing treaties under Article 253 hint at the binding character of international human right principles. The post-Bangalore Principles development has facilitated automatic absorption of human rights in the course of adjudication without waiting for specific adoption by the State unless it is incompatible with the domestic law.²⁵

II. Constitutional Mandate of Social Security in India

As an aspirational constitution oriented towards social and economic justice, the Constitution of India has express provisions guiding the social security policy. Since it has

²⁰ Arlene Walshe and Padraic Kenna, 'Working Paper on the Right to Social Security' (2004) Seminar on Human Rights, , University of Essex, Colchester, United Kingdom.

²¹ European Social Charter, 1996 (revised), Article 12

²² id, Article 8

²³ id, Article 13

²⁴ id, Article 27

²⁵ P Ishwara Bhat and Shubhangi Bajaj Bag, 'Judiciary and Protection of Human Rights: A Focus on Bangalore Principles' Impact' (2015) 1 Journal of West Bengal Human Rights Commission 139

nexus with basic human rights, its implementation through rights-based approach and mainstream judicial activism has elevated its position substantively.

a. Towards respectable position of social security policy

The constituent assembly debates should be the starting point of any discussion on rights and duties of a man as the spirit behind the enactment is found there. Pandit Jawahar Lal Nehru (United Provinces: General) while moving the Resolution in the matter of ‘Aims and Objects’ of the Constitution put it in a very firm way that the people of India shall be guaranteed and secured with “justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith worship, vocation, association and action, subject to law and public morality.”²⁶ Taking part in the discussion Mr. M. R. Masani (Bombay: General) had rejected the idea of social or economic justice through this ‘Aims and Objects’ Resolution tabled by Pandit Nehru as it did not take into account the wide and gross inequalities which exist in India.²⁷ He elaborated by saying that if the national income is divided into three equal shares, only the one-third earned by the 62 percent of the population which he rejected as social or economic justice. There were others including B. R. Ambedkar (Bengal: General) who also expressed the lack of a realistic approach in the Resolution tabled by Pandit Nehru. Dr. B. R. Ambedkar elaborated his disappointment in the following words:

“I should have expected some provision whereby it would have been possible for the State to make economic, social and political justice a reality and I should have from that point of view expected the Resolution to state in most explicit terms that in order that there may be social and economic justice in the country, that there would be nationalisation of industry and nationalisation of land, I do not understand how it

²⁶ Constituent Assembly of India Debates (Proceedings), Vol. 1, December 13, 1946

²⁷ id, December 17, 1946

could be possible for any future Government which believes in doing justice socially, economically and politically, unless its economy is a socialistic economy.”²⁸

Though several amendments were suggested by the members of the Constituent Assembly yet all of those were finally withdrawn and the Resolution was subsequently passed. Pandit Nehru delivered his closing speech on this Resolution saying that India through its rightful and honoured place in the world will make full and willing contribution to promote peace and welfare of mankind.²⁹ Though he did not clearly address the points made by Ambedkar and Masani on equal social and economic rights a reality for all, but it is noteworthy that the framers were in search of an egalitarian social order. Finally, we find that the preamble to the Constitution of India promises a sovereign, socialist, secular, democratic republic along with ensuring justice, liberty, equality and fraternity for all its citizens.³⁰

The Constitution of India also kept provisions envisioning social security in the Directive Principles under Part IV of the Indian Constitution. Directive Principles as stated by B. R. Ambedkar “are really instruments to the executive and the legislature as to how they should exercise their power.”³¹ The framers of the Indian Constitution visualised that the socioeconomic principles under Part IV along with civil rights in Part III will ensure the functioning of a welfare State.³² It was thought that social democracy and economic

²⁸ id

²⁹ Constituent Assembly of India Debates (Proceedings), Vol. 1, January 22, 1947

³⁰ Constitution (Forty-second Amendment) Act, 1976, Section 2(a): “In the Preamble to the Constitution- (a) for the words “Sovereign Democratic Republic” the words “Sovereign Socialist Secular Democratic Republic” shall be substituted.”

³¹ See n (27)

³² At the Karachi Session of the Indian National Congress in 1931, it was resolved that "in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions" and that the State has to safeguard "the interest of industrial workers", ensuring that suitable legislation should secure them a living wage, healthy conditions, limited hours of labour and protection from the "economic consequences of old age, sickness and unemployment". This idea was in the uppermost in the minds of constitution makers.

democracy would supplement political democracy.³³ Articles 41, 42 and 43 in Part IV of the Constitution make specific references to the social security measures. There are other provisions which aim at avoidance of exploitative practices that put people, especially women and children, into a situation of indignity. In the Constituent Assembly, the proposals for amending Article 41 (draft Article 32) [a] to add the words ‘medical aid’ in order to obligate providing of the said relief to the beneficiaries of social security and [b] to substitute the words ‘public assistance’ by the words ‘State assistance’ were rejected.³⁴ This did not narrow down the scope of the social security policy. After a brief narration of the phases of development about status of Part IV of the Constitution, the implications and impact of these Articles were taken up for discussion.

The socio-economic principles under Part IV are not enforceable by any Court, but the spirit of these provisions can be achieved by the State in governance and policy by enacting appropriate laws.³⁵ But a law giving effect to the Directive Principles has to observe all the constitutional limitations such as the fundamental rights and in case it violates these limitations, it must be held unconstitutional.³⁶ This was also the view of the Supreme Court in several cases.³⁷ However, on the question of whether fundamental rights can have supremacy over Directive Principles merely because Directive Principles are non-justiciable, it does not

³³ Dr B R Ambedker in CAD dated 19th November 1948; H V Kamath in CAD dated 22nd November 1948; K T Shah in CAD dated 22nd November 1948.

³⁴ These were moved by Shamanandan Sahay and H V Kamath in CAD dated 23rd November 1948.

³⁵ Constitution of India, 1949, Article 37: “Application of the principles contained in this Part The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

³⁶ Upendra Baxi, ‘The Little Done, the Vast Undone- Some Reflections on Reading Granville Austin’s The Indian Constitution’ (1967) 9 Journal of the Indian Law Institute 362

³⁷ *State of Madras vs. Champakam Dorairajan*, AIR 1951 SC 226, 228: “The directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights”. *Chandra Bhavan Boarding & Lodging vs. State of Mysore*, AIR 1970 SC 2042, 2050: no “conflict on the whole between the provisions contained in Part III and Part IV” and “ they are supplementary and complementary to each other”. *Mohd. Hanif Qureshi vs. State of Bihar*, AIR 1958 SC 731: “A harmonious interpretation must be placed up on the Constitution, and so interpreted it means that the state should certainly implement the directive principles, but it must do so in such a way as not to take away or abridge fundamental rights.”

mean that they are subservient to fundamental rights. While destroying fundamental rights in order to achieve the goals of Directive Principles amounts to violation of basic structure, giving absolute primacy to one over another disturbs harmony. So the goals of Directive Principles should be achieved without abrogating fundamental rights. As Directive Principles enjoy a higher place in the constitutional scheme, both fundamental rights and Directive Principles must be read in harmony.³⁸ This principle of harmony and balance between fundamental rights and Directive Principles has not always been applied in a uniform manner.³⁹ It can be argued that reconciliation is required so that the interests of all people within the society are covered by both the fundamental rights and Directive Principles.⁴⁰ It is expected that the inclusion and recognition of socioeconomic rights in the international legal instruments and national constitutions will be able to increase the strength of the provisions contained in the Directive Principles of State Policy. The way for recognition of these rights has been further widened while the Courts of law have taken specific reference on the implementation of the socioeconomic rights camouflaged under the umbrella of the fundamental rights in order to accommodate a ‘dynamic move’.⁴¹ Justice K. K. Mathew in *Kesavananda* referred to the goals of social and economic justice as connected to human rights like liberty and equality. He held that the moral rights embodied in Part IV of the Constitution are equally an essential feature of it; that in the light of its experience each generation has to pour content to the vessels of fundamental rights; and that supremacy or

³⁸ See *Minerva Mills Ltd and Ors vs. Union of India*, AIR 1980 SC 1789, 1806: “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution”.

³⁹ *P.A. Inamdar vs. State of Maharashtra*, AIR 2005 SC 3226 (With regard to the protection of educational interests of the weaker sections of the society read with Article 15(4), the Supreme Court held that unaided private educational institutions could not be required to reserve any seats for these sections and such reservation would be an unreasonable restriction on the occupational or business rights of such institutions under Article 19(1)(g).)

⁴⁰ *V.N. Shukla's Constitution of India* (edited by M P Singh, 12th Edition, 2013) 371

⁴¹ Jawaharlal Nehru while introducing the Constitution (First Amendment) Bill said: “The Directive Principles of State Policy represent a dynamic move towards a certain objective. The fundamental rights represent some static, to preserve certain rights which exist. Both again are rights.” Lok Sabha May 16, 1951.

priority of fundamental rights is liable to be overborne by the moral claims embodied in Part IV.⁴²

Along similar lines, it was also observed by Justice Krishna Iyer that “in the creative Indian context, may look for light to the lodestar of Part IV of the Constitution... where two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference.”⁴³ Thus, it is well established by the decisions of this court that the provisions of Part III and Part IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve that goal indicated in Part IV.⁴⁴ Mixing of unenforceable policies of Part IV with normative principles of Part III had a salutary effect of elevating some of the essential policies into principles, recognising positive rights, formulating legislative measures to give effect to policies, treating such legislations as reasonable restrictions on fundamental rights and building the social security norms on sound pedestal.

b. Specific constitutional provisions on Social Security and their value-based interpretation

According to Article 41, “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old-age, sickness and disablement, and in other cases of undeserved want.” As per Article 42, “The State shall make provision for securing just and humane conditions of work and for maternity relief.” Article 43(3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities. Article 39(f) expects the State to protect the children and youth against exploitation and against moral and material abandonment. Laws under Article 19(6) requiring

⁴² *Kesavananda Bharati vs. State of Kerala*, AIR 1973 SC 1461, 1741

⁴³ *Mumbai Kamgar Sabha, Bombay vs. M/S Abdulbhai Faizullabhai & Ors*, AIR 1976 SC 1455

⁴⁴ *Unni Krishnan, J.P. and Ors. vs. State of Andhra Pradesh and Ors.*, AIR 1993 SC 2178

the employers to provide social security to workers are reasonable restrictions in the interests of general public, and effectuate social security policy through legal norms.⁴⁵ With the emergence of judicial activism in using fundamental rights to effectuate the spirit of Directive Principles like Articles 41, 42, and 39, provisions like Articles 14 and 21 became the source of social security measures by an interpretation that right to life includes right to livelihood.⁴⁶ In relation to the rights of labourers in the country, the Supreme Court observed that the workers “have a special place in a socialist pattern of society. They are not mere vendors of toil; they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital.... They supply labour without which capital would be impotent and they are, at least, equal partners with capital in the enterprise.”⁴⁷

In a 1954 case, the Madras High Court abstained from applying Article 41 in a circumstance of lay off due to shortage of electricity supply as it was a case of insufficient employment rather than unemployment.⁴⁸ The Court equated the situation to that of shortage in supply of raw materials by private producers. Obviously, the approach was hesitant in using the rights model by the application of fundamental rights, and the state’s duty to facilitate avoidance of job loss. But when job loss occurred due to the arbitrary action of the State, the Supreme Court, in 1990s, applied the rights model in support of Article 41. The Court in *Central Inland Water Transport Corporation* case applied Article 14 and held the service rule authorising the public corporation to terminate its servants by three months

⁴⁵ *Bakshish Singh, Appellant vs. M/s. Darshan Engineering Works*, AIR 1994 SC 251 where validity of Payment of Gratuity Act was upheld against a challenge based on freedom of business. The provisions of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 regarding health and welfare, conditions of employment, leave with wages, extension of benefits were upheld as reasonable restrictions on freedom of business under Article 19 (1) (g) read with 19 (6) in *Mangalore Ganesh Beedi Works vs. Union of India*, AIR 1974 SC 1832.

⁴⁶ *Olga Tellis vs. Bombay Municipal Corporation*, AIR 1986 SC 180

⁴⁷ *National Textile Workers Union vs. P R Ramakrishnan*, AIR 1983 SC 75 approvingly affirmed in *Workmen of Meenakshi Mills Ltd. etc. vs. Meenakshi Mills Ltd.*, AIR 1994 SC 2696

⁴⁸ *Radhakrishna Mills vs. S I T*, AIR 1954 Mad 686

notice as violating the principles of natural justice which are implicit in right to equality.⁴⁹ The atmosphere of job security is also protection against unemployment. The Court observed, “The mode of making ‘effective provision for securing the right to work’ cannot be by giving employment to a person and then without any reason throwing him out of employment.”⁵⁰

In the matter of protection of the aged persons, the Supreme Court in *D. S. Nakara*⁵¹ traced the concept of social security in old-age in social morality, socioeconomic justice and abhorrence for economic exploitation. The Court observed,

“Having set out clearly the society which we propose to set up, the direction in which the State action must move, the welfare State which we propose to build up, the constitutional goal of setting up a socialist State and the assurance in the Directive Principles of State Policy especially of security in old-age at least to those who have rendered useful service during their active years, it is indisputable, nor was it questioned that pension as a retirement benefit is in consonance with and furtherance of the goals of the Constitution. The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare State because by pension the socialist goal of security of cradle to grave is assured at least when it is mostly needed and least available, namely, in the fall of life.”⁵²

The modus operandi in effectuating old-age security consisted in nullifying the irrational classification amidst different categories of pensioners on the ground of violation of right to equality under Article 14. ‘Public assistance in case of undeserved want’ under Article 41 has been a source of remedial measure in numerous cases. In the matter of unjustified and wasteful litigation by a public transport company whose fault had caused accident resulting in loss of limbs of several passengers, the Court invoked Article 41 and

⁴⁹ *Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly*, AIR 1986 SC 1571

⁵⁰ *Ibid* paragraph 111.

⁵¹ *D. S. Nakara vs. Union of India*, AIR 1983 SC 130

⁵² *Id.*, para 36

provided remedy and expressed that the State Corporation should have sympathised with the victims of the tragic accident and generously adjusted the claims within a short period.⁵³ Withholding of gratuity of a public servant without hearing in a circumstance he was not guilty of grave misconduct went against Article 41 and not justified.⁵⁴ Discontinuance of Jawahar Rozgar Yojna resulting in loss of livelihood was not remediable under Article 41 read with Article 21 as the state's obligation is within the limits of economic capacity.⁵⁵ Availability of term insurance policy only to public servants and exclusion of others violated Article 14 in view of social security content of it under Article 41.⁵⁶ In supporting right to maintenance as an aspect of right to life, Article 41 helped in *Madhu Kishwar* and other cases.⁵⁷ In *Pritilal Nanda*, rejection of the claim of a physically handicapped applicant who was not sponsored as per the requirement under the advertisement but was called for an interview and placed in merit list was remedied under Article 41 read with Article 16.⁵⁸ In supporting the principle of victim compensation, the Law Commission and the Indian Supreme Court have gathered support from Article 41.⁵⁹ The argument that denial of opportunity of jobs to the visually handicapped due to non-implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 amounted to violation of Articles 14, 21 and 41 was accepted in *Justice Sunanda Bhandare Foundation* case.⁶⁰

Public assistance in case of disablement and sickness arising from mass torts like Bhopal Gas Leak tragedy or natural calamities or man-made disasters like fire accidents and

⁵³ *The Rajasthan State Road Transport Corporation, Jaipur vs. Narain Shanker*, AIR 1980 SC 695

⁵⁴ *D.V. Kapoor vs. Union of India*, AIR 1990 SC 1993

⁵⁵ *Delhi Development Horticulture Employees' Union vs. Delhi Administration*, Delhi, AIR 1992 SC 789

⁵⁶ *L. I. C. of India vs. Consumer Education and Research Centre*, AIR 1995 SC 811

⁵⁷ *Madhu Kishwar vs. State of Bihar*, AIR 1996 SC 1864

⁵⁸ *Union of India and Ors. vs. Miss. Pritilata Nanda*, AIR 2010 SC 2821

⁵⁹ *Ankush Shivaji Gaikwad vs. State of Maharashtra*, AIR 2013 SC 2454

⁶⁰ *Justice Sunanda Bhandare Foundation vs. U.O.I.*, AIR 2014 SC 2869

communal riots has emerged as a policy accepted in judicial decisions, legislations and administrative actions by directly or indirectly invoking Article 41.⁶¹ Right to maintenance supports social security policy. As viewed by Deepak Misra J “when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival” and the circumstance demands a social security approach.⁶² In *K. C. Bajaj*, the claim of doctors to include in their pension the component of non-practising allowance was admitted on the basis of social security idea, but technically on ground of unreasonable classification. The principle of fixation of compensation in motor vehicle accidents has been on the basis of social security principle in order to commensurate with the economic loss.⁶³ Social and economic support to the trans-gender was contemplated by the apex Court on grounds of social security, but Court substantially reasoned on the basis of Articles 14, 19 and 21 to arrive at the conclusion.⁶⁴ In Birbhum gang rape case, the State arranged for social security measure in addition to the sanction of interim relief of Rs 50,000 and a sum of Rs 5 lakhs ordered by the Apex Court.⁶⁵ In *Dewan Chand Builders* case, a Welfare Fund was created under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act). The levy of cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and to other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. The Court reasoned that the said fund is set apart and appropriated specifically

⁶¹ *Sushil Ansal vs. State through CBI*, AIR 2014 SC (Supp) 293; *Bhopal Gas Peedith Mahila Udyog Sangathan and Ors. vs. Union of India*, AIR 2012 SC 3081; *Bhopal Gas Peedith Mahila Udyog Sanghathan and Anr. vs. Union of India*, AIR 2007 SC (Supp) 690; *Union Carbide India Limited and others vs. Union of India*, AIR 1994 SC 201; *Charan Lal Sahu vs. Union of India*, AIR 1990 SC 1480

⁶² *Shamim Bano vs. Asraf Khan*, AIR 2014 SC (Supp) 463

⁶³ *Puttamma and others vs. K. L. Narayana Reddy*, AIR 2014 SC 716; *National Insurance Company Ltd. vs. Sinitha*, AIR 2012 SC 797

⁶⁴ *National Legal Services Authority vs. Union of India*, AIR 2014 SC 1863

⁶⁵ *In Re : India Woman says Gangraped on Orders of Village Court* published in Business and Financial News dated 23-1-2014, AIR 2014 SC 2816

for the performance of a specified purpose; it is not merged in the public revenues for the benefit of the general public, and as such, the nexus between the cess and the purpose for which it is levied gets established.

In the matter of just and humane conditions of work, the constitutional development is towards activist approach of establishing elaborate guidelines for the avoidance of sexual harassment in workplace.⁶⁶ Again, it is the rights approach that could aggressively carve out such a position. In *Consumer education Research Centre case*⁶⁷ the Court engaged in social policy formulation by invoking rights approach, international human rights norms and the philosophy of social justice. The Supreme Court issued a very dynamic order in protecting the health benefits of workers by directing the asbestos industries to maintain the health record of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment, whichever is later.⁶⁸ This decision followed with further directions to the Government to ensure insurance cover for the workers from hazardous diseases. The Court held that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43 48A and all related to Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. The judgment made a notable breakthrough in applying the international

⁶⁶ *Vishaka vs. State of Rajasthan*, AIR 1997 SC 3011

⁶⁷ *Consumer Education and Research Society vs. Union of India and Ors*, 1995 3 SCC 42; reference to ILO safety standards and the Asbestos Convention of 1986; see paragraphs 3 to 17 and extensive reference to American cases in paragraph 18.

⁶⁸ *Consumer Education and Research Society vs. Union of India and Ors*, 1995 3 SCC 42; per Ramaswamy J: "it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39 (c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State Government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right to life. Denial there of denudes the workman the finer facets of life violating Art. 21."

labour safety standards and overarching social justice to the premise of right to life. This deviates from the textual approach in a 1992 case which denied a claim for extension of ESI Act to the employees of agents of a Public undertaking. The argument that socio-economic rights are the basis of the right to life and, thus, the right to social security is a right under Article 21 of the Constitution of India could not convince the majority, whereas K Ramaswamy J in dissent was in favour of this stand.⁶⁹

On the expansive scope of the Maternity Benefit Act, 1961, again, it is the rights approach that could bring comfortable result. The State's duty to implement Maternity Benefit law in the unorganised sector was considered as part of the scheme for the eradication of bonded labour contemplated under Article 23 of the constitution.⁷⁰ The Court in *Municipal Corporation, Delhi* case⁷¹ gave a landmark verdict extending the Maternity Benefit Act 1961 to all the women employees in the muster roll irrespective of the question of regularisation of their employment by applying both fundamental rights and Article 42. The Court observed,

“To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of a child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the workplace while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.”⁷²

⁶⁹ *Calcutta Electricity Supply Corporation (India) Ltd. vs. Subhash Chandra Bose*, AIR 1992 SC 573

⁷⁰ *Bandhua Mukti Morcha vs. Union of India*, AIR 1992 SC 38

⁷¹ *Municipal Corporation of Delhi vs. Female Workers*, AIR 2000 SC 1274

⁷² *Ibid* at 1281 paragraph 30

Extension of the law to banks, shops and establishments was done in subsequent cases by employing the rights approach.⁷³ From the preceding observations, it can be inferred that there has been an exponential growth in social security concept, which has largely taken place by making use of the provisions under the fundamental rights chapter and the Directive Principles of State Policy. This has reinforced the essential policy underlying various statutes on social security.

c. Post-globalisation aberrations

However, after globalisation the Indian economy started getting liberalised and this change witnessed considerable shift in the judicial approach. A new adjustment in the judicial approach of non-interference has been adopted for deciding cases on economic and labour policy which is also a matter of greater scrutiny.⁷⁴ Under the newly adjusted approach, while considering the validity of the industrial policy of Madhya Pradesh, the Supreme Court held that the industrial policy though non-utilitarian cannot be said to be arbitrary as the State Government is empowered to recommend or even revise a policy as per its needs.⁷⁵ In another instance, the Supreme Court following the adjusted activism approach on a matter where reimbursement of medical expenses incurred in private hospitals to the serving and retired government employees were not provided. The condition for the government put there was that it will only be providing such expenses incurred in private hospitals if similar

⁷³ *Punjab National Bank by Chairman and Anr. vs. Astamija Dash*, AIR 2008 SC 3182; *National Campaign Committ., C.L. Labour vs. Union of India*, AIR 2009 SC (Supp) 259

⁷⁴ Upendra Baxi, Access to Justice in a Globalised Economy: Some Reflections, Lecture of the Indian Law Institute, August 5, 2006: "I will suggest that the World Bank/IMF/UNDP and related programs of good governance understandably, if not justifiably, promote structured adjustment of judicial activism. These covertly address, as well as, overall seek to entrench market friendly, trade related forms of judicial interpretation and governance. Judicial self restraint covering macro-economic policy as on the basis of adjudicatory policy stands proselytized by the already hyper globalised Indian Appellate Bar."

⁷⁵ *M.P. Oil Extraction and Anr vs. State Of Madhya Pradesh and Ors*, (1997) 7 SCC 592, 610: "Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."

treatment is not available in government hospitals, and the rate of such reimbursement will be determined by the concerned authority. The court after dealing with the issue raised under Article 21, provided its decision in the following way:

“No State of any country can have unlimited resources to spend on any of its project. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent finance permits. If no scale or rate is fixed then in case private clinics or hospitals increase their rates to exorbitant scales, the State would be bound to reimburse the same. Hence, we come to the conclusion that the principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India.”⁷⁶

In a case where the policy of the government to privatise one organisation and the effect of that on the rights of labourers was in question, the Supreme Court held that the process of disinvestment was a policy decision based on complex economic factors and the growth of the country.⁷⁷ The Supreme Court further made it clear that the “courts must... act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the court will not interfere.”⁷⁸

It shall be noted that the values of social security meticulously built through the rights approach and statutory schemes have occupied the major space and the aberrations remain peripheral and liable to be confined to the factual circumstances. The text of the constitution making the social security law dependent upon economic capacity of state has its practical impact.

⁷⁶ *State of Punjab & Ors vs. Ram Lubhaya Bagga*, (1998) 4 SCC 117

⁷⁷ *BALCO Employees Union (Regd.) vs. Union Of India & Ors*, (2002) 2 SCC 333

⁷⁸ *id.*, para 233

d. Federalism and multi-layered formulation and implementation of social security measures

In democracies with federal structures such as that in the United States of America, Canada and Australia, the provinces or states are mainly responsible for labour and social security legislations.⁷⁹ The reason for this may be for their formation as a federal country as combination of states those were independent of each other. In the case of India, the centralised scheme of federalism makes it 'union of States' which is a part of the basic structure and matters related to social security come under the List III (Concurrent List) of the Schedule VII of the Constitution of India.⁸⁰ The Constitution of India has devised the scheme of allocation of legislative powers in such a way that there exists centralisation within a federal pattern and framework though different governments exist in the Centre and the States.⁸¹ The justification for central leadership in the matter of social security is to ensure common policy framework, common financial resource and common pattern of implementation. Co-operative federalism has valuable role to play to support social security measures. In constitutional challenges on legislative competence of the Union Government to enact laws on social security matters, the Supreme Court has upheld them as relating to welfare of workers rather than as regulating industry.⁸² The case has also demonstrated the practice of cooperative federalism wherein State governments enacted rules supplementing the enabling legislation, and thereby engaging in multilayered norm formulation. Implementing the spirit of Article 41 of the Constitution of India through 73rd and 74th Constitutional Amendment Acts, the local government structure has been introduced in India which is under the jurisdiction of the States under Entry 5 of List II of the VII Schedule. There have been questions regarding the powers, functions and working of these local

⁷⁹ Section 92 (13) of the Canadian Constitution Act 1861; *AG Canada v. AG Ontario*, (Unemployment Insurance reference case) 1937 AC 355

⁸⁰ List III, Schedule VII: "22. Trade unions, industrial and labour disputes; 23. Social security and social insurance, employment and unemployment; 24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits."

⁸¹ M P Jain, *Indian Constitutional Law*, 243

⁸² *Mangalore Ganesh Beedi Works vs. Union of India*, AIR 1974 SC 1832

government bodies under the federal scheme of India. State functions can be transferred from the State Government to the local bodies can be done through state laws.⁸³ Entry 26 of the Eleventh Schedule denotes devolution of the power relating to social welfare, including the welfare of the handicapped and mentally retarded; Entry 23 refers to health; and Entry 27 refers to welfare of the weaker sections. Entry 3 of the Twelfth Schedule denotes devolution of power relating to planning for social and economic development on municipalities and municipal corporations. It has been argued that transferring of various state functions to the local government bodies was not successfully implemented.⁸⁴ However, various schemes related to social and employment security are now in operation under the umbrella of these local government structures.⁸⁵ For example, the National Rural Employment Guarantee Act, 2005 was enacted to provide “livelihood security of the households in rural areas of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work.”⁸⁶ Under this Act, States are responsible for providing work in accordance with the Scheme prepared by respective State Government for providing not less than 100 days of guaranteed employment in a financial year, to those who demand work.⁸⁷ The funding pattern of this Act provides that the Central Government will bear the responsibility for the full amount of wages for unskilled manual work and State Governments are required to pay the full amount unemployment allowance.⁸⁸ It is noteworthy that the Central Government is the major facilitator bearing the financial burden under this Act and maintaining the centralist structure of having overall control on the implementation of these kinds of schemes.

⁸³ See Schedule XI and Schedule XII of the Constitution of India along with Article 243G and 243W of the Constitution of India.

⁸⁴ KC Sivaramakrishnan, Local Government, in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Ed.), *The Oxford Handbook of the Indian Constitution*, OUP, 2016, p. 574

⁸⁵ Matters related to social security have got place in the List III of the VII Schedule of the Constitution of India where concurrent power of legislation lies both with the Centre and the States.

⁸⁶ Preamble, National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

⁸⁷ National Rural Employment Guarantee Act, 2005, Section 3 & 4

⁸⁸ Id, Section 22

Several other schemes such as Janani Suraksha Yojana (JSY), Integrated Child Development Scheme (ICDS), National Maternity Benefit Scheme (NMBS), Antyodaya Anna Yojana (AAY) and National Family Benefit Scheme (NFBS) exclusively funded by the Central Government are in operation. The interrelatedness of these above-mentioned schemes was recognised in the case of *People's Union for Civil Liberties v. Union of India* to ensure that the benefits under these schemes are not denied to the beneficiaries and that assistance is provided promptly at the nearest point where it can be assessed.⁸⁹ Subsequently in 2008 in *People's Union for Civil Liberties v. Union of India*⁹⁰ the Court issued set of guidelines to the central and state government to continue the schemes, to pay Rs 500 in every case of child birth by pregnant woman entitled under the scheme, to ensure that the benefits of the scheme reach the intended beneficiaries, to regularly advertise the revised scheme so that the intended beneficiaries can become aware of the scheme, to avoid diversion of fund, to give details about utilization of funds and take actions against abuse of funds. The statistical details showing the extent of use of the fund under the scheme point out that in 12 states and union territories the utilization of funds fell below 22 per cent denying the facility to eligible pregnant women.

It is ironical to note that even the aforementioned orders and judgments delivered by the Courts pointed out the implementation deficiency of the centrally funded schemes related to social security; the Centre has not yet made any fundamental change in its policies concerning implementation. The reasons for this may be that there is a heartfelt intention of

⁸⁹ W.P. Civil No. 196 of 2001, Order Dated: November 28, 2001. Supreme Court hearings on this case have been held at regular intervals since April 2001. Though the judgement is still awaited, interim orders have been passed from time to time. However, the orders of the Supreme Court is followed in the following decisions of the Delhi High Court: *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, W.P.(C) 8853/2008, Date of Judgment: 04.06.2010; *Jaitun v. Maternity Home MCD, Jangpura & Ors*, W.P.(C) 10700/2009, Date of Judgment: 04.06.2010.

⁹⁰ AIR 2008 SC 495

the Centre to make the local governmental bodies work and become a third tier of the government within the federal structure of the Constitution of India.

Regarding the issue whether the burden of social security measures can be shifted through legislative measure upon the shoulders of parties which are not relevant to the economic process of production, the approach of the apex Court is not to allow such a course of action. At issue in *Koluthara Exports Ltd.*,⁹¹ was the constitutionality of the Kerala Fishermen's Welfare Fund Act, 1985, which obligated the dealers in fish to contribute to a fund which was to serve as a resource for meeting the requirements to provide for distress relief to fishermen in times of natural calamities; to assist in case of disability; to bear the expenses of disease and death of dependents; to assist in situations of lean months; to meet education related expenses of fishermen; to restore the loss of house or fishing equipment due to natural calamities; to provide old age assistance to fishermen; and such other objects. The Court declared the scheme as unconstitutional by reasoning, "The burden of the impost may be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the scheme made there under." The judgment implies that public assistance for social security shall flow from the relevant economic sector that envisages employer employee relation. From the angle of avoiding undeserved burden and unjust enrichment the approach is appropriate.

From the preceding it can be inferred that the distribution of legislative power in the matter of social security has appropriate pattern. In addition to laws, the centrally sponsored administrative schemes have served the social interest. Absence of effective coordination amidst different layers of government has failed the spirit of the social security policy.

⁹¹ *Koluthara Exports Ltd. vs. State of Kerala*, AIR 2002 SC 973

Greater participation of local bodies will have greater transparency, people's participation and civil society's initiative.

III. Conclusions

The framework of constitutional values for social security and the design for their implementation are basically sound, especially in the aftermath of judicial activism traversing the path of rights based approach and enactment of constitutional amendments for grass root governance. The passing of Rubicon from policy to principle is a significant game changer. The original intention of guiding the nation to a regime of social security has been reinforced by legislations and integrating the human rights principles in the realm of international law. International norms on social security have inspired and persuaded for domestic initiative. The mainstream constitutional activism has judicially shaped and elevated the social security law to a higher level. Integrating right to life with policy of social justice has added value to social security law. However, it appears, enacting several legislations for ensuring social security has not been much successful because of factors related to improper implementation or the lessening of coverage of the schemes under the respective enactments.

It is well established that in a democracy it is the government which will formulate the policy with the rider that in case of a change in government, the policy may also change its focus. A change in the focus of the social policies or schemes may be adversely affecting the welfare of workers or other sections of the people in need of social security protection. The aberrations of post globalization development are only peripheral, and have not disturbed the core law of social security. Courts have adequate competence to address temporary distractions. The legislations on rural employment guarantee, public health, food security and

education have revived the commitment to the aim of social security with greater rigour in the twenty first century.

Under the Constitution, social security is a responsibility of multiple layers of government, civil society, corporate sector and the general public. Unlike other federal systems where states have legislative competence in matter of social security, Indian system believes in central government's stewardship in policy, planning and finance in relation to social security measures. This has largely contributed to the success of the measures wherever States have enthusiastically participated. Federalism has a responsibility of bringing wholesome growth of all the regions of the nation.⁹² The instances of neglect by the States in implementing the centrally sponsored social security scheme warn us against their future recurrence. In response, decentralised administration of central laws, programmes and policies imposes greater responsibility upon the panchayat raj system in this sphere. By taking a clue from the success of the grassroots democracy in the task of environment protection⁹³ it is possible to suggest for their vital role in effectuation of social security law.

⁹² P Ishwara Bhat, 'Why and how federalism matters in elimination of disparities and promotion of equal access to positive rights and welfare' (2012) 54(3) Journal of Indian Law Institute 324-363

⁹³ *Village Panchayat, Calangute vs. The Additional Director of Panchayat-II*, AIR 2012 SC 2697