

Justiciability of ESDR : South Asian Experience

Experience of India : its legal model

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What is JUSTICIABILITY ??

Lets take some opinions

(Of a state or action) subject to
trial in court of law

Justicier (french)=bring to trial,

Preamble

“We the people of India”

“Sovereign Socialist
Secular Democratic
Republic”

“JUSTICE: Social,
economical & political

“Liberty, Equality &
Fraternity ”

**Fundamental
Rights:
Egalitarian
society**

**D.P.S.P. :
Welfare
State**

**Conscience
of the
constitution:
Human
Rights**

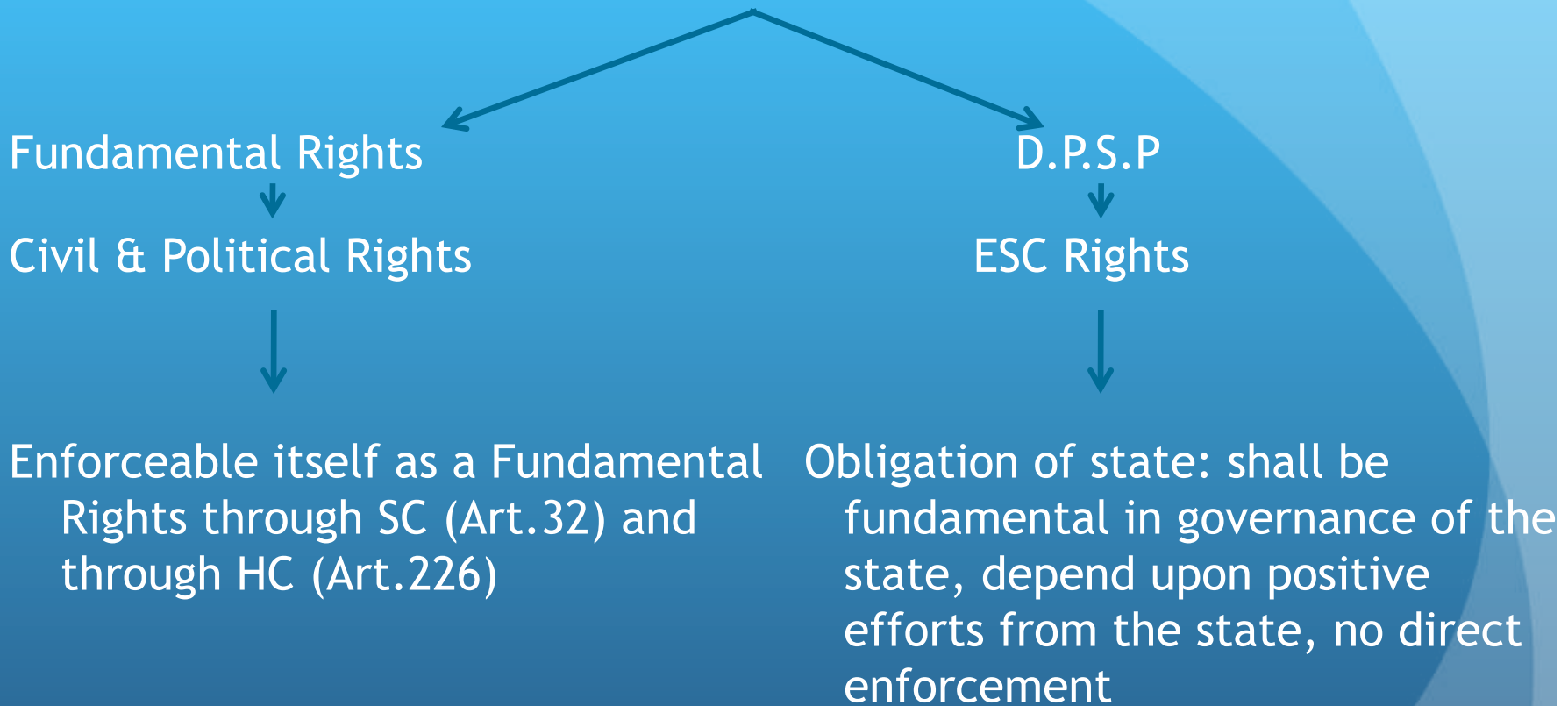
Constitution of India and ESD Rights

- Constitution of India was formed in between 1948 to 1950, that's why there is a serious impact of UDHR and other contemporary international human rights document on it, that's why in the constitution there is beautiful blend of Human Rights.
- Constituent assembly put generally all Civil-Political Rights under chapter III Fundamental Rights and put generally all Economic-Social-Cultural Rights in Chapter IV Directive Principles of the State Policy.

The comparable provisions of the directive principles of state policy enshrined in the constitution of India and the ICESCR :

Articles of the constitution	Articles of the ICESCR
Article 39	Articles 3,6(1) & 7
Article 41	Articles 6 & 7
Article 42	Articles 7 & 10(2)
Article 43	Articles 11(1),11(2) & 15
Article 45	Articles 13(1), 2 (a), 3 & 4 & 14
Article 47	Articles 12(1), 2(a) to (d)
Article 51	Articles 1(3) & 2 (1)

Enforcement of Human Rights through Constitutional Mechanism in INDIA



So what's the way to enforce ESD Rights:



Before that there is a story with these question ?

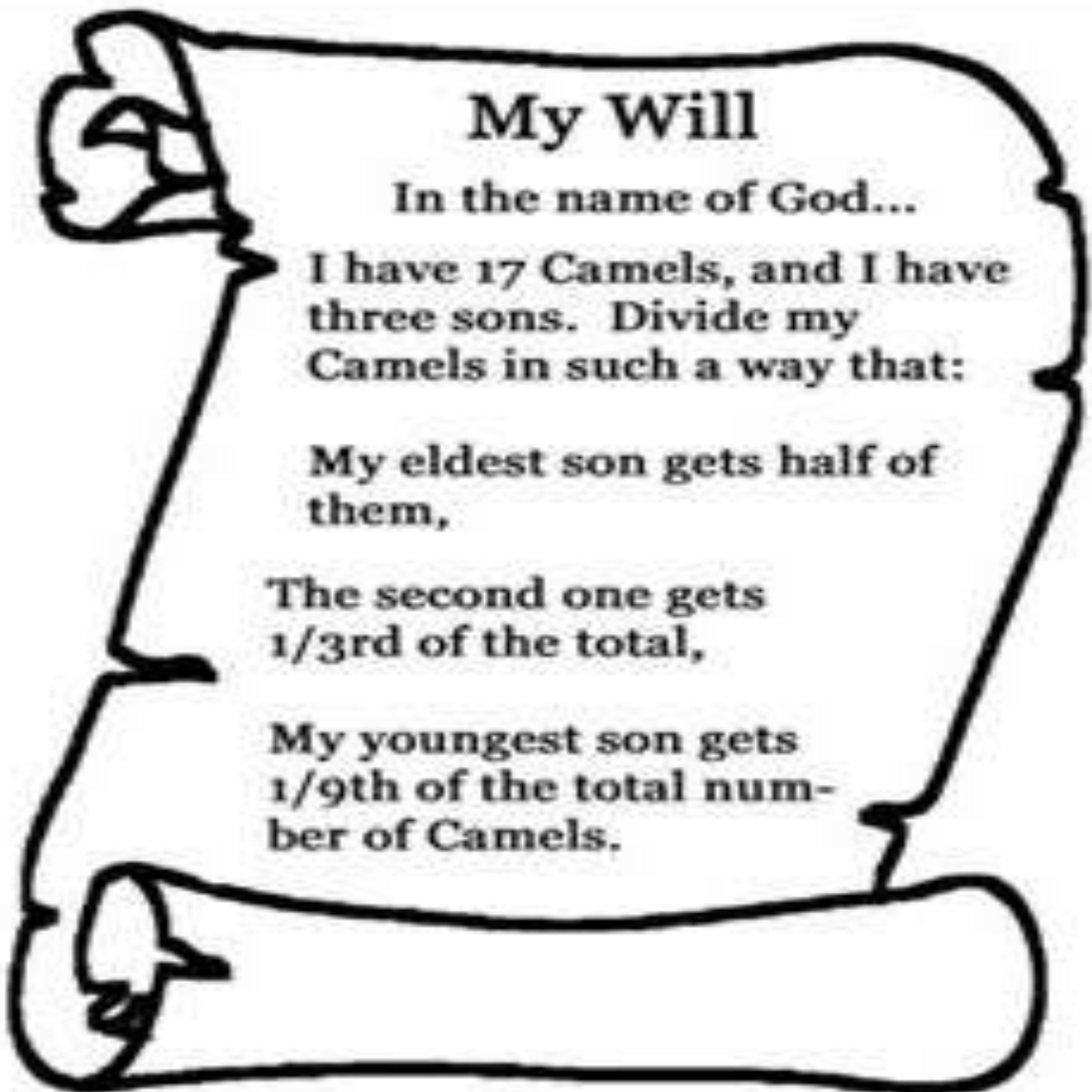
Can there be JUSTICIABILITY WITHOUT ACTUAL JUSTICIABILITY ??

Can there be an enforceable right without any direct enforceability ?

DIVIDING 17 CAMELS BETWEEN 3 PEOPLE

Sufi Comics

Arif & Ali

A hand-drawn scroll with a thick black outline. The scroll is unrolled, with the top and bottom edges curled up. The text is written in a simple, bold, sans-serif font. The scroll is set against a white background with a thick black border.

My Will

In the name of God...

I have 17 Camels, and I have three sons. Divide my Camels in such a way that:

My eldest son gets half of them,

The second one gets $\frac{1}{3}$ rd of the total,

My youngest son gets $\frac{1}{9}$ th of the total number of Camels.

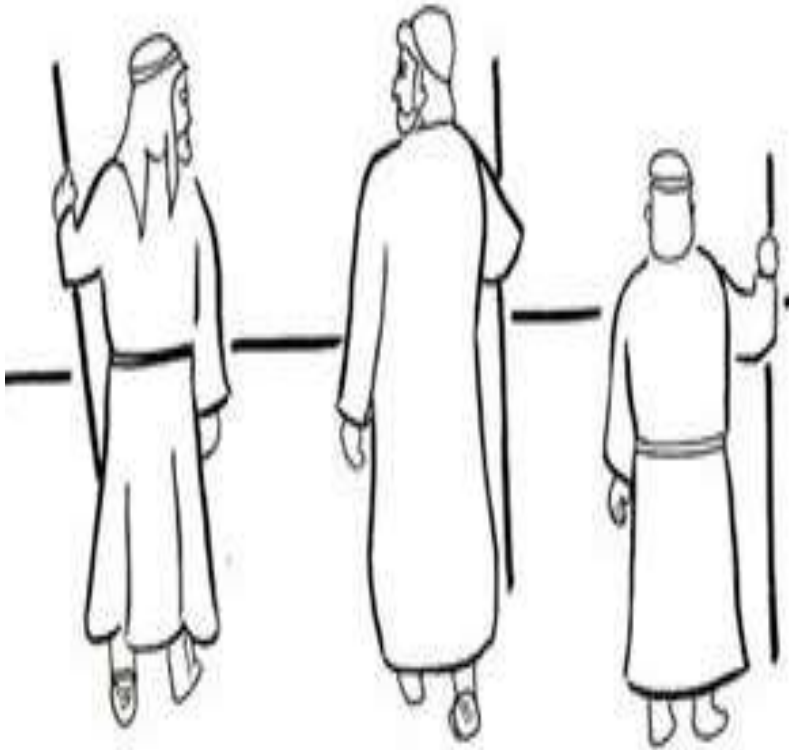
OUR FATHER HAS ASKED TO DIVIDE 17
CAMELS BETWEEN THE 3 OF US IN A WAY
THAT IS IMPOSSIBLE.



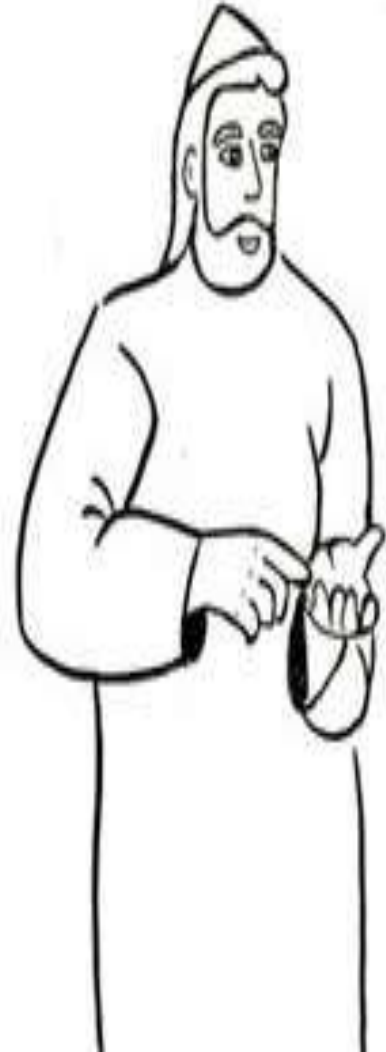
I'VE HEARD OF IMAM
ALI'S BRILLIANCE, HE'S
THE ONLY MAN IN ARABIA
WHO CAN HELP US.



SO THE 3 OF THEM SET OUT MEET IMAM ALI



AND THEY EXPLAIN TO HIM THEIR PROBLEM...



OK, I WILL LEND ONE OF MY CAMELS TO THE TOTAL WHICH MAKES IT 18 (17+1=18), NOW LETS DIVIDE AS PER HIS WILL....

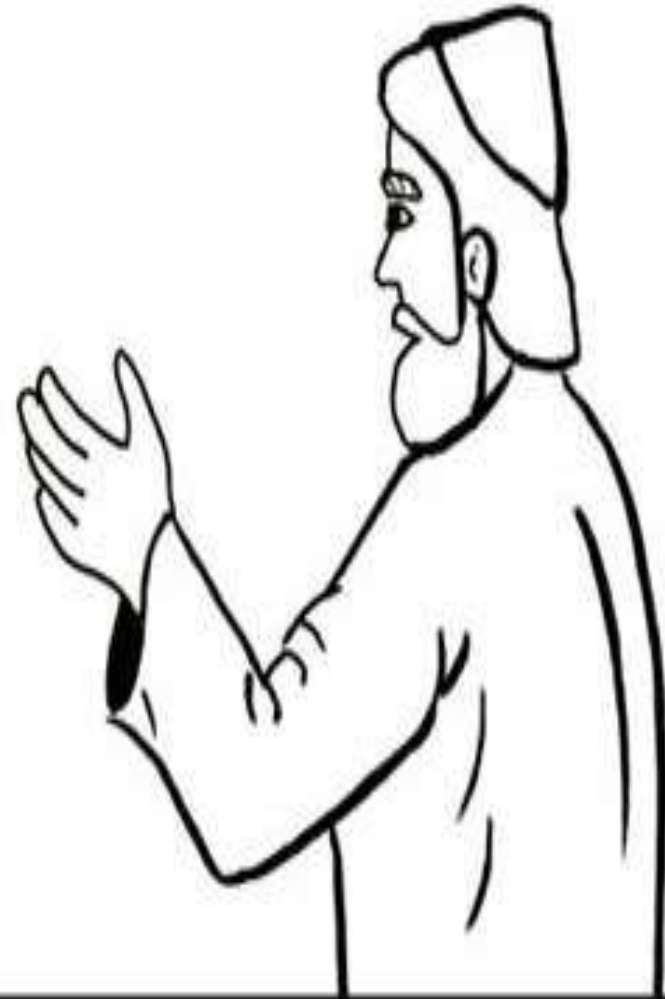


THE ELDEST SON GETS $1/2$ OF 18 = 9
THE SECOND ONE GETS $1/3$ OF 18 = 6
THE YOUNGEST GETS $1/9$ OF 18 = 2

O IMAM, YOU ARE TRUELY
BRILLIANT! I HAVE NOT BEEN
LET DOWN.

NOW THE TOTAL NUMBER OF CAMELS
= 17 ($9+6+2=17$)

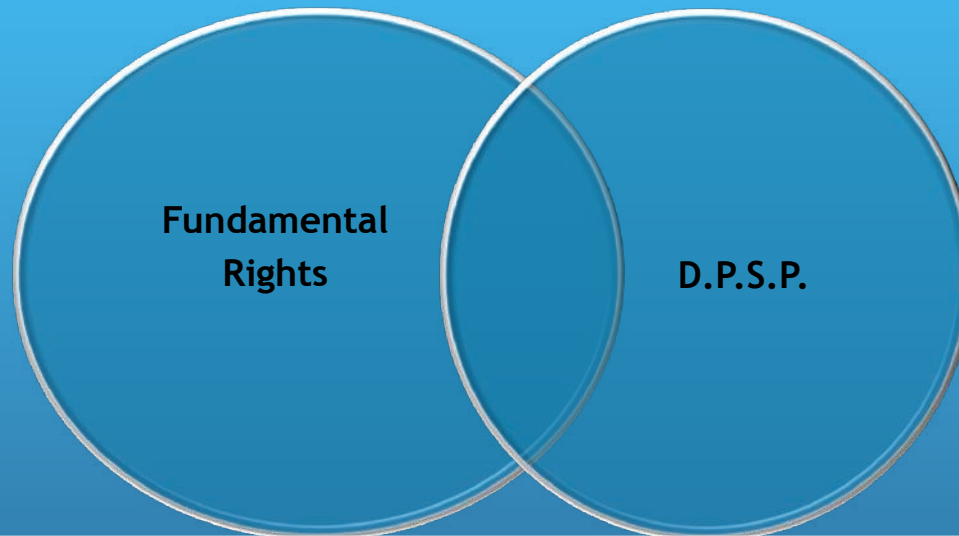
NOW I WILL TAKE MY CAMEL BACK.



But there is no direct JUSTICIABILITY in respect of ESC Rights in respect of Constitutional Frame-work

- **IDEA 1** : Make all important ESC Rights enforceable through a constitutional Amendment
- **IDEA 2** : Interpret ESC Rights that's DPSP within the meaning of Fundamental Rights that's CP Rights : so that without amendment all ESC Rights can be justified through SC and HC accordingly.
- **IDEA 3** : Provide Administrative set-ups - Resource mobilization in the sector so that Government can implement the policies as its an obligation of the state

Interaction Between Fundamental Rights, D.P.S.P. & Fundamental Duties: Realization of Socio-Economic Rights



- Era of irreconcilability: Fundamental rights will prevail over D.P.S.P.
- Era of harmonious construction: to realise economic-social right.
- Era of integrated schemes which is elastic enough to meet the change in the society : “fundamental rights (C/P Rights) are not the end themselves but the means to the end, the end is specified in D.P.S.P(ESCD Rights)”
[Minerva Mills vs. union of India AIR 1980, SC- 1789]

Right to food : Constitutional Framework

- Constitution of India
- **Article 14.** Equality before law
- **Article 21.** Protection of life and personal liberty.
- **Article 39.** Certain principles of policy to be followed by the State-
The state shall, in particular, direct its policy towards securing-
a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
- **Article 47.** Duty of the State to raise the level of nutrition and the standard of living and to improve public health-The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

Contd..

▪ Legislations:

- Food Safety and Standard Act, 2006 (No. 34 of 2006)
- Infant Milk Substitutes, Feeding Bottles and Infant foods (Regulation of Production, Supply and Distribution) Act, 1992(No. 41 of 1992)
- National Rural Employment Guarantee Act, 2005 (No. 42 of 2005)
- Prevention of Food Adulteration Act, 1954 (No. 37 of 1954)
- Protection of Human Rights Act, 1993 (No.10 of 1994)

Judicial Determinations

- **C.E.S.C Ltd. Vs. Subhash Chandra Bose AIR1992 SC 573**
- **Chameli Singh Vs. State of Uttar Pradesh 1996 SC 1051**

Right to life guaranteed in article 21 of the constitution includes in its true meaning, the basic right to food, shelter and clothing.

- **Kishen Pattnayak & Anr. Vs. State of Orissa AIR 1989 SC 677**

Right to food can never be realised unless government is not willing to take macro level measures to reduce the drought in the region, irrigation and well functioning public distribution programmes.

Judicial Determination

- **Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.;** AIR 1986 SC 180

If the government fails to realise the most basic right to food, it's the biggest failure of the government. It's a situation of no government.

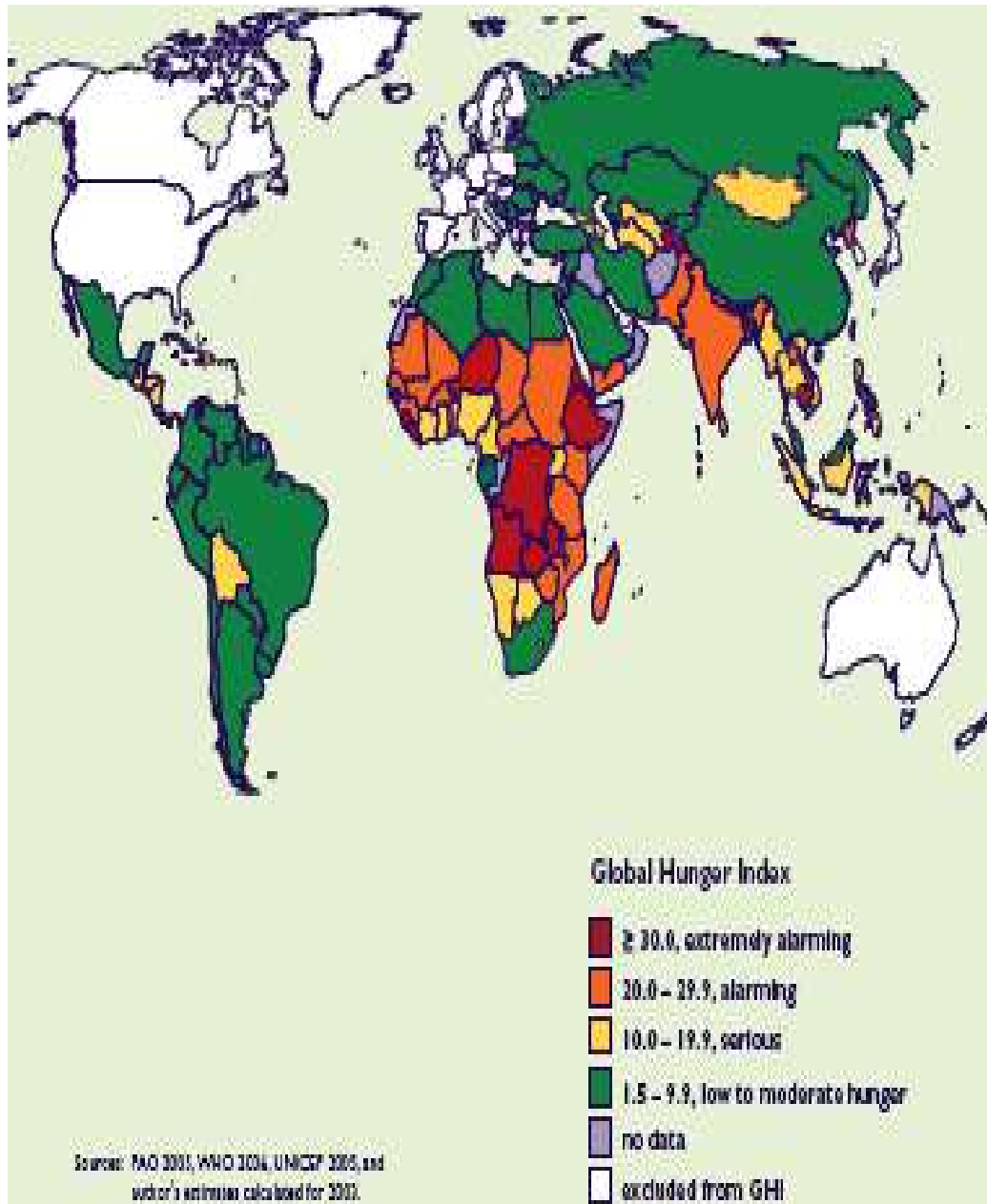
- **People's Union for Civil Liberties Vs. Union of India** 2007(1) SCC 719
- **People's Union for Civil Liberties Vs. Union of India** (september 2010)

Over 50 million food is lying idle in the premises of the FCI, although there was widespread hunger and starvation death taking place in the country, especially in the drought-affected areas of Rajasthan and Orissa, is the brutal reality of Indian socio-economic challenges.

Denial of right to food is itself denial to human rights

Schemes : Administrative actions

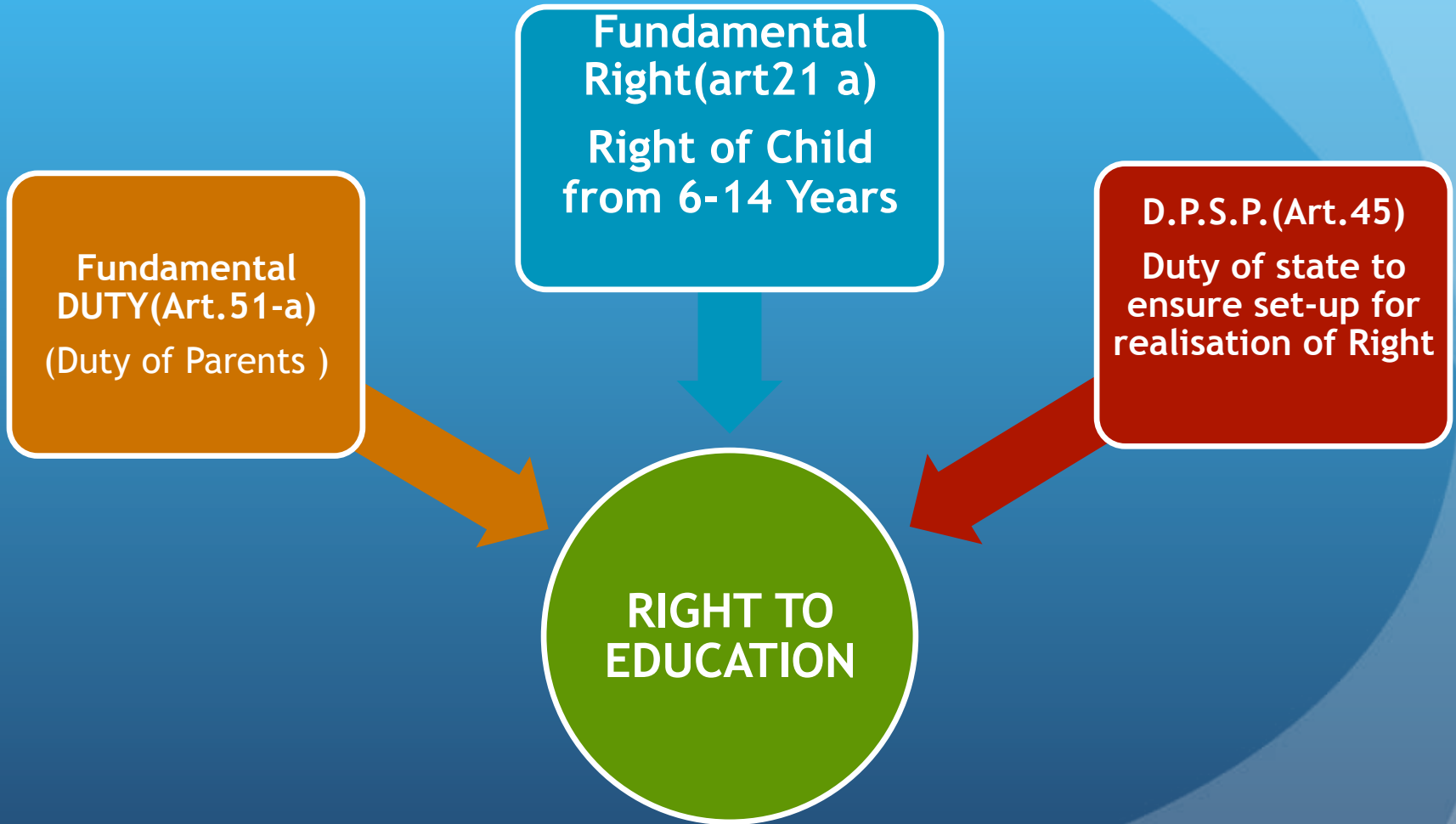
- Annapurna Schemes, 2000-01
- Antyodaya Anna Yojana (AAY)
- Applied Nutritional Programme (ANP) : Planning Commission
- Emergency Feeding Programme, 2001
- Integrated Child Development Services Schemes (ICDS), 1975
- Mid Day Meal Scheme, 1995
- National Food Security Mission, 2007
- National Maternity Benefits Schemes
- National Nutritional Policy (NNP), 1993
- Nutritional Programme for Adolescent Girls, 2002-03
- Public Food Distribution Scheme (PPS)
- Sampoorna Grameen Rozgar Yojana (SGRY)
- Scheme for Supply of Food Grains to SC/ST/OBC/Hostels/Welfare Institutions, 2002-03
- Targeted Public Distribution Scheme (TPDS)



- News of starvation deaths & farmers' suicides from many states
- Stagnant agricultural production, and falling food availability
- Unemployment has increased from 4 to 8% in ten years
- Regional disparities are increasing
- IMR stagnating around 60 per 1000, it is 46 in Bangladesh
- Immunization coverage fell from 60 to 40% in 5 yrs
- ***There is no will to improve administration in poor states***

Right to Education

- Constitutional (86th) Amendment 2002



- Art.28. Freedom to attend religious instructions and religious worship in certain educational institution.
- Art. 29(2) No discrimination regarding admission with in educational institutions receiving govt. aids
- Art 30 Right of minorities to establish and administer educational institutions.
- Art 41 Right to work, to educations and public assistance in certain cases.
- Art 46 Promotion of educational and economic interests of SC-ST & other weaker sections.

Right to education: Indian S.C.'s Endeavour

- Mohini Jain vs. State of Karnataka (1992) 3scc 666: “ The right to life includes right to education”
- Unnikrishnan vs.State of A.P.(1993)scr 594: “ The right to education the base of human rights”
- P.A. Inamdar vs. State of Maharashtra, Mordern school vs. Union of India.(2005)
- “The judiciary has made right to education as fundamental right yet it is for the state to secure to all the people, therefore the question of enforcement of this right is a significant part of the entire campaign to declare it as a fundamental rights.”



EDUCATION OF GIRLS

Drop out rate is high
Out of every 10 girls who enter school only 6
Reach class five
Every third of the girls who enter class 1 drop out
After class 2

A Reality: Right to Education

- An estimated 95 percent of the rural population living in 8,26,000 habitations have a primary school within one km
- 85 percent population have an upper primary school within three km.
- 176,523 habitations did not have access to primary schooling

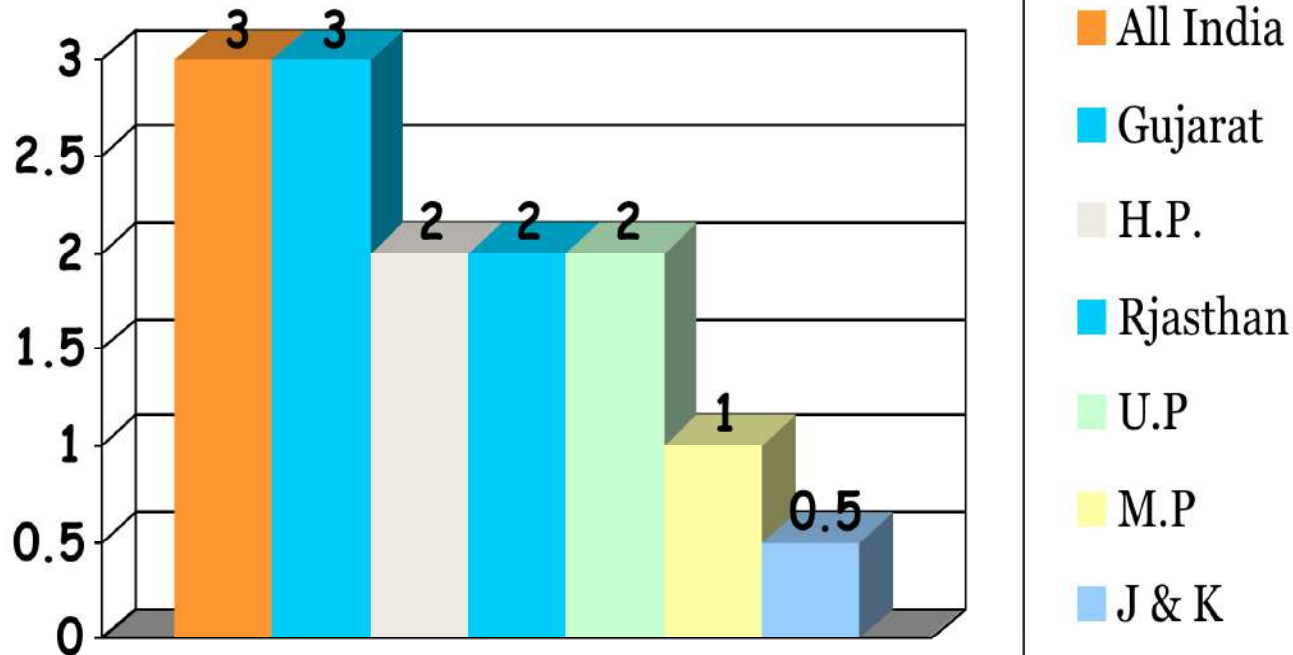
Right to Education: Schemes

- The Government of India is implementing more than 120 schemes and programmes for the welfare and development of children and women through more than 13 Ministries and Departments
- Very little coordination between these departments.
- Accessibility: high pupil-teacher ratio. (national average is 46:1 with some states high as 68).

Right to education: A Reality

. Challenge of Access: States having schools less than all India average

No. of Secondary Schools (Classes IX-X) per 100 Sq. Km.



- Out of approx. 200 million children in the age group 6-14 yrs, only 177 million were enrolled.
- About 39% of primary and 54% of upper primary students drop-out of school.

Need of 'Pro child rights based policy on education'

- Identifying minimum qualitative entitlements
- Respecting non-negotiable principles to implement the entitlements like non-discrimination, equality and child participation
- Ensuring that relationships between child-State, parent-child, parent-State and community-child/parent-State are clearly defined
- Fixing social accountability on different actors and creating a grievance redressal mechanism. This would entail clear identification of duty-bearers at different levels- Centre, State, District, Local level bodies and school.
- National planners and programmers must direct their investment not only to inputs and outputs, but to outcomes.

Right to health : An approach for India



“ It is my aspiration that health finally will be seen not as a blessing to be wished for, but as a human right to be fought for”

Mr. Kofi Annan

Characteristics of health care in India

- Vast and complex (Public-private, urban- rural)
- Diseases still associated with socio-cultural-religious beliefs.
- 29% of global burden of diseases (16% population).
- Health services continue to be supply pushed than demand driven.
- Indigenous system: contracting and complementing each other.
- World bank survey recently revealed that 93% of all hospitals, 80-85% of doctors, 90% of patient are in private sector.

The Right to Health

*Health is a state of complete physical,
mental well-being and
not merely the absence of disease or
infirmity*

Right to Health: Constitutional Edifices

- Art. 21: Right to life and personal liberty.
- Art 39(e): Health and strength of workers, men-women and workers.
- Art 39(f): Developing healthy manner and standard of living .
- Art 42: Securing just and humane conditions of work and maternity relief.
- Art. 47: State's Endeavour to rise the level of nutrition and standard of living.

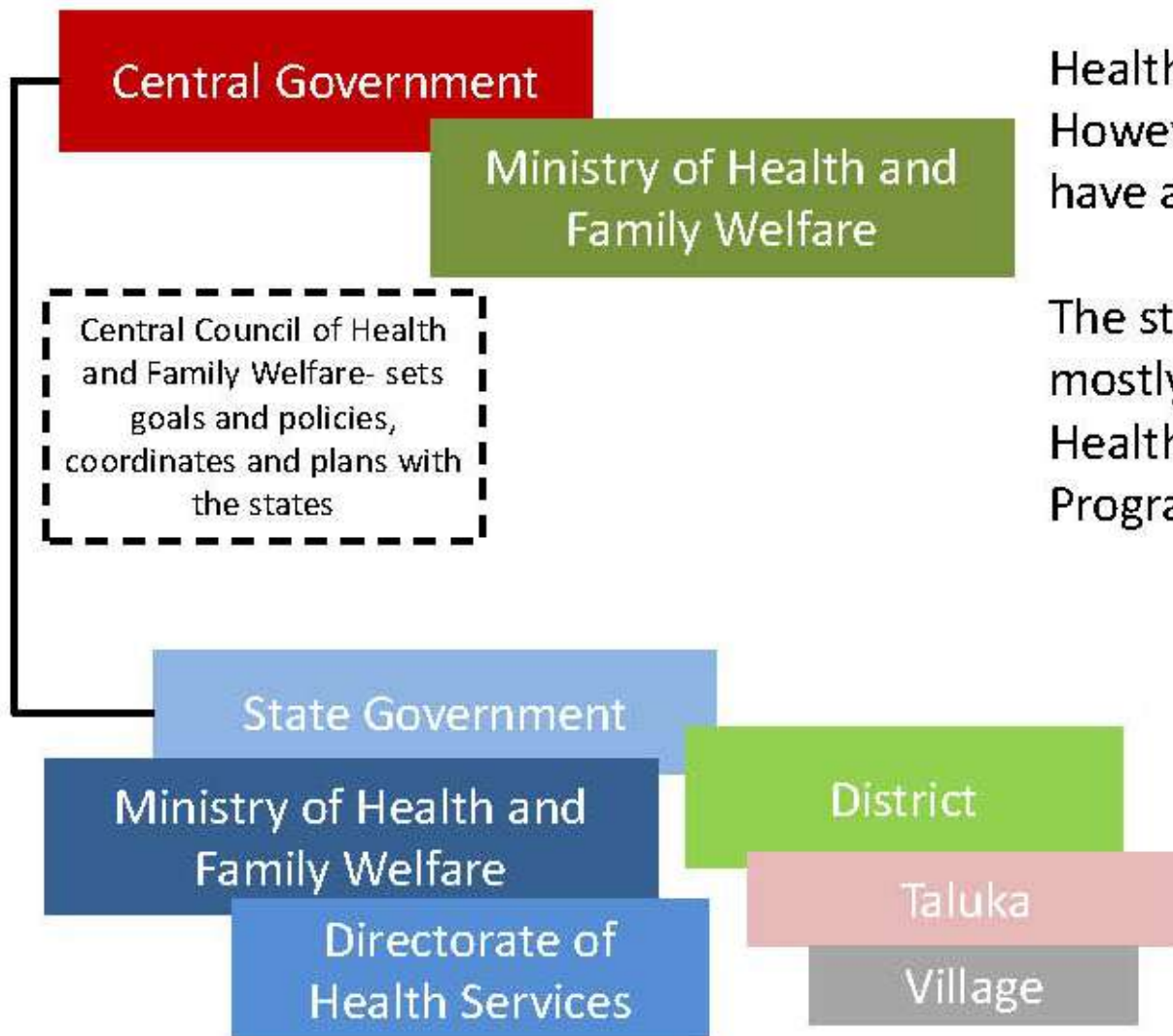
Legislations protecting Right to Health

1. Workmen's Compensation Act 1912
2. The Child Marriage Restraint Act 1929
3. The Red Cross Society Act (Allocation of Property) 1936
4. The Drugs and Cosmetic Acts 1940
5. The Indian Nursing Council Act 1947
6. The Dentist Act 1948
7. The Pharmacy Act 1948
8. The Drugs (Control) Act 1948
9. The Minimum Wages Act 1948
10. The Factors Act 1948
11. The Employees State Insurance (ESI) Act 1948
12. The Plantation Labor Act 1951
13. The Mines Act 1952
- The Prevention of Food Adulteration Act 1954 (Amended 1956, 1964, 1971, 1976, 1986)
16. The Indian Medical Council Act 1956 (Amended 1964, 1993 and 2001)
18. The Maternity Benefit Act 1961
19. The Registration of Birth and Death Act 1969
20. The Medical Termination of Pregnancy (MTP) Act 1971 (Rules

Schemes

1. National Vector Borne Disease Control Program (NVBDCP)
2. National Filaria Control Program
3. National Leprosy Eradication Program
4. Revised National TB Control Program
5. National Program for Control of Blindness
6. National Iodine Deficiency Disorders Control Program
7. National Mental Health Program
8. National AIDS Control Program
9. National Cancer Control Program
10. Universal Immunization Program
11. National Program for Prevention and Control of Deafness
12. Program on Prevention and Control of Diabetes, CVD and Stroke
13. National Tobacco Control Programm
14. National Polio Eradication Mission.

Public Health Structure



Health is a State subject in India. However many states do not have a clear Health Policy.

The strategies of the states is mostly guided by the National Health Policy and the National Programs.



Health Expenditure

Central Government : 05.2%

State Government : 15.2%

Municipal Corp. & Private Donors: 01.3%

Insurance & Third party: 03.3 %

Out of Pocket : 75%

Includes Primary (Prevention, Promotion, Curative), Secondary and Tertiary Health Care (Major Surgeries)

90% patients need Primary/Secondary Care

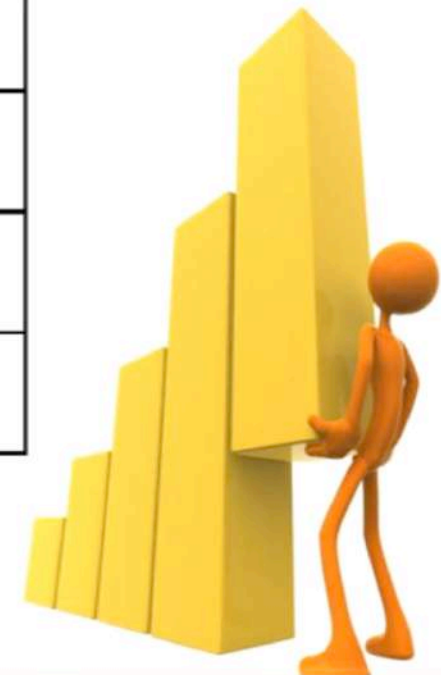


- Total Expenditure on health in India is nearly 4.5% of the entire GDP

- Government spending is less than 25% against the average spending of 40-50 % in other developing countries.

- Health care expenses were responsible for over 50% of all cases of decline into poverty. (NSSO Survey)

State	1987	1998	2006
Andhra Pradesh	7.88	5.44	3.57
Karnataka	8.23	5.85	3.73
Maharashtra	9.38	4.29	3.55
Orissa	8.50	4.82	4.34
Punjab	10.52	4.93	3.31
Rajasthan	14.48	7.97	4.65
Tamil Nadu	10.04	6.28	4.76
Uttar Pradesh	9.08	6.03*	4.94
West Bengal	9.73	6.43*	4.78



GOVT EXPENDITURE ON HEALTH IS DECREASING YEAR BY YEAR

Challenges regarding Right to health

- **Access to Healthcare** is limited by:
 - Dysfunctional Physical Infrastructure
 - Lack of adequate human capital
 - Poor healthcare financing
- **Public Healthcare Delivery system.**
Buildings in a dilapidated condition
- **Shortage of medical men/women power.**
- **Inequity of resource- distribution**
 - Urban / Rural
88% towns have healthcare facilities Vs. 12% villages
86% medical professionals are in urban areas
 - Income Inequity, Gender Inequity, Social Inequity.

Right to work

Constitutional Edifice

- Art 21: Right to life and personal liberty.
- Art 41: Right to work, educate and to public assistance in certain cases.
- Art 38: State to secure a social order for the promotion and welfare of the people.
- **Right to just and favorable conditions of work (Art 24 and Art 42)**
- **Equal Remuneration (Art 43)**
- **Right to form the trade union (Art 19(1)c)**
- **Right to social security (Art.41)**

The right to work: S.C. Court's Endeavour

- “Right to life includes right to work”

Delhi development horticulture Employee's union vs. Delhi administration (AIR 1992 SC 789)

- “Enforcement of art 38 and 43 is State's duty and needs serious endeavors from state's side”

K Rajendran vs. state of Tamilnadu (1982 2scc 273)

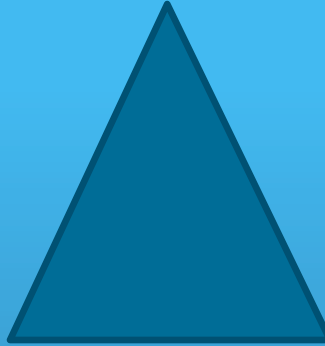
- “..... That is true that Article 38 and article 43 of the constitution insists that the state should endeavor to find sufficient work for the people so that they may put their capacity to work into economic use and earn fairly good living.”

Olga Tellis vs. Bombay Municiple Corporation (AIR 1986 SC 180)

Schemes for Unemployment Reduction

- TRYSEM
- DWCRA
- IRDP (Integrated Rural Development Program)
- NREP (National Rural Employment Program)
- RLEGP (Rural Landless Employment Guarantee Program)
- JRY (Jawahar Rojgar Yojna)
- JGSY (Jawahar Gram Samrudhhi Yojna)
- NRY (Nehru Rojgar Yojna)
- PMRY (Pradhan Mantri Rojgar Yojna)
- EAS (Employment Assurance Scheme)
- MGRGS (Mahatma Gandhi Rural Employment Guarantee Scheme)

Economic Growth Drip Centric
1950-70



Employment & Poverty Centric
1970-90

Unemployment & Right to Work Centric
1991 - Till Date

Long Term

Short Term

Self
Employment

Production
Centric

Complementary
Employment
Centric

The right to work: challenges

- Jobless Growth:
 - 1990-2010 GDP growth 8.5%, employment growth 1.99%
- Population explosion and increase in labour supply:
- Inappropriate educational and training system.
- Irregularity and corruption in implementation of schemes.
- Coordination and integration between schemes.

Summing Up

- Economic-Social realisation through ‘pro- people’ approach of the administration.
- Common framework of human rights: economic & social rights are as demandable as civil-political rights. In respect to India these rights claims primary status for realisation of C-P rights.
- Progressive Realisation by creating the conditions of human security.
- Priority should be on:
 1. Integration of rights perspective and approaches to plans, programmes and processes.
 2. Strengthening civil societies.
 3. Public awareness and education on economic-social rights.