

# Justiciability of Right to Food

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**Abstract-** The right to food aims to bring about a change in the lives of millions of persons suffering from hunger. To ensure a world free from hunger this right needs to be justiciable. Justiciability means a mechanism which ensures every instance of violation of the right can be redressed by the judiciary or any quasi judicial organ. There are two sets of mechanism for the redressal of the right to food, one at the international level represented by the International Court of Justice and the United Nations treaty bodies and the other at the domestic level. At the international level the justiciability largely depends on the consent of the states while at the domestic level the legal frame work is highly inadequate. Therefore the international organisations and the Nation States needs to wake by to the sufferings of the hungry and starving population and take steps to make the right to food a truly justiciable right.

**Index Terms-** Justiciability, Right To Food, Supreme Court on hunger in India

## I. INTRODUCTION

The World Declaration on Nutrition, 1992 defined the right to food as the access to nutritionally adequate food which is safe for human consumption. Jean Ziegler describes the right to food as a right of assistance when a person is unable to take care and includes above all the right to feed oneself in dignity.<sup>i</sup> Jean Ziegler further described the right to food as an entitlement to be free from hunger when the Nation State has resource both economic and institutional to ensure adequate nutrition to everybody.<sup>ii</sup>

The constitution of most of the Nation States guarantees the fundamental right to a dignified life. The right to life does not merely means animal existence. Life guaranteed under the constitution does not only include physical existence. It includes the right to live with human dignity.<sup>iii</sup> Since the need for food to satisfy hunger is the basic necessity of life and without food life becomes impossible, the right to food is thus protected under the right to life.

The doctrine of *ubi jus ibi remedium* holds that where there is a right, there is a remedy. Thus, every right is redress able. The great German philosopher Immanuel Kant defined justiciability as the power to award to each person that which is due to him under law.<sup>iv</sup> Therefore, if the right to food is legally recognized in the country, according to Kant it is justiciable. Without the means of enforcement there can be no real right. The essence of the right to food is that it creates certain obligation and it allows the holder to demand the redressal of the violation of the right. The right to food is a human right. As a consequence, its full realization can be pursued by everybody whose right has been

violated. Justiciability means the capacity to be considered as a subject of dispute before a judicial or a quasi judicial body.

However, the judiciary is not the only medium to bring enforceability to the right. The administrative and the political authorities also play an important role in making the right enforceable.

According to Amartya Sen in a democratic country, the political freedom to create a government responsible to the people helps to safeguard the economic freedom of the people.<sup>v</sup> Therefore freedom from starvation can be redressed through the participatory democratic process.

Jean Dreze argues that in India, most people are unable to participate effectively in the democratic process due to economic insecurity, lack of education, social discrimination and other forms of disempowerment. They are unable to use the political system to redress the violation of their rights. This actually perpetuates their deprivation and they are ignored by the political system.<sup>vi</sup> Thus, in India the responsibility of ensuring the justiciability of the right to food is primarily on the judiciary. This is also true for most of the third world countries where the vulnerable population is unable to redress their rights through the democratic process. For such countries the mechanism to redress their rights is through the judiciary.

## II. MEANING OF JUSTICIABILITY OF RIGHT TO FOOD

Jean Dreze defines justiciability of the right to food as the possibility that a recognised human right can be invoked before a judicial or quasi judicial body which can determine as to whether the right has been violated and recommend appropriate measures in case of violation.

The justiciability is the ability of the judiciary or the quasi judicial authority to uphold the law through effective judicial pronouncements.<sup>vii</sup> Thus, justiciability is possible only when there is a legislation creating a distinct entitlement capable of enforcement. Whenever a right is held as a justiciable right, an adequate remedy may be provided in case of violation. The remedy can be in the form of restitution, financial compensation, non repetition or just a declaration of violation. Thus, a right is justiciable when it is recognized as a legal entitlement. This entitlement can not only be redressed through the judiciary but also other quasi judicial bodies.

## III. IMPORTANCE OF JUSTICIABILITY

The justiciability of the right to food has certain advantages. Firstly, the constitution of most of the countries of the world makes the judiciary the guardian of the rights of the people. Therefore, the judges are entrusted by the constitution to define the rights of the people. The rights enumerated by the judiciary

becomes binding before all authorities be it the administration or any other power. Similar power is not available with any other authority. Therefore, the enforcement through the judiciary is more appropriate. Secondly, advantage of enforcement of the right to food through the judiciary is that the judges apply the international standards of human rights to the national laws. Thus, through the decisions of the court a more appropriate relief can be given in case of violation of the right to food of the people. Thirdly, only the judgments of the court on the right to food can create a sense of obligation in the mindset of the administration. Usually the government looks upon the entitlements on the right to food as a kind gesture on their part, rather than redressal of the rights of the people. Fourthly, when a law is ambiguous on a point, the judiciary is the appropriate forum to clarify the position. Fifthly, the political system is unstable. Therefore, the right to food cannot be enforced through the political system. Sixthly, the doctrine of precedent is applicable to the judicial decisions. Therefore the decision of the judiciary is established as the law of the land. This shall lead to a great expansion of the right to food. India stands as an example where most of the entitlements for realization of the right to food have been implemented by the orders of the judiciary.<sup>viii</sup>

#### IV. CONSTRAINTS OF JUSTICIABILITY

The enforcement of the right to food through the judiciary also suffers from certain limitations. Firstly, the judiciary is often inaccessible to the victims of violation of the right to food. Such victims usually belong to poorest of the poor category of people and due to poverty and ignorance they are unable to take up their grievance before the judiciary. The victims and the lawyers have a very limited knowledge on the right to food.<sup>ix</sup> The entitlements for realization of the right to food are scattered in the various schemes, legislations and judicial pronouncements. If a country lacks a comprehensive legislation of right to food, the justiciability of the right becomes difficult.

In most of the countries of the world, right to food to a great extent still remains as a derivative right established through the doctrine of precedent, its justiciability therefore suffers from the drawbacks of the doctrine of precedent. In a large number of countries non-derivative provisions of the right to food find a place as constitutional goals. The constitutional goals being usually non-justiciable in nature, cannot be enforced through the judicial or quasi-judicial bodies.

#### V. JUSTICIABILITY OF RIGHT TO FOOD AND SEPARATION OF POWERS

In the developing jurisprudence, the judiciary issues orders on any legislation or policy extending the benefits for realization of the right. The courts also scrutinize the measures taken by the government for realization of the right to food in determining whether they are in compliance with the international and national obligations. Upon finding a violation, the judiciary provides relief to the victim or instructs the government to find appropriate redressal of the violation. It is sometimes argued that the right to food involves the allocation of resource and rightly belongs to the legislative and the executive sphere and the right

to food is not a justiciable right. However, the right to food like any other human right is a justiciable right under the concept of rule of law. Moreover the realization of the human right cannot be left exclusively to politically elected authorities. The political actors enjoy a large discretionary power in adopting legislations and schemes for realization of the right to food, but in case of disputes the judiciary scrutinizes the adequacy of the measures.<sup>x</sup>

The judiciary and the executive should in harmony progress towards realization of the right to food. Legal philosopher Friedmann opines that the relation between the executive and the judiciary is of cooperation rather than separation.<sup>xi</sup>

#### VI. CONCEPT OF JUSTICIABILITY OF RIGHT TO FOOD

Justiciability of the right to food may be at the national level or at the international level. The justiciability of the right to food within the national, regional and international arenas is supported by a number of national and international laws.

##### **International Laws Supporting Justiciability of Right to Food**

A number of international customary and treaty laws establish the right to food as a justiciable right at the national as well as at the international level.

##### **(a) Justiciability of Right to Food under Universal Declaration of Human Rights**

The Nation State is required under this international law to create a competent national tribunal to redress the acts of violation of fundamental rights and other statutory rights on the right to food.<sup>xii</sup> Therefore, in every Nation State right to food should be enjoyed by the people as justiciable right.

##### **(b) Justiciability of Economic Social and Cultural Rights**

The *United Nations Committee of Economic Social and Cultural Rights* have advised the Nation States to provide to the people an effective and appropriate judicial remedy so that the relief can be granted to the victims of the violation of the right to food.<sup>xiii</sup> It further advised the Nation States to provide appropriate remedy to an aggrieved individual or a group of individuals under the domestic legal system.<sup>xiv</sup> The Nation States that have ratified the *International Convention on Economic Social and Cultural Rights* have an international obligation to establish the right to food as a justiciable right.

##### **(c) Justiciability under Voluntary Guidelines of Food and Agricultural Organization**

The voluntary guidelines on the right to food seek the Nation State to create an effective domestic human rights institution or ombudsman to address the violation of the right.<sup>xv</sup> Such institution often plays a proactive role in focusing the cases of the violation of the right of the people. Therefore attention of the judiciary is drawn towards the cases of the violation of the right to food.

##### **Institutions Responsible for Justiciability of Right to Food**

The justiciability of the right to food can be through the international agency or national judicial or the quasi judicial bodies. The enforcement of the right to food by the international agency is carried out by the treaty bodies and the *International*

*Court of Justice*. These bodies show strong respect for the sovereignty of the Nation States. Therefore they adopt a softer approach of constructive dialogue to make a Nation State take steps towards realization of the right to food.

## VII. JUSTICIABILITY OF THE RIGHT TO FOOD AT INTERNATIONAL LEVEL

At the international level justiciability of the right to food can be brought about by the judicial and the quasi judicial bodies like the treaty bodies and the *Human Rights Commissions*. The judicial body created under the *United Nation Charter* for enforcement of the international law is the *International Court of Justice*. There are various treaty bodies created for implementing and monitoring the human rights obligations set forth in the treaties. There are seven main treaty bodies as a mechanism for enforcing the human rights treaties which contain provisions for the realization for the right to food.

### (a) International Court of Justice

The *International Court of Justice* (ICJ) is the principal judicial organ of the *United Nations*.<sup>xvi</sup> The statute of the ICJ is an integral part of the *Charter of the United Nations*. Therefore the members of the *United Nations* are *ipso facto* parties to the statute. The ICJ exercises jurisdiction over Nation States that are parties to the statute.<sup>xvii</sup> The ICJ also entertains disputes when the state parties through a declaration submit to the jurisdiction of the court. It is the most authoritative enforcing mechanism under the international law. A number of important decisions of the ICJ upheld the right to food of the people.

The ICJ as an enforcing mechanism suffers from certain limitations. Firstly, the ICJ takes up disputes referred only by Nation States. The court does not entertain complaints by individuals against a Nation State.<sup>xviii</sup> Therefore the ICJ cannot enforce the violation of the rights of an individual by the Nation State.

Secondly, the jurisdiction of ICJ depends upon the consent of the Nation State involved.<sup>xix</sup> This makes the enforceability of the right through ICJ a limited protection. Thirdly, when ICJ has rendered a judgment on the violation of the right, there is no international enforcing agency to enforce the judgment. The implementation of the judgment depends to a large extent upon the voluntary compliance by the Nation State. The *Security Council of the United Nations* can however take collective action against the Nation State.

### (b) Quasi Judicial Organs

There are various organs of the *United Nations* for enforcing the violation of the rights guaranteed under the international law. There cannot be an international protection of human rights unless there is a strong and effective mechanism for enforcement. Many of the international conventions have therefore created an enforcement mechanism. The treaty bodies are represented by a number of committees set as a mechanism for monitoring and implementing the violation of human rights.

#### (b) (i) Human Rights Committee.

The *Human rights Committee* (HRC) was established to implement the provisions of the *International Covenant on Civil*

*and Political Rights, 1966*. The HRC is competent under the *Optional Protocol of the International Covenant on Civil and Political Rights*, provided certain requirements have been met, to receive communications from individuals claiming to be the victims of the violation of the right. Though HRC is a mechanism to redress the violation of the provisions of the *International Covenant on the Civil and Political Rights* while the right to food basically is an economic and social right, HRC could consider the right to food through the broad interpretation of the right to life.

#### (b) (ii) Committee on Elimination of Discrimination Against Women

The *Committee on the Elimination of Discrimination against Women* (CEDW) is established under *International Convention on Elimination of all forms of Discrimination on Women*.<sup>xx</sup> Under the Protocol of the Convention, the committee can consider complaints from affected woman or from groups of women relating to the violation of the rights guaranteed under the convention.

#### (b) (iii) United Nations Human Rights Council

The *United Nations Human Rights Council* has the responsibility to protect all human rights and fundamental freedoms. The council is a subsidiary organ of the *General Assembly*. The council entertains all complaints of systematic violation of the human rights.

## Justiciability of Right to Food at the National Level

At the domestic level the justiciability of right to food depends upon firstly the recognition of international law as a part of the municipal law and secondly the legal protection of the right to food in the constitution or other legal framework of the country.

When the right to food is recognised as a constitutional right it is a structural framework which needs to be supported by adopting a supporting legal and policy framework of the country for creating a delivery mechanism, as the constitutional protection are usually scratchy in nature. However, the nature of constitutional protection is more permanent to other legal protection and the judiciary tends to make such rights immediately justiciable. The classic case to adopting the comprehensive legislation on right to food is found in the case of Brazil. The country was the first and the only country to adopt a Zero Hunger Legislation which has moved the lives of the half hungry people of Brazil which constituted one half of the population of Brazil to a life with dignity.

## Impact of International Law on Domestic Jurisprudence

The international law is of great relevance to the fast changing socio legal order of all national regimes. In many countries the international law directly becomes a part of the municipal law while in some countries the international law becomes a part of the municipal law through adaption.

Under the English system treaties are required to be adapted into the municipal law to make it enforceable.<sup>xxi</sup> In England when an ambiguity arises in a statute, the international law acts as an aid to interpretation.<sup>xxii</sup> According to the English legal system the domestic law should conform to the international

law.<sup>xxiii</sup> In such cases the justiciability of right to food largely depends on domestic legal framework.

In some legal system the treaties ratified by the Nation State are given the equivalent position to that of the constitution. The Constitution of America adumbrates the treaty as the supreme law of the land.<sup>xxiv</sup> In the American legal system the treaty is implemented by self execution.<sup>xxv</sup> The treaty prevails even over a pre-existing federal law.<sup>xxvi</sup> Under the American legal system, if a treaty is not self executing like the *Charter of the United Nations* it cannot be enforced.<sup>xxvii</sup> For such countries the right to food is a justiciable right as the international law creates strong provision for protection from hunger.

In India, the international charters are recognised in the same manner as the expressed provisions of the Indian Constitution.<sup>xxviii</sup> The judiciary in India uses the international charters of organisations in the nature of *United Nations*, to interpret the provisions of the Constitution.<sup>xxix</sup> In India the language of the Constitution can be stretched to give effect to a provision of a treaty without doing violence to the Constitution.<sup>xxx</sup>

#### **Resource implication viz-a-viz Justiciability of Right to Food**

The strongest objection to the justiciability of the right to food is that the right to food is an economic and social right therefore it involves a resource implication and is a non justiciable right. The poor countries cannot recognize the right to food as a justiciable right. The lack of resource is a valid defence, however the courts can examine the measures taken for realization of the right in context to the available resource.

The ultimate goal of every treaty is the full realization of the rights flowing from the treaty. However as the right to food has a substantial resource implication the realization of the right to food to a great extent depends upon the economic capacity of the Nation State.<sup>xxxi</sup> The Nation State is required to progressively realize the right to food of the people. This means that the Nation State is required to take positive step in the above direction.<sup>xxxii</sup> This balances the right to food with the economic capacity of the Nation State. The realization of the right to food cannot be differed indefinitely on the ground of economic incapacity.<sup>xxxiii</sup> However the extent of the adequacy of the steps could vary according to the economic capacity of the Nation State.<sup>xxxiv</sup> The Nation State should undertake diverse steps as short time measures which will lead to the realization of the right to food of the people.

The realization of the economic rights should be as quick as possible. The Nation State is required to realize the economic rights on the basis of the present resource available with the Nation State rather than postpone it to the future economic growth.<sup>xxxv</sup>

The lack of political will cannot be given the colour of resource constrain as an excuse for a Nation State to deny the right to food.<sup>xxxvi</sup> In *Grootboom and others-versus-Government of the Republic of South Africa and others*<sup>xxxvii</sup> the Constitutional Court of South Africa found that the Nation State should allow the progressive realization of the economic right to housing of the larger section of the people to the extent of the available resource.

The Nation States cannot be permitted to deny any constitutional rights on the ground of financial constrain. In *Hussainara Khatoon-v-Home Secretary, State of Bihar*<sup>xxxviii</sup> the Supreme Court of India has held that a constitutional right cannot be denied on the ground of financial constrain, *Rhem-v-Malcolm*<sup>xxxix</sup> the Supreme Court of the United States of America has held that law does not permit the government to deny a constitutional right on the ground of poverty. Lord Blackstone as observed that constitutional requirements cannot be measured in dollar consideration.<sup>xl</sup> Therefore the Nations where the right to food is a constitutional right, it is justiciable.

#### **VIII. CONCLUSION**

According to the international law the right to food is subject to progressive realization by the Nation States as per their economic capacity. However protection from hunger is established as justiciable right.

The justiciability at the international level is weak and is dependent on the consent of the violating party. Therefore at the international level the right is not truly justiciable.

On scrutiny of the legal framework of countries it is found that most of the countries have yet to establish it as a legally recognised right under the national legal framework. Under such circumstance, the justiciability of right to food largely depends on the proactive role played by the judiciary of the country and the policy of adaption of international law and the treaty laws in the legal system.

The judiciary through various case laws and tools of interpretation established the fundamental right to food as a justiciable right in many countries for example India. The Supreme Court and the High Courts in India are invested with the power to bring about justiciability to the right to food. The Supreme Court of India is situated in Delhi, the capital of India. The High Courts are situated in the capital of each state. The High Courts of all states are situated in big cities. No state has a bench of a High Court at any rural area where poverty is concentrated. The Supreme Court and the High Court are the judicial organs to enforce the right to food in India. They are situated beyond the means and reach of the food vulnerable section of the society who are suffering from hunger and starvation. Under such circumstance General Comment 12 paragraph 32 and 34 are violated.

The justiciability of the right to food of the hungry and starving population depends to a large extent in the incidents of public interested litigation. The hungry population who are unable to manage two square meals a day cannot afford the time and money required to enforce their rights. The statistics of hunger clearly indicate towards this fact. Therefore, even if the legal structure establishes the right to food as a justiciable right, there may be structural denial in the justiciability of right to food. The legal structure should ensure justice in the door step of the poor. Measures in the nature of free legal aid should be taken to enable the poor to knock the doors of the judiciary in case of violation of their right to food as the hungry cannot be burdened with litigation costs to enforce their right to food.

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