



# DELHI HIGH COURT'S SOCIO-ECONOMIC RIGHTS ADJUDICATION: SOME INSIGHTS

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**Abstract**—Indian constitutionalism has always occupied a central place in the global academic discourse on socio-economic rights. This is especially due to the design of the Indian Constitution (where socio-economic rights are constitutionalized in the form of non-enforceable ‘Directive Principles of State Policy’) and the creative interpretations of the post-emergency Supreme Court. Nearly all academic studies, however, have focussed singularly on the jurisprudence of the Supreme Court. The decisions of the other constitutional courts in India - the High Courts have largely gone unstudied. Thus, there is lacunae in academic literature on Indian socio-economic rights enforcement. In this essay, we seek to examine the Delhi High Court’s socio-economic rights adjudication. More specifically, we assess the interlinking of rights, nature and design of remedies, measure its decisions vis-à-vis theories of judicial review, explore the tools used to balance information asymmetry and highlight the manner of judicial activism. The method of analysis is interpretive.

## I. INTRODUCTION

The discourse on human rights has been characterized by a cleavage between civil and political rights (‘CP rights’) on one hand, and socio-economic rights (‘SE rights’) on the other. SE rights have been placed on an unsteady pedestal and made the subject of great controversy and debate. The traditional distinction, between CP rights and SE rights is said to be thus. The former, which are characterized as ‘negative rights’ and ‘libertarian rights’, are viewed as individual

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protections against the state.<sup>1</sup> The latter, characterized as ‘positive rights’ and ‘communitarian rights’, are seen as “private entitlements to protection by the state”,<sup>2</sup> which involve resource allocation to achieve its ends. However, vast amount of recent scholarship has been dedicated to answering the scepticism against, and misconceptions surrounding SE rights.<sup>3</sup>

In the global SE rights discourse, India occupies a significant position. Its judicial decisions, especially those of the Apex Court, have come to be globally recognized and applied. This distinct position is due to two primary reasons: *first*, its singular constitutional scheme wherein the Directive Principles of State Policy occupy a noteworthy position. *Second*, the creative judicial interpretation received by the provisions at the hands of the Apex Court, has been tantamount to virtual enforcement. This has been done in a myriad ways. A few examples would be the wide interpretation of Article 21,<sup>4</sup> using the distinction between enforceability, admissibility, justiciability and cognizability<sup>5</sup> to its advantage, evolution of creative judicial remedies such as social action litigation and immediate public access to judgments, as well as the borrowing of private law principles such as injunctions as well as interim orders in the arena of public law adjudication.<sup>6</sup>

However, a general observation we made is that most studies<sup>7</sup> that have analysed the developing jurisprudence of SE rights in India, have directed their

<sup>1</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 222 (1<sup>st</sup> ed., 2001).

<sup>2</sup> *Id.*

<sup>3</sup> For example, see HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY* 13-29, 35-64 (2<sup>nd</sup> ed., 1996), where he argues that all rights have positive and negative duties and hence CP rights and SE rights cannot be conceived in the form of positive and negative rights; See also CECIL FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* (2000).

<sup>4</sup> It has been read almost at par with the 9<sup>th</sup> amendment of the US Bill of Rights, i.e. the unenumerated rights clause.

<sup>5</sup> The equivalent part and provision in the Irish Constitution, the Direction Principles of Social Policy (Article 45), states that the provisions are not even *cognizable* by the Courts; the equivalent provision in the Papua New Guinea Constitution (Article 25(1)) provides that the National Goals and Directive Principles are non-justiciable. The Indian Courts have creatively interpreted the provisions as not barring admissibility of the case and ability of the Courts to question a failure on the part of the other branches of the Government to fulfil its reasonable obligations.

<sup>6</sup> For an excellent exposition, see S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA; TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2d ed. 2003).

<sup>7</sup> For example, see Usha Ramanathan, *In the Name of the People: The Expansion of Judicial Power*, in *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEOLIBERAL INDIA* (Mayur Suresh & Siddharth Narrain ed. 2014), S. Muralidhar, *Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate* in *ECONOMIC, SOCIAL, CULTURAL RIGHTS IN PRACTICE: THE ROLE OF JUDGES IN IMPLEMENTING RIGHTS* 23-32 (2003), S. Muralidhar, *India: The Expectations and Challenges of Judicial Enforcement of Social Rights* in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Malcolm Langford ed. 2008), Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 *Int'l J. Const. L.* 739-765 (2010), Gautam Bhatia, *Directive Principles of State Policy: Theory and Practice* in *OXFORD HANDBOOK FOR THE INDIAN CONSTITUTION* (Sujit Choudhry, P.B. Mehta, and M. Khosla ed. 2015) [Forthcoming], Manoj Kumar Sinha, *Enforcement of Economic, Social, and Cultural Rights: International and National Perspectives* 157 (2006), Prashant Bhushan, *Misplaced Priorities and*

attention to the decisions of the Supreme Court. There has been little scholarship which analyses the High Court decisions and examines its contribution to the development of SE rights. High Courts are coordinate courts and not subordinate to the Supreme Court in our constitutional jurisprudence.<sup>8</sup> One may note that since Article 14 guarantees equal protection of the laws, the adjudication of one High Court has a strong influence on the others. Under Article 215, the High Courts are Courts of Record. As a matter of judicial discipline, the Supreme Court (also a Court of Record) does not exercise Writ Powers over the decisions of the High Courts. For the purpose of this study, we have chosen the Delhi High Court.<sup>9</sup> We have limited the scope of our study to decisions rendered by the HC in the last ten years, i.e. 2005 to 2014.

In studying the contribution of the Delhi High Court to the theory, development and understanding of socio-economic rights, this paper will be restricted to a few key issues. We explore the interlinking and interrelationship of rights, the issue of remedies in SE rights adjudication, and the broader theme of judicial review of SE rights. Following these will be sections on the High Court's response to the 'institutional competence' objection, and the manner of judicial activism. While limited to some vital areas, we have attempted to do a *multi-dimensional* analysis. Consequently, our analysis encompasses rights, remedies, structure of the decisions as well as solutions and responses to academic criticism of the judicial enforcement of socio-economic rights.

## II. INTERLINKING RIGHTS: FREEDOM FROM WANT, FREEDOM FROM FEAR

In his famous 1941 State of the Union Address, President F D Roosevelt identified four freedoms that people everywhere in the world ought to enjoy – freedom of speech, freedom of worship, freedom from want and freedom from fear. Similarly, “We do not want freedom without bread, nor do we want bread without

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*Class Bias of the Judiciary*, Vol. XLIV EPW 14, 32 (2009), and Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade* in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* (Daphne Barak-Erez and Aeyal M. Gross ed. 2007). There are some exceptions where decisions of the High Courts have been studied, whilst done empirically to study the number of cases, nature of litigants, impact of decisions, etc. – Shylashri Shankar and Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India* in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri and Daniel M. Brinks ed. 2000) and SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR, AND SOCIAL RIGHTS* (2009). However no substantive analysis of the judicial enforcement of SE rights by the High Courts has been done.

<sup>8</sup> L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.

<sup>9</sup> A mix of personal and academic reasons led to our choice. One of us worked as a Law Researcher at the High Court. All the orders (and not just judgments) delivered in the period under consideration was readily available on the website of the Delhi High Court. The choice of the High Court is only intended to be a starting point; many other High Courts are equally worthy of study.

freedom”<sup>10</sup>, said Nelson Mandela on the occasion of the Bill of Rights Conference during the formative years of the Constitution of South Africa. These world leaders were offering a harmonious solution to a major ideological debate in the 20<sup>th</sup> century – whether primacy ought to be given to CP rights or SE rights. This harmonious solution is now well accepted, with the Universal Declaration of Human Rights and newer Constitutions like the South African Constitution endorsing both the types of human rights. Declarations like Vienna Declaration and Programme of Action of 1993 stated that “all human rights are universal, indivisible and interdependent and interrelated”.<sup>11</sup>

This has been well reflected in our Supreme Court’s jurisprudence. The Supreme Court, in a few landmark decisions such as *Kesavananda Bharati v. State of Kerala*<sup>12</sup> and *State of Kerala v. N.M. Thomas*<sup>13</sup> has negated the notion that Directive Principles of State Policy are subservient to Fundamental Rights.<sup>14</sup> In *Minerva Mills Ltd. v. Union of India*,<sup>15</sup> the Supreme Court reiterated its position and held that Fundamental Rights are not superior to DPSPs. Memorably, it stated “just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms”.<sup>16</sup>

Due to the scheme of the Indian Constitution, a unique adjudicative approach adopted by the Supreme Court has been that the violation of a SE right has been linked to the violation of a CP right. This is based on the notion that CP rights cannot be fulfilled without the realization of SE rights and vice-versa. For example, in *Olga Tellis*,<sup>17</sup> the Supreme Court linked the right to life under Article 21 with the right to livelihood under Article 39 because “no person can live without the means of living, that is, the means of livelihood.”<sup>18</sup> The rationale adopted by the Court was that if “the right to livelihood is not treated as a part of the

<sup>10</sup> Address on the occasion of ANC’s Bill of Rights Conference, as cited in n A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee, May 1991 (1991) 9 – 14 at 12.

<sup>11</sup> Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>12</sup> (1973) 4 SCC 225 at 879.

<sup>13</sup> (1976) 2 SCC 310 at 367.

<sup>14</sup> Most SE rights are entrenched in the Directive Principles of State Policy. Some notable exceptions, like the provision against bonded labour or the right against untouchability, are found in the chapter on Fundamental Rights.

<sup>15</sup> (1980) 3 SCC 625.

<sup>16</sup> *Id.* The early position adopted by the Supreme Court was that Directive Principles of State Policy is subservient to Fundamental Rights. P.K. Tripathi, in *Directive Principles of the State Policy: The Lawyer’s Approach to them Hitherto, Parochial, Injurious and Unconstitutional*, 17 SCJ 7 (1954) was one of the earliest critiques of this position – and his views were later accepted by the Apex Court.

<sup>17</sup> *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545.

<sup>18</sup> *Id.*

constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation”.<sup>19</sup>

Khosla argues that the approach of the Supreme Court has led to a change in the social meaning attached to SE rights and consequently an upward shift in the importance such rights. He refers to the techniques of “tying” and “ambiguation”, citing Lawrence Lessig.<sup>20</sup> Lessig discusses both these concepts in the context of construction and regulation of social meaning.<sup>21</sup> In the technique of “tying”, “the social meaning architect attempts to transform the social meaning of one act by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have.”<sup>22</sup> In the second technique of “ambiguation”, “the architect tries to give the particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first”.<sup>23</sup> The architect here, of course, is the Apex Court.

We see evidence of a similar approach by the Delhi High Court. In *Laxmi Mandal*,<sup>24</sup> a case concerning maternal healthcare for poor women who had been denied adequate pre and post natal healthcare services, the HC indulged in an exercise of interlinking of rights. The Court first linked the rights to health (including reproductive rights) and food under Article 47 and reproductive rights with the right to life under Article 21. In its judgment, the Court opined that the former are “two inalienable survival rights that form part of the right to life”<sup>25</sup> Later the Court recognized another form of interrelationship of rights. It highlighted how although the *PUCL case*,<sup>26</sup> (the parent case pending in the Supreme Court), was about the right to food, the adjudication extended to reproductive rights of the mother and health rights of an infant child. It stated that “there could not be a better illustration of the indivisibility of basic human rights...”<sup>27</sup> Here we must note that the Court interlinked rights in two ways. First, the Court linked CP rights and SE rights by arguing that Article 21 includes the right to health and food; second, the Court *internally* linked different SE rights: by noting that the right to food and the right to health are interrelated.

In the *Social Jurist case*<sup>28</sup>, a case concerning the right to education, the Delhi HC observed that Article 45, Article 21, Article 19 and the now Article 21A

<sup>19</sup> *Id.*

<sup>20</sup> Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 I.CON 4, 739-765 (2010).

<sup>21</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1009).

<sup>22</sup> *Id.*, as cited in *supra* note 19.

<sup>23</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1010).

<sup>24</sup> *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, 2010 SCC OnLine Del 2234.

<sup>25</sup> *Id.*

<sup>26</sup> *PUCL v. Union of India*, WP (C) No. 196 of 2001.

<sup>27</sup> Kindly refer to the *Laxmi Mandal* case.

<sup>28</sup> *Social Jurist v. Govt. of NCT of Delhi*, 2013 SCC OnLine Del 703 : (2013) 134 DRJ 529 (DB).

must be read together.<sup>29</sup> The HC observed that in order realize our rights under Article 19, the enforcement of Article 21 is necessary. One must however note that the Court held that basic principles on which policies must be formulated with respect to education lie not just in Article 21, but also in Part IV and part IV-A (Fundamental Duties). Thus a broader understanding of the right to education was developed by a joint reading of Article 39F (opportunities for children to develop in a healthy manner), Article 41 (right to work, education and public assistance) as well as Article 51A(k) which casts a duty on parents and guardians to provide educational opportunities for children.

*Sudama Singh v. Govt. of Delhi*<sup>30</sup> involved writ petitions seeking the intervention of the Court to rehabilitate the petitioners who were residing at ‘jhuggies’. The Court interlinked the right to life under Article 21 with the right to shelter, right to housing and the right to rehabilitation or relocation. Again, the Court did this in two ways. It not only held that denial to shelter and housing would lead to denial of rights under Article 21, but also held that “adequate housing serves as the crucible for human well-being and development, bringing together elements related to ecology, sustained and sustainable development.”<sup>31</sup> It also opined that future international instruments on housing rights “would include emphasis on the physical structure such as the provision of drinking water, sewer facilities, access to credit, land and building materials as well as the *de jure* recognition of security and tenure and other related issues...”<sup>32</sup> It cited international documents which included in the ambit of adequate housing – culturally appropriate housing, accessibility for disadvantaged groups, access to employment options, etc. This echoes a holistic reading of SE rights and identifies the interrelationship of various SE rights.

In *Mohd. Ahmed v. Union of India*,<sup>33</sup> the issue before the Delhi HC was whether a financially impoverished minor child, suffering from a rare chronic disease, is entitled to free medical treatment. The HC first linked the right to life under Article 21 with Articles 39(e), 41 and 43. After recognizing that financial constraints of the State are relevant, the Court held that in spite of that, the State cannot refuse to treat patients with chronic and rare diseases.<sup>34</sup> The governmental obligation “to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health” is held to flow from Article 21.<sup>35</sup> Article 21 also imposes a legal obligation to “ensure access to life saving drugs to patients”.<sup>36</sup> Thus, the right to health is characterized as a “constitutional right”, and the Delhi

<sup>29</sup> *Id.*

<sup>30</sup> 2010 SCC OnLine Del 612.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 2014 SCC OnLine Del 1508.

<sup>34</sup> *Mohd. Ahmed v. Union of India*, 2014 SCC OnLine Del 1508.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Government is directed to provide the petitioner with the necessary therapy.<sup>37</sup> One may note that the Court also read Articles 21, 38 and 46 together. Article 38 directs the State to strive for a just social order based on justice, social economic and political and to strive to reduce inequalities; Article 39(e) provides that the health and strength of workers not be abused; Article 41 provides for the right to work and for public assistance in case of old age, sickness etc.; Article 43 provides for living wage for workers so that they can enjoy with leisure and can take up social and cultural opportunities; Article 46 states that the State shall promote with special care the interests of backward castes. Thus the Court does not just stop at giving new social meaning to SE rights and enforcing SE rights through Article 21; the Court also actively recognizes the holistic interrelationship of SE rights themselves.

M P Singh argues in his paper,<sup>38</sup> that this “development in law”, namely that of interlinking of DPs into Article 21, has shifted the attention from DPs to Article 21. Although beginning with good intentions, he argues this trend has only expanded the base of Article 21 while highlighting the ineffectiveness and inferiority of DPs in constitutional interpretation. In response to this argument, it would be useful to note the second form of interlinking discussed above, i.e., internally interlinking different DPs to form a holistic and substantive content of SE rights. In other words, aside from interlinking Article 21 with DPs, the High Court has also identified the interrelationship of various DPs among themselves, thus giving them substantial character and enlarging their scope. Moreover, in cases like *Social Jurist v. Govt. of NCT of Delhi*,<sup>39</sup> another case by the same NGO pertaining to giving hospital beds for weaker sections of society at nominal prices by private hospitals, used the interlinking of Article 47 and Article 21 to apply SE rights horizontally.

### III. REMEDIES

In this section, we will examine the next issue, which is of remedies in SE rights adjudication by the Court.

#### A. Vindicating Khosla?

Madhav Khosla further argues in his paper,<sup>40</sup> that the model of social rights adjudication by the Indian Supreme Court differs from other models. He classifies SE rights adjudication in two ways. The first is called “systemic” social rights adjudication. In this model, he argues, the Court undertakes a judicial review

<sup>37</sup> *Id.*

<sup>38</sup> Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directives Principles - A Human Rights Perspective*, (2003) 5 SCC J-1.

<sup>39</sup> 2002 SCC OnLine Del 1286.

<sup>40</sup> Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 I.CON 4, 739-765 (2010).

of the “inherent nature of measures taken by the state.”<sup>41</sup> The systemic model includes the minimum core approach as well as the reasonableness approach to social rights adjudication. On the other hand is the “conditional” social rights adjudication model followed by the Indian Supreme Court. Here, the judicial review by the Court is limited to the implementation of the measures taken up by the State in pursuance of the social right. An example of the *Olga Tellis* case,<sup>42</sup> among others, is given to elucidate the distinction. The *Olga Tellis* case involved the question of the rights of pavement dwellers. Although the Court held that right to livelihood is a part of right to life under Article 21, and hence recognized the right of the pavement dwellers (under an assumption that eviction from the slums would lead to denial of livelihood), the remedy was only towards ensuring that proper procedure is followed during eviction as per already existing state measures. As Khosla notes,<sup>43</sup> there was no elaboration of the content of the right under Article 21, neither was there a remedy based on the recognition of a systemic right, in the form of either an individualized remedy or reasonableness remedy. The Court only held that slum dwellers who were the subject of census and those who were given identity cards, i.e., those covered under a state policy, would be entitled to alternate accommodation – which also would be determined by the State. This, he opines, resembles a “private law contractual model of adjudication”<sup>44</sup>.

We find traces of this model in the adjudication of the Delhi High Court as well. In *Court on its Own Motion v. Union of India*,<sup>45</sup> a case taken up by the Court *suo motu* upon reading a newspaper report which brought to light the incident of a destitute mother dying giving birth to a baby girl on a busy street. The first order<sup>46</sup> of the Court states, “We have been apprised that there are number of schemes, namely, Janani Suraksha Yojana (JSY), Integrated Child Develop Scheme (ICDS), The National Maternity Benefit Scheme (NMBS), the Antyodaya Yojana, National Family Benefit Scheme (NFBS), etc. When such a host of schemes are in vogue, it is really perplexing that children of this country have to breathe the first breath on the road side footpaths ... The emphasis has to be laid on mother care and should not be allowed to suffer or take a back seat despite so many measures taken by framing of the schemes.”<sup>47</sup> There is no mention of Article 21 or any of the Directive Principles. Instead, the Court chose to focus on the existing State schemes. In *Laxmi Mandal*,<sup>48</sup> the Court followed a similar approach. The Judgment begins with in the introduction, stating that “These two petitions highlight the deficiencies in the implementation of a cluster

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<sup>41</sup> *Id.*, at 742.

<sup>42</sup> *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545.

<sup>43</sup> Khosla, *supra* note 40, at 746-748.

<sup>44</sup> *Id.*

<sup>45</sup> 2011 SCC OnLine Del 2424.

<sup>46</sup> Order dated 1.9.2010.

<sup>47</sup> *Id.*

<sup>48</sup> *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, 2010 SCC OnLine Del 2234.

of schemes...<sup>49</sup> The judgment closes with a set of general directions, wherein the Court states, “certain general directions ...also become necessary to be issued ... these directions are necessary to ensure that the benefits under the various schemes are not denied to the beneficiaries...”<sup>50</sup> Although there is a mention of rights under Article 21, the focus is on the implementation of already existing schemes.

The reason for this approach seems to be elaborated in *Jagdish v. DDA*,<sup>51</sup> where the Court in its judgment stated, “This Court is conscious that the petitioners in the instant case are not seeking the enforcement of some policy of the state but of specific statutory provisions in the form of the Act [The Delhi Development Authority Act, 1957] and the MPD [Master Plan for Delhi]. Thus the Court need not be detained by any issue arising out of non-enforceable rights which might depend on the ability and resources of the state.”<sup>52</sup> The remedy given by the Court also reflected a similar sentiment: “The respondent DDA will have to be issued directions to evolve a meaningful scheme in a time bound and transparent manner for resettling the petitioners consistent with the MPD 1962 and 2001 norms...”<sup>53</sup> Thus the Court focussed on the aspect of implementation of already existing housing schemes.

However, one may well argue that the application of this model is not universal. As we will see, cases such as *Mohd. Ahmed*, *Sudama Singh*, *Manushi Sangathan*, etc. which are discussed in this essay, follow the systemic adjudication model.

## B. Individual Remedies

Cases in which the Court has granted individual remedies *simpliciter* in SE rights cases are few and far between. Rather, the remedies are more in the nature of “two-track” remedies - which will be discussed later in this essay. Nevertheless, it will be instructive to mention two prominent cases in which the Court has granted individual remedies.

In *P.K. Koul v. Estate Officer*,<sup>54</sup> the petitioners were Kashmiri Pandits and Central Government employees who were allotted government quarters. Upon reaching superannuation from service, the petitioners’ accommodation was cancelled. The petitioners contended that this forced eviction would amount to violation of their right to housing since they could not go back to Jammu & Kashmir, where the situation was hostile. The Court held that right to adequate housing

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> WP (C) No. 5007of 2002.

<sup>52</sup> *Id.*, Judgment dated 14.7.2006.

<sup>53</sup> *Id.*

<sup>54</sup> 2010 SCC OnLine Del 4207.

is guaranteed under Article 21 and directed that: a) the the orders of eviction be quashed; b) endeavours be made to effectively rehabilitate and resettle them; c) petitioners be allowed to retain their accommodation until alternate arrangements are made; d) exemplary compensation be paid.<sup>55</sup> One may note that the form of adjudication was “systemic” – there was no existing scheme or policy; rather an inherent review of the existing policy was undertaken by the Court on the touchstone of Article 21 and international principles. A “minimum core” approach was adopted, opening the doors for further litigation. In several places, the Court stated, “international human rights law thus establishes a legal obligation for ensuring minimum welfare guarantees ... shelter and housing is a basic right of every individual which is the bare minimum to be provided ... [this situation] clearly reflects the imperative to take a to take a holistic view and for the decision makers to take a ‘minimum-needs’ based approach... .”

In *Mohd. Ahmed v. Union of India*,<sup>56</sup> as previously stated, the issue that arose before the Court was whether a child from an economically weaker section of the society suffering from a rare disease would be entitled to free medical treatment which would normally cost about rupees 6 Lakhs per month.<sup>57</sup> The Court, finding that there is no orphan drug policy in India to treat rare diseases, held that there are certain “core and non-derogable [obligations] irrespective of resource constraints.”<sup>58</sup> Locating the right to health within the right to life under Article 21, the Court held that obligation to ensure access to essential medicines is one such core obligation. The NCT of Delhi was directed to provide free treatment to the petitioner. As we can observe, the High Court has undertaken a systemic review of SE rights. Similarly here, just as in *P.K. Koul* case, the Court recognized a “minimum core” remedy.

### C. Two-Track Remedies

Rather than providing only an individualized remedy or a reasonableness remedy, the trend of cases seem to point towards a remedy that is more accommodative of many of the theoretical concerns raised against traditional forms of judicial enforcement of socio-economic rights – the “two-track” remedy.<sup>59</sup> Briefly, the concerns raised against providing a minimum core remedy are that individualized remedies often tend to favour the rich due to the economics of litigation;<sup>60</sup>

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<sup>55</sup> *Id.* at Result.

<sup>56</sup> 2014 SCC OnLine Del 1508.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> This form of remedy may certainly not be peculiar to just the Delhi High Court (vis-à-vis the Supreme Court) – perhaps the individual “minimum core” remedy is more unique – but there seems to be failure to identify or recognize this form of remedy by academic commentators. Considering the scope of this paper, we will presently stick to an analysis of the Delhi High Court cases.

<sup>60</sup> See FB Cross, *Error of Positive Rights*, 48 UCLA L. Rev. 857 (2001).

that the Court will not be able to adjudge the content of “minimum core”;<sup>61</sup> and that the decision of the Courts will not lead to systemic reforms.<sup>62</sup> On the other hand, the primary concerns raised against the reasonableness review are that it provides no incentive for litigants to come before the Court; and that the government may not adequately and effectively respond to the Court’s directions. Scholars like Kent Roach have argued that there is a need to go beyond this “remedial dichotomy” and have suggested the “two-track” model, based on some decisions of the Inter-American Court of Human Rights.<sup>63</sup> In these cases, interim or immediate remedy is given to the petitioners, along with orders to ensure systemic relief – which is essentially a combination of both models in the remedial dichotomy.

A few examples may justify this claim. In *Amit Ahuja v. Union of India*,<sup>64</sup> the petitioner was suffering from Haemophilia and was unable to afford medical treatment. In its first order,<sup>65</sup> the Court accepted the suggestion of the counsel for NCT, Delhi, to release an amount of Rs. 5 Lakhs from the Delhi Arogya Nidhi Scheme and also directed that a Board of Directors be set up to examine the patient and intimate the Court about the prognosis. After it came to light a few days later that the funds under the Arogya Scheme was exhausted, the Court asked<sup>66</sup> the State Government as to a) what scheme is available for haemophilia patients, and b) why the petitioner’s case does not fall under such a scheme. Thereafter in the subsequent hearing,<sup>67</sup> the NCT of Delhi through its counsel produced a policy for treatment of haemophilia patients. The Court directed that the petitioner be treated under such a policy. We see that the Court here was concerned with not just the individual petitioner but also the existence of a systemic policy. Even in *Laxmi Mandal*, earlier highlighted as a case adopting a conditional model of social rights adjudication, the remedial model was two-track. While the petitioners were given compensation according to existing schemes as well on the basis of constitutional rights violation, the Court also issued suggestive as well as mandatory orders to review and revise the implementation of existing schemes due to several shortcomings.

*Sudama Singh* is another interesting case in point. A batch of petitions, which were clubbed together, sought “the intervention of [the] Court to rehabilitate and relocate the petitioners who were residing at various slum clusters in the Capital city to a suitable place and [to provide] them alternative land with ownership rights...”. The question that arose was whether existing schemes for rehabilitation and resettlement excluded persons living on the “right of way” and

<sup>61</sup> Govt. of South Africa v. Grootboom, CCT 11/00, 4 October 2000.

<sup>62</sup> *Id.*

<sup>63</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June, 2005, Int. Am. Ct. H. R. (Ser. C.) No. 125.

<sup>64</sup> 2014 SCC OnLine Del 1370.

<sup>65</sup> Order dated 5.3.2014.

<sup>66</sup> Order dated 26.3.2014.

<sup>67</sup> Order dated 1.4.2014.

whether such a policy would be unconstitutional. The Court found that there is no such policy; and even if there is such a policy, it would be violative of the right to shelter under Article 21. Thereafter, picking up from the *Joe Slovo Community v. Thubelisha*<sup>68</sup> case, the Court directed the respondents to “engage meaningfully” with those sought to be evicted. Brian Ray calls this the “engagement” approach,<sup>69</sup> wherein the Government is to dialogically engage with the evictees to reach a satisfactory agreement. One example is the *51 Olivia Road* case,<sup>70</sup> wherein the petitioners of purportedly unsafe buildings prayed that they not be evicted. After an interim order<sup>71</sup> directed the government to have a dialogue with the evictees, an agreement was reached that the buildings would only be refurbished instead of being destroyed. The Delhi High Court in this case stressed greatly that the engagement must be “meaningful”: it noted that systematic surveys have to be carried out with appropriate protocols keeping in mind the special nature of the Jhuggi dwellers. For example, the Court mentioned that documentation has to be preserved carefully since they are “literally a matter of life for a jhuggi dweller”, and that visits have to be carried out at a time when most family members are to be found – since most family members work invariably from morning to night. The key point here is to note that the systemic reforms are applicable to not just the petitioners, but also to future evictees from among the jhuggi dwellers. In fact, the Court also directed that “wide publicity” be given to the operative portions of the judgment in local languages among residents of jhuggi clusters to make them aware of their rights.

#### **D. Of Supervision and Dialogue: Structural Interdicts**

In this sub-section, we will note the use of supervisory jurisdiction by the High Court. Mitra Ebadolahi in her paper<sup>72</sup> aims to arrive at a suitable model of adjudication for socio-economic rights cases. She notes that declaratory or prohibitory orders are “limited as tools for broader social change”.<sup>73</sup> Mandatory orders, she opines, have their own drawbacks, due to concerns of institutional legitimacy and competence, the possibility that the government’s obligations will remain imprecise due to orders being too general, and the nature of the order being such that it aims to settle the issue “once and for all”.<sup>74</sup> One solution, she therefore says, is to use a remedial technique called “structural interdict”, since

<sup>68</sup> CCT 22/08(2009) ZACC 16 (10 June 2009).

<sup>69</sup> Brian Ray, *Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy*, 9 Wash. U. Glob. Stud. L. Rev. 399 (2010).

<sup>70</sup> *Occupiers of 51 Olivia Road v. City of Johannesburg*, (2008) 5 BCLR 475 (CC).

<sup>71</sup> Order dated 30.8.2007, as cited in David Landau, *The Reality of Social Rights Enforcement*, Harvard International Law Journal, Vol. 53, No. 1, Winter 2012.

<sup>72</sup> *Using Structural Interdicts and The South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83 NYU L. Rev. 1565 2008.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

it takes care of the above concerns. Citing Currie and Waal,<sup>75</sup> she points out that structural interdict involves multiple steps: the Court identifies inconsistency with the constitution;<sup>76</sup> it mandates that the Government evolve a new plan or rectify an existing one to fulfil its constitutional responsibilities;<sup>77</sup> it prepares a timeline within which the Government comes back with its suggestions and reports;<sup>78</sup> there is then a dialogue between the Court, the other branches of the State as well as the litigants to assess the plan;<sup>79</sup> after discussion, a final plan, including the government proposal as well as the Court suggested amendments is concretized through a judicial order.<sup>80</sup> In case of non-compliance with the order, provisions for contempt of Court could be availed.<sup>81</sup> She then notes some High Court cases in South Africa, which have successfully used the tool of structural interdict.<sup>82</sup> She lists out the advantages of using the structural interdict, the substance of it being that concerns of institutional legitimacy and competence are taken care while retaining supervisory jurisdiction and promoting dialogue between various branches of State.<sup>83</sup> The disadvantage may be the possibility that the Government may simply not comply with the Court orders.<sup>84</sup>

The Delhi High Court cases have followed a similar pattern, which has hitherto remained unnoticed by academic observers. For example in *Manushi Sangathan v. Govt. of Delhi*,<sup>85</sup> the petitioners were an NGO litigating on behalf of rickshaw pullers in Delhi. The Delhi High Court, held that the cap in licences for rickshaw puller, the “owner-plier” policy, and certain policies permitting arbitrary confiscation and scrapping of rickshaws are unconstitutional.<sup>86</sup> In addition, the Court also directed that: (a) zoning restrictions, due to which rickshaws could not ply on some roads, be reconsidered, and (b) alternate arrangements be made to ensure immunity from harassment. In doing so, they used the tool of “continuing mandamus” as developed in *Vineet Narain v. Union of India*,<sup>87</sup> directing the government to report back with suggestions, keeping the case pending for further adjudication.<sup>88</sup> The case remains open to this day. Similarly in the *Court on*

<sup>75</sup> Iain Currie and Johan de Waal, *Remedies*, in THE BILL OF RIGHTS HANDBOOK 217 (Iain Currie and Johan de Waal eds.). They in fact note that “the structural interdict is arguably the only really effective remedy [for violations of socio-economic rights]”.

<sup>76</sup> *Supra* n. 71, at 1591.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> For example, *City of Cape Town v. Rudolph*, (2004) 5 SA 39 (C).

<sup>83</sup> *Supra* n. 71.

<sup>84</sup> *Id.*

<sup>85</sup> 2013 SCC OnLine Del 5169.

<sup>86</sup> *Id.*, order dated 10.2.2010. See proviso to Bye-law 3(1) of the Municipal Corporation of Delhi Bye-laws governing rickshaws.

<sup>87</sup> (1998) 1 SCC 226.

<sup>88</sup> Indeed, continuing mandamus bears close resemblance to structural interdicts. However, in issuing structural interdicts, the focus is on receiving the opinion of the government and dialogue

*its Own Motion* case,<sup>89</sup> the Court took the assistance of amicus, social activists and the counsel for NCT who came up with suggestions to tackle this issue.<sup>90</sup> The Court then directed the State Government to consider the proposal and file an affidavit within 4 weeks.<sup>91</sup> The Government filed the counter-affidavit, which the Court found to be unsatisfactory on the touchstone of Article 21.<sup>92</sup> It directed the implementation of the suggestions and continued to monitor the progress.<sup>93</sup> Later in the same case, the Court with the help of amicus and counsel for NCT, suggested guidelines for running the shelter homes, and also took up the issue of de-addiction centres.<sup>94</sup> Again, the Government was asked to report back on the suggestions.<sup>95</sup> In subsequent hearings, not only the counsel but also various secretaries and officers of the Government attended the hearings and proposals were accepted on behalf of the State Government.<sup>96</sup> Thus there is an identifiable pattern of constant dialogue along with Court supervision.

#### IV. IN DEFENCE OF JUDICIAL REVIEW

In this section, we will consider David Bilchitz's defence of judicial review of constitutional rights and test whether the Delhi High Court's adjudication on socio-economic rights offers significant support to Bilchitz's claim.

In his work "*Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*,"<sup>97</sup> Bilchitz offers a multi-fold but brief argument in support of judicial review. The advantages he offers in favour of judicial review include that of advantage of time, insulation from politics, expertise on rights violation, lesser likelihood of bias, greater accountability, and the possibility of 'particular' decision making.

In this essay we will consider two of the above arguments:<sup>98</sup> first, with respect to the advantage of time. The argument is that majoritarian institutions of the political class often have to take decisions in a short span of time since the officials and representatives are involved in multifarious issues. The Court on the other hand does not have any time limit and may engage in matters with extended deliberations over time. With respect to the greater possibility of

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among the various stakeholders, whereas continuing mandamus is issued in a variety of situations: to monitor investigations, to ensure implementation of Court orders, etc.

<sup>89</sup> Court on its Own Motion v. Union of India, 2011 SCC OnLine Del 137.

<sup>90</sup> *Id.*, Order dated 20.10.2010.

<sup>91</sup> *Id.*

<sup>92</sup> 2011 SCC OnLine Del 137.

<sup>93</sup> *Id.*

<sup>94</sup> WP (C) No. 5913 of 2010, Order dated 23.3.2011.

<sup>95</sup> *Id.*

<sup>96</sup> WP (C) No. 5913 of 2010, Orders dated 1.4.2011 and 25.5.2011.

<sup>97</sup> DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* (1<sup>st</sup> ed. 2007).

<sup>98</sup> The other arguments are forceful in principle.

‘particular’ decision making, the argument is that legislative decisions are likely to be general in nature applying to a broad section of society, whereas Court cases, whilst applying general laws and policies, engage with individual and specific groups.

The advantage of time is pronounced. For example the *Manushi Sangathan* case discussed above was a Writ filed in 2007 and is still pending at the time of writing. The case consists of at least 52 orders passed till date. The prolonged litigation must not be construed as a delay, since many of the orders are substantive in nature and the case is kept pending for monitoring purposes – including the use of structural interdicts and continuing mandamus as discussed above. Likewise the writ petition in *National Campaign for Dignity & Rights of Sewerage & Allied Workers v. MCD*<sup>99</sup> has been pending since 2007 and has had about 43 orders passed so far. Substantive in nature, these orders encompass compensation and constitutional torts as well as directions to implement suggestions on improving the working conditions of sewerage workers. It may be useful to note that after the passage of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, a parallel writ pending in the Supreme Court, in *Safai Karamchari Andolan v. Union of India*<sup>100</sup> was disposed of. However, the Delhi High Court case was kept pending. In fact, a recent order<sup>101</sup> directed the respondents to file affidavits giving the status of compliance with provisions of the Act. Thus the advantage of ‘time’ may be more pronounced in the case of High Courts.

Coming to the argument that highlights the advantage of ‘particular’ decision making, Delhi High Court cases are a testimony in support. The *Mohd. Ahmed* case discussed above dealt with a boy suffering from a rare Gaucher disease. The only scheme in place was a general health scheme, the Delhi Arogya Kosh. However the funds were insufficient as the treatment was expensive. Moreover, due to the rarity of the disease, the drug prices were expensive. This was magnified due to the absence of an orphan drug policy in the India. The Court on observing this, noted that it cannot direct the government to frame a particular policy, and hence chose to give suggestions and then pass an order in favour of the petitioner directly under Article 21. In the *Amit Ahuja* case, also discussed above, the petitioner was suffering from haemophilia. The petitioner’s case was earlier treated only under a general Arogya Nidhi scheme, whose funds soon ran out. Only after the Court’s intervention, the Government was able to produce a specific policy for the petitioner and haemophilia patients. Thus it is evident that these cases demonstrate considerable support for Bilchitz’s claims.

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<sup>99</sup> 2008 SCC OnLine Del 948.

<sup>100</sup> (2014) 11 SCC 224.

<sup>101</sup> Dated 23. 7.2014.

## V. THE PROBLEM OF COMPETENCE

Among the debates that figure prominently in the socio-economic rights discourse is the question of *constitutionalization* of socio-economic rights. In other words – the question of whether socio-economic rights must be entrenched in constitutions or left to the discretion of the government and the pressure of public opinion.

Many object to the constitutionalization or legalization of socio-economic rights on the basis of libertarian theories of justice. Briefly, the proponents of such a theory point out that constitutionalization or legalization of socio-economic rights would entail redistribution – and redistribution would be unjust since it would mean that the coercive apparatus of the state transfers money from the rich to the poor.<sup>102</sup> However, scholars have pointed out that even civil and political rights entails redistributions – and that all fundamental rights (civil and political, as well as social and economic) have indivisible and interrelated philosophical foundations.<sup>103</sup>

Others object only to the constitutionalization – arguing that socio-economic rights must be left in the domain of ordinary law or policy schemes, since entrenchment would take away the possibility of flexibility with changing social, political and economic situations.<sup>104</sup>

However, outside the area of political philosophy, scholars of constitutional theory argue against constitutionalization on a further ground. They point out that constitutionalization would, in most cases, entail judicial review of redistributive policies. This follows from constitutional logic – if socio-economic rights are entrenched in the constitution, the judiciary would be appointed as the guardian of such rights – in the same manner as that of civil and political rights.

The objections that arise in case of judicial review of socio-economic rights are twofold – i) institutional competence and ii) institutional legitimacy.<sup>105</sup> The latter is the objection that the judiciary is usually an unelected and unaccountable body, and thus is not a 'legitimate' body to play a part in the redistribution of resources. The former is the objection that the structure of the judiciary is such that the members do not have the *expertise* to deal with issues of policy and

<sup>102</sup> See generally, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (Wiley Blackwell 2001). Cf. JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press 1999). Note that this argument is normative – many constitutions have inherent redistributive designs.

<sup>103</sup> HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY* (2nd ed., Princeton University Press, 1996), 13-29, 35-64. See also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (OUP 1999).

<sup>104</sup> See Cass Sunstein, *Against Positive Rights*, 2/1 East Eur. Constit'nal Rev. 35 (1993), in the context of post-communist countries.

<sup>105</sup> For a good summary of the debate and its responses, see Cecile Fabre, *Constitutionalizing Social Rights*, 6 J. Polit. Phil. 263 (1998).

redistribution. It is not disputed – for the purpose of this paper – that resource allocation requires a certain level of expertise.

The idea is that an information asymmetry exists between the judiciary and the executive. In other words, the executive is better equipped to deal with policy issues vis-à-vis the judiciary. Two solutions may be envisaged– either to bar judicial review, or bridge the information asymmetry.

The Supreme Court’s interpretation of the Indian constitutional scheme was to identify socio-economic rights under the Directive Principles of State Policy as enforceable rights under Article 21.<sup>106</sup> The merit of such an interpretation is not the subject of the paper. Thus the second solution must be the subject of scrutiny – bridging the information asymmetry. The Indian Supreme Court has employed various methods, including the appointment of amicus curiae, expert commissioners and reliance on expert reports.<sup>107</sup> In this essay, we will study the methods employed by the Delhi High Court.

## A. Amicus Curiae and Polycentric Conversations

In *Court on its Own Motion (suo motu)*,<sup>108</sup> the Delhi High Court took suo motu cognizance of a case reported in *The Hindustan Times*. The newspaper reported that a destitute woman had died giving birth to a baby girl on a busy street. Lamenting the state of maternal health, the Court wondered why a number of schemes that existed were not implemented. In its first order,<sup>109</sup> the Court appointed Colin Gonzalves (Senior Advocate, HRLN) as the amicus curiae. In a subsequent order,<sup>110</sup> the Amicus submitted his suggestions and the Court gave four weeks for the State to respond. With the co-operation of the counsel for the State, the Court then directed some interim relief and gave further directions to continually monitor the issue (based on the Amicus’ suggestions).<sup>111</sup>

In subsequent hearings, the Court inexplicably delved into distinct issues, such as the maintenance of de-addiction centres. Here, the Court initiated a polycentric conversation. The Court in its initial order,<sup>112</sup> requested Senior Counsel Arvind Nigam to file a report after visiting the locations. It was then directed that the senior officials of the Public Works Department and the Department of Child and Women Development be present.<sup>113</sup> The next day, the senior officials of various departments were present. Based on suggestions from various quarters – the

<sup>106</sup> This is a theme which we explored in Part I.

<sup>107</sup> A useful case study is *PUCL v. Union of India*, WP (C) No. 196 of 2001 – popularly called the “right to food” case.

<sup>108</sup> *Court on its Own Motion v. Union of India*, 2011 SCC OnLine Del 137.

<sup>109</sup> WP (C) No. 5913 of 2010, dated 1.9.2010.

<sup>110</sup> WP (C) No. 5913 of 2010, dated 20.10.2010.

<sup>111</sup> 2011 SCC OnLine Del 137.

<sup>112</sup> WP (C) No. 5913 of 2010, dated 23.3.2011.

<sup>113</sup> WP (C) No. 5913 of 2010, dated 30.3.2011.

State of NCT and its multiple departments, the Court passed orders to ensure cleanliness and upkeep of the de-addiction centre.<sup>114</sup> Therefore a polycentric conversation as well as the assistance of the amicus' report was used as a tool to bridge the information asymmetry.

## B. Brandeis Briefs

When the constitutionality of a statute limiting maximum working hours was challenged before the United States Supreme Court in *Muller v. Oregon*,<sup>115</sup> then lawyer (and future Supreme Court Justice) Louis Brandeis was hired to represent the State of Oregon. Brandeis' brief in the case prominently included socio-economic statistics as opposed to legal arguments. Such a brief came to be known as the 'Brandeis brief' and served as a model for future cases on health and workers' rights.

In *Laxmi Mandal v. Deen Dayal Harinagar Hospital*,<sup>116</sup> the Court requested Dr. Prakasamma, Director, Academy for Nursing Studies and Women's Empowerment Research Studies to conduct a 'maternity audit' of the circumstances of the death of one Ms. Shanti Devi, a poor woman who died giving birth to a child. The idea was to not just look at the *immediate, medical* reasons for her death, but the socio-economic factors *leading* to her death. Legal arguments would clearly be of little consequence here, if the Court was to both understand and pass useful orders with reference to the facts. This is reflected in the first point of the report filed by Dr. Prakashamma: "direct cause of Shanti Devi's death was the Extensive Haemorrhage (PPH) with Retained Placenta. However, there were many indirect and contributing factors to her death, which broadly include, her dismal socio-economic status which denied access to needed resources and services, and her poor health condition which is a culmination of anaemia, tuberculosis and repeated, unsafe pregnancies."<sup>117</sup> This opinion of the expert was given due weight both in the analysis of facts as well as in the final orders. This is a unique measure adopted by the Delhi High Court and reminds one of the 'Brandeis' approach to socio-economic problems in the legal realm.

## C. Judicial Commissioner

In *National Campaign for Dignity & Rights of Sewerage & Allied Workers v. MCD*,<sup>118</sup> the Court entertained a petition pertaining to the right to livelihood, health and dignity of the sewerage workers or the *safai karamcharis*. The Court recognized that before intervening in the issue, present circumstances and state of affairs must be determined: "We are also of the view that any process of

<sup>114</sup> WP (C) No. 5913 of 2010, dated 1.4.2011.

<sup>115</sup> 52 L Ed 551 : 208 US 412 (1908).

<sup>116</sup> 2010 SCC OnLine Del 2234.

<sup>117</sup> *Id.*

<sup>118</sup> 2008 SCC OnLine Del 948.

evaluation of the existing systems, the feasibility of reforms in the same would require to be monitored. This can, in our opinion, be done more effectively if the agencies concerned have an opportunity to first interact with each other and evaluate the options available to them. That process could be undertaken before a local commissioner or a committee appointed by this Court as has been done in many cases involving public interest...<sup>119</sup> The appointment of commissioners is certainly not unique to the Delhi High Court. In the much discussed *Right To Food case*,<sup>120</sup> the Supreme Court appointed commissioners to suggest measures and oversee implementation of orders.

In the instant case however, the Delhi High Court took a perhaps unprecedented step. “To save cost and yet make the process effective and speedy,” the Division Bench asked a brother Judge, Justice Muralidhar, to preside as the authority to hear various points of view and propose measures. Justice Muralidhar held several sittings, heard all stakeholders and suggested ameliorative measures. This is perhaps an extraordinary order in judicial creativity, where a sitting Judge himself acted as a commissioner to a parallel division bench. Furthermore in this case, after interim directions were given by the Court, it appointed a special committee comprising senior bureaucrats and the petitioner organization to oversee implementation of its directions.

#### **D. Expert Reports**

The Court has always utilized multiple reports of external experts or petitioner organizations in reaching its conclusion. In the aforementioned case of sewerage workers, the Court relied on a special report prepared by the Delhi Commission for Safai Karamcharis.<sup>121</sup> In *Sudama Singh v. Govt. of Delhi*<sup>122</sup> (also noted earlier in this essay), a case dealing with jhuggi dwellers and their right to livelihood and shelter, the Court relied on several reports and documents – Special Rapporteur’s Guidelines on Relocation of the Displaced, UN Committee on Economic, Social and Cultural Rights’ ‘Concluding Observations on India’, and the Urban Poverty Report. These observations were cited in order to carve out relief for the jhuggi dwellers who were to be evicted from the jhuggis. The reports highlighted the state of affairs and also suggested remedial and ameliorative proposals to minimize rights violations. Similarly in a matter relating to free hospital services for poor patients (*Social Jurist v. Govt. of NCT*<sup>123</sup>), the Court relied on recommendations made in Justice Qureshi Committee Report.

As we see above, the Court has taken several ‘bridging’ efforts, to take care of the ‘competence’ objection to judicial review of socio-economic rights. This is

<sup>119</sup> *Id.*, as cited in order dated 2.8.2008.

<sup>120</sup> PUCL v. Union of India, WP (C) No. 196 of 2001.

<sup>121</sup> WP (C) No. 5232 of 2007, order dated 25.4.2012.

<sup>122</sup> 2010 SCC OnLine Del 612.

<sup>123</sup> 2007 SCC OnLine Del 473.

an addition to the long line of creative measures adopted by Indian constitutional courts.

## VI. JUDICIAL ACTIVISM AND JURISTIC ACTIVISM

In a well-known essay, published as an introduction to a book on Justice K. K. Mathew's judgments<sup>124</sup>, Prof. Upendra Baxi distinguishes between *judicial* activism and *juristic* activism.<sup>125</sup> While the approach of the Indian Supreme Court in the 1970s and 1980s has largely been labelled as 'activist', Prof. Baxi labels the judgments as *juristically* active but *judicially* restrained. We must understand the distinction between the two.

Let us first understand Prof. Baxi's concept of 'communication constituencies'<sup>126</sup>. When we accept judges and the judiciary as institutions of 'law-making' (vis-à-vis law declaration), it is clear that pronouncements are *also* directed at parties *external* to the instant litigants. Thus the judiciary authoritatively *communicates* its law making decisions to other groups – appellate judiciary, legislative draftsmen, police, prison administrators, etc.<sup>127</sup> A unique group that the appellate and constitutional judiciary communicates its decisions to is the bar.

Having understood 'communication constituencies', we may now proceed to the notion of 'juristic activism' vis-à-vis judicial activism. Prof. Baxi explains the former as "the introduction and elaboration of new ideas and conceptions without at the same time actually using these in deciding the case at hand"<sup>128</sup>. Juristic activism by design "is intended to address the bench and the bar constituencies, as well as all kinds of governmental agencies, concerning possible lines of *future* developments of law in the area"<sup>129</sup>. A *judicially* activist judge, on the other hand, applies the "new ideas and conceptions" *contemporaneously*, i.e., to the instant facts of the case.

In this section, we will use this thesis to characterize the decisions of the Delhi High Court. In doing so, we use a couple of case studies.

<sup>124</sup> Upendra Baxi, *Introduction*, in K. K. MATHEW ON DEMOCRACY, EQUALITY AND FREEDOM (Upendra Baxi ed., 1978).

<sup>125</sup> Prof. Baxi later revised his views. According to him, the term judicial activism is theoretically unsound. He instead terms what is commonly known as activism as 'adjudicative leadership'. See Upendra Baxi, *Public and Insurgent Reason: Adjudicatory Leadership in a Hyper-Globalizing World* in GLOBAL CRISES AND CRISIS OF GLOBAL LEADERSHIP 161-178 (Stephan Gill ed., 2011). For the purposes of this essay, we will stick to his original classification.

<sup>126</sup> *Supra* 68, pg. xii -ff.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* Emphasis in the original text.

## A. The Case of Slum Dwellers

The case of *Olga Tellis v. Bombay Municipal Corpn.*<sup>130</sup>, is cited as a classic case of juristic activism coupled with judicial self-restraint. In a momentous decision, the Supreme Court's Constitution Bench laid down that right to life under Article 21 would include the right to livelihood. The Court also opined, by 'common sense', that eviction would lead to a violation of the right to livelihood and thus consequently a violation of Article 21. However, the impugned statute (Bombay Municipal Corporation Act) was held to be constitutional despite providing for eviction without notice. This was justified, according to the Court, since there is no right to encroach. Even in the final orders, though the Court directed that alternate sites must be given at places "which the Government considers reasonable", it was not a condition precedent. Moreover, the Court did not explore any right against eviction and its final order was directed towards minimum protection post the eviction.

In *Sudama Singh v. Govt. of Delhi*<sup>131</sup>, the Delhi High Court once again reiterated the fundamental right to shelter of the jhuggi dwellers (as against the 'right of way' claimed by the government). After citing several foreign case law and international law describing the modalities of the right to shelter, the Court directed "the respondents to engage meaningfully with those who are sought to be evicted"<sup>132</sup> as a condition precedent to eviction (consultation with respect to alternate sites). It also directed all surveys and engagement with jhuggi dwellers be done with special sensitivity to their needs – for example, using digital documents (since documents are often "a matter of life" for jhuggi dwellers), visiting the survey area multiple times (due to odd hours of their work), etc. In its final orders, the Court directed that the relocation site must have all the basic amenities consistent with dignity rights. Moreover, the judgment is directed at an explicit 'communication constituency' – it was held that the Delhi Legal Services Authority distribute the operative portion of the judgment in the local language among the jhuggi dwellers. Thus we see a *judicially* and *juristically* active Delhi High Court in a similar issue. We will see a similar pattern in the following cases.

## B. The Case of Manual Scavengers

The petition in *Safai Karamchari Andolan v. Union of India*<sup>133</sup>, was filed as a Writ Petition for violation of Articles 14, 17, 21 and 23, and for the enforcement of the then Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. The Supreme Court passed orders from time to time – but once the Prohibition of Employment as Manual Scavengers and their

<sup>130</sup> (1985) 3 SCC 545.

<sup>131</sup> 2010 SCC OnLine Del 612.

<sup>132</sup> *Id.*

<sup>133</sup> (2014) 11 SCC 224.

Rehabilitation Act, 2013 was passed, the Court laid down the broad scheme of the statute and disposed of the petition.

The 2013 statute was also noticed by the Delhi High Court in a parallel petition pending before it.<sup>134</sup> The Delhi High Court had passed orders from time to time before the passing of the statute. However, once the 2013 Act was passed, the Court directed the state authorities to file affidavits showing compliance with provisions of the statute (S. 5, S. 6 and S. 11 as well as survey provisions) within four weeks. The case was not disposed of and continues to be heard to this day.

### C. The Case of Medical Treatments

In *State of Punjab v. Ram Lubhaya Bagga*<sup>135</sup>, the government had changed its medical policy for serving and retired employees. The policy restricted the medical reimbursements to a particular extent. When challenged before the Supreme Court, the Court reiterated that the right to life includes the right to health when read with Article 47. However, the Court held that financial considerations are a practical reality and held that the state may limit health schemes according to its financial health.

In *Mohd. Ahmed v. Union of India*<sup>136</sup>, we noted earlier in the paper that the petitioner was an economically weak child seeking medical treatment for a rare disease (Gaucher). The petitioner had exhausted general health schemes of the government. The Court once again opined that Article 21 include the right to health. The Government pleaded that the right to health is subject to financial constraints – since the treatment was expensive. The Court opined that although the right to health is progressively realizable, “certain obligations” are core and non-derogable – and essential medicines must be provided without the defence of resource constraints.

These case studies show that the Delhi High is not just juristically active – but also judicially active. The application of the juristic development is both contemporaneous as well as futuristic.

## VII. CONCLUSION

A study of the Delhi High Court’s adjudication on SE rights reveals valuable results and patterns. At the outset, the High Court has reflected the Supreme Court’s approach of interlinking CP rights and SE rights contained in the

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<sup>134</sup> National Campaign for Dignity & Rights of Sewerage & Allied Workers v. MCD, WP (C) No. 5232 of 2007, order dated 23.7.2014.

<sup>135</sup> (1998) 4 SCC 117.

<sup>136</sup> 2014 SCC OnLine Del 1508.

Constitution by acting as an adept architect of social meaning. Furthermore, we identified the recognition of ‘internal’ links among various SE rights themselves.

We then noted that the Delhi High Court has relied on the “conditional” social rights adjudication model in a few instances. We have proceeded to observe that cases in which the High Court has provided individual remedy – while they are few in number, they are prominent and significant, laying down new parameters for SE rights adjudication. The Court has favoured the provision of “two-track remedies”, which involve the granting of both immediate remedy to petitioners, as well as orders to ensure systemic relief. Additionally, we see the employment of “structural interdicts”.

Further, we have noted that the HC’s adjudication supports Bilchitz’ argument in favour of judicial review. First, the advantage of time which is evident from the High Court’s long-term monitoring of the State in various cases. Second, the advantage of ‘particular’ decision making is also visible in the High Court’s adjudication on SE rights. The Court has engaged with individuals and groups in a manner which would not have been possible by the Legislature.

There is also plenty of attempt to respond to the objection of institutional incompetence – in the form of polycentric conversations, appointment of amicus briefs, Brandeis briefs and appointment of commissioners. Moreover, we see that the design of judicial review is not just restricted to *juristic* activism, but also extends to *judicial* activism.

The key message emerging from our study is that the High Court has contributed significantly to debates and discourse on human rights. The innovation is not only procedural in nature, but also substantive. Some theories advanced by scholars around the world find reflections in High Court cases. Therefore this oft-neglected area of study deserves further exploration. We are aware that many of the decisions draw on the previous work by the Apex Court. But this only enhances the value of this essay, since it is useful to analyse whether the High Courts are applying the Supreme Court precedents in letter and spirit. Our essay itself was limited in two ways – we analysed only the Delhi High Court, and narrowed down our analysis to decisions between 2005 and 2014. A future researcher may find it useful to analyse other High Courts as well as a longer stretch of decisions.