

NOT A NUMBERS GAME: A CONSTITUTIONAL ARGUMENT TO INCREASE COVERAGE UNDER THE NATIONAL FOOD SECURITY ACT, 2013

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Is it constitutionally permissible to further constrict the already narrow right to access subsidised food grains by calculating the eligible beneficiaries on the basis of outdated population data? Although, the answer to this query must necessarily be in the negative; unfortunately, this is exactly what has been done through §9 of the NFSA which imposes an artificial restriction, unsupported by any ground level data. Legislatively, over 100 million people will be deprived of this most basic and fundamental of human rights. This article, therefore, seeks to pose a constitutional challenge to §9. Although, the Act has been in vogue for over half a decade, the extremely deleterious consequences of the artificial exclusions imposed by §9, have only exacerbated the heartrending human tragedies that have been wrecked on the most economically precarious due to the COVID-19 pandemic, which has, therefore, been used as a case study to propose some structural reforms to the NFSA. Indisputably, the process of evolving and structuring policies to suit the aspirations of a vast country, is a gargantuan task; the need of the hour is to engage policymakers in a debate to rethink such provisions and guarantee nutrition for one and all.

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I. INTRODUCTION

“That future is not one of ease or resting but of incessant striving so that we may fulfil the pledges we have so often taken and the one we shall take today. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity.

The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over”.¹

- Jawaharlal Nehru, Tryst with Destiny

On March 26, 2020, two days after the announcement of a nation-wide lockdown in the wake of the current COVID-19 pandemic, eight-year old Rakesh Musahar allegedly died of starvation in Arrah’s Jawahar Tola slum of Bhojpur District in Bihar.² His family has admitted to not having cooked a meal at home since the lockdown was imposed on March 24 till Rakesh’s death. No autopsy was carried out by the local administration for

¹ Pandit Jawaharlal Nehru, Address to the Constituent Assembly: A Tryst with Destiny (August 14-15, 1947).

² Umesh Kumar Ray, *COVID-19 Lockdown: 8 Year Old Dies of Hunger as Family Struggles to Make Ends Meet*, THE WIRE, March, 30, 2020, available at <https://thewire.in/rights/bihar-starvation-deaths-lockdown> (Last visited on July 11, 2020).

ascertaining the cause of death. The ration card issued to the family was in the name of Rakesh's grandmother and since her death, for the past one year, they had not been issued a fresh ration card or food grains, on the basis of the old card. Garwaha district of Jharkhand reported four starvation deaths during the national lockdown.³ At least 167 starvation deaths have been reported in the country since the beginning of the lockdown and we are still counting.⁴

India's first Prime Minister welcomed independence with the promise of *swaraj*: the freedom to control one's life and destiny.⁵ Independence was, for India's teeming millions, only the beginning of a journey to strive for conditions which could lead to *swaraj*. However, even after 73 years of independence, we have not been able to fully secure and guarantee them, the most basic requirement to attain *swaraj*: food and nutrition. In 2019, India was ranked 102 out of 117 countries in the Global Hunger Index with the highest child wasting rate, i.e. children under the age of five with low weight compared with height indicating acute undernutrition, and a situation worse than it was in 2010.⁶ It is the most food insecure country, according to the latest State of Food Security and Nutrition in the World ('SOFI') Report prepared by the Food and Agriculture Organisation ('FAO') of the United Nations.⁷ The news reports discussed earlier show that the current COVID-19 pandemic and the ensuing lockdown have acutely aggravated this situation.

Article 47 of the Constitution of India, enjoins the State to raise the level of nutrition and standard of living of the people.⁸ The right to food has been recognised as a part of the right to life by the Supreme Court.⁹ These constitutional guarantees have been operationalized through The National Food Security Act, 2013 ('NFSA' or 'the Act'). Then

³ Vivek Kumar, *In Jharkhand, a Mockery of 'Right to Food' as Lockdown Relief Measures Fail to Deliver*, THE WIRE, May 13, 2020, available at <https://thewire.in/food/lockdown-jharkhand-hunger-deaths-corruption-food> (Last visited on July 11, 2020).

⁴ Aman, et al., *Non Virus Deaths Database*, THEJESH GN BLOG, available at <https://thejeshgn.com/projects/covid19-india/non-virus-deaths/> (Last visited on July 11, 2020); Kabir Aggarwal, *PM Garib Kalyan: 144 Million Ration Card Holders Not Provided Grain in May*, THE WIRE, June 4, 2020, available at <https://thewire.in/rights/pm-garib-kalyan-144-million-ration-card-holders-not-provided-grain-in-may> (Last visited on July 11, 2020).

⁵ Prof. G Mohan Gopal introduced the idea of '*swaraj*' as the freedom to control one's life and destiny to the authors. See also Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all Minorities*, Vol. 2(3), NUJS L. REV., 419 (2009) (discussing the theoretical foundations and meaning of *swaraj*).

⁶ CONCERN WORLDWIDE & WELT HUNGER HILFE, *Global Hunger Index 2019: India*, (October, 2019), available at <https://www.globalhungerindex.org/pdf/en/2019/India.pdf> at 15 (Last visited on July 11, 2020). Global Hunger Index uses four indicators: undernourishment (share of population whose calorific intake is insufficient), child wasting, child stunting (children under the age of five who have low weight for their height reflecting chronic undernutrition) and child mortality (the mortality rate of children under the age of five) at 9. The report states that 14% of India's population was characterised as undernourished, 20.08% of children face wasting, 37.09% children are stunted, and the under-five mortality rate is 3.9% at 52. It also claims that only 9.6% children are fed an acceptable diet between 6 to 23 months of age at 14.

⁷ United Nations Food and Agriculture Organisation, *Report on the State of Food Security and Nutrition in the World, 2020 - Part 2: Transforming Food Systems for Affordable Health Diets*, July 13, 2020, available at <https://sustainabledevelopment.un.org/index.php?page=view&type=20000&nr=6909&menu=2993> (Last visited on August 26, 2020); See also THE HINDU (Vaishali Bansal), *More evidence of India's food insecurity*, August 24, 2020, available at <https://www.thehindu.com/opinion/lead/more-evidence-of-indias-food-insecurity/article32424037.ece#:~:text=These%20estimates%20show%20that%20while,48.86%20crore%20in%202017%2D19> (Last visited on August 26, 2020) (Bansal explains that SOFI is based on two indicators: Prevalence of Undernourishment (PoU) which focuses on calorific intake and Prevalence of Moderate and Severe Food Insecurity (PMSFI) which measures access to 'adequate and nutritious food').

⁸ The Constitution of India, 1950, Art. 47.

⁹ *M/s Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520 ('M/s Shantistar Builders'); *Swaraj Abhiyan v. Union of India*, Interim Order dated March 22, 2017, (2018) 12 SCC 170 ('Swaraj Abhiyan').

how did we get here? Right to food activists, who have been relentlessly supporting the need for protection against hunger and starvation, at the present time, have brought the shortcomings of the NFSA and its implementation, back to the fore of public debate during the current pandemic.

The NFSA guarantees access to subsidised food grains to seventy-five percent of the rural population and fifty percent of the urban population through the Targeted Public Distribution System ('TPDS').¹⁰ However, under §9 of the Act, these percentages are converted into actual numbers, on the basis of the last published census. §9, therefore, effectively freezes the number of beneficiaries under the Act, on the basis of the last census, conducted in 2011 and does not account for the manifold increase in the population to suitably enhance coverage under the NFSA. This has reportedly left 100 million people outside the safety net of the NFSA.¹¹ §9 is the remnant of an old practice of the Indian State, to under-estimate the extent of beneficiaries under the Public Distribution System ('PDS').¹² The most effective and enduring intervention announced by the Central Government on the front of food security during the current pandemic, remains confined to NFSA beneficiaries and therefore, the present article argues that it is the need of the hour, to amend §9 and ensure access to benefits under the NFSA on the basis of actual population estimates.¹³

The article traces the legislative history of the NFSA to the PDS (Control) Order, 2001, ('PDS Order'), jurisprudence developed by the Supreme Court in the Right to Food case and the National Food Security Bill, 2011 ('NFSB, 2011') in Part II. Part III of the article analyses the main features of the NFSA and particularly the exclusionary impact of §9. In this part, the article also draws on the executive measures announced during the pandemic to argue that relief measures implemented at the time of national disasters, tend to be targeted towards NFSA beneficiaries and therefore the hardship of such extraordinary times is aggravated by exclusionary provisions such as §9. In Part IV, the article examines whether §9, to the extent that it mandates use of outdated census data, can withstand scrutiny under the general constitutional guarantee of equality under Article 14. Part V of the article attempts to make constructive suggestions for enhancing coverage under the NFSA, during the time of any national disaster, by relying on the decision in *Swaraj Abhiyan v. Union of India* ('Swaraj Abhiyan').¹⁴ It also makes interpretative recommendations for litigation, raising claims of food insecurity at the present time.

¹⁰ The National Food Security Act, 2013, §§3(2), 2(23).

¹¹ THE HINDU, *Outdated census data deprives over 10 crore of PDS: economists*, April 15, 2020, available at <https://www.thehindu.com/news/national/outdated-census-data-deprives-over-10-crore-of-pds-economists/article31350648.ece> (Last visited on April 28, 2020); SCROLL.IN, *100 million Indians fall through gaps in food safety net, economists urge rethink on Covid-19 relief*, April 15, 2020, available at <https://scroll.in/article/959235/100-million-indians-fall-through-gaps-in-food-safety-net-economists-urge-rethink-on-covid-19-relief> (Last visited on April 28, 2020); Symposium, Jean Dreze, *Poverty, Targeting and Food Security*, ENDING HUNGER (New Delhi, 2012), available at http://www.india-seminar.com/2012/634/634_jean_dreze.htm (Last visited on April 25, 2020) ('Dreze').

¹² P Sainath, *How right you are, Dr. Singh*, THE HINDU, September 14, 2010, available at <https://www.thehindu.com/opinion/columns/sainath/How-right-you-are-Dr.-Singh/article15952068.ece> (Last visited on May 6, 2020).

¹³ For discussion on the Pradhan Mantri Garib Kalyan Anna Yojana, see *infra* Part IV.

¹⁴ *Swaraj Abhiyan* (II), (2016) 7 SCC 489, 534. This particular judgment among the many orders passed in *Swaraj Abhiyan* is problematic for its characterisation of the right to food as a constitutional right as opposed to a fundamental right. However, in subsequent orders, the Court referred to the right as a part of Article 21. See *Swaraj Abhiyan*, *supra* note 9, at 3.

II. LEGISLATIVE ANTECEDENTS OF THE NFSA: FROM WELFARE TO EMPOWERMENT TO LIMITED RIGHTS

“In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems”.¹⁵

A universal PDS, accessible to all ration card-holders, providing essential commodities at subsidised rates was functioning in India, till 1997.¹⁶ In June, 1997 the Central Government decided to secure the Below Poverty Line (‘BPL’) population by excluding the Above Poverty Line (‘APL’) population from accessing food grains at subsidised prices from the PDS.¹⁷ From universal, the PDS became targeted or TPDS. The legal framework for the TPDS was laid down under the PDS (Control) Order, 2001, issued under §3 of the Essential Commodities Act, 1955.¹⁸ Surprisingly during this period, India recorded unprecedented levels of food production and stocks as well as hunger and starvation.¹⁹ Intervention by the Supreme Court to alleviate the suffering caused by this situation, resulted in a significant expansion of the limited guarantees made by the PDS Order.

In this section, the article will discuss the jurisprudence developed by the Court situating it in the context of the PDS Order; and, thereafter, the legislative measures preceding the NFSA, to contrast the approach of the Court, with that of the executive. The purpose of the analysis is two-fold: *first*, to facilitate an evaluation of the NFSA in the background of its legislative antecedents to examine the progress and compromises made by it for securing freedom against hunger and malnutrition; and *secondly*, to use the antecedents of the NFSA, to argue that the policy for making the number of beneficiaries dependent on outdated census figures under §9, was rejected by both the Court and expert bodies.

¹⁵ The Supreme Court of India, People’s Union for Civil Liberties (‘PUCL’) v. Union of India, Interim Order dated July 23, 2001, Writ Petition (Civil) No. 196 of 2001, (‘July 23, 2001 Order’).

¹⁶ Bal Krishan Negi & Seema Bathla, *‘One Nation One Ration Card’ Could Have Changed How the Pandemic Affected Migrants*, THE WIRE, June 4, 2020, available at <https://thewire.in/rights/one-nation-one-ration-card-migrant-workers> (Last visited on July 11, 2020); Dreze et al., *supra* note 11, at 4.

¹⁷ APL Families could buy food grains at 100% of economic cost from 01.04.2000 and BPL Families could buy at 50% of the economic cost. See ‘Targeted Public Distribution System (TPDS), Government of India, Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution at <https://dfpd.gov.in/pds-tpds.htm> (Last visited on August 24, 2020).

¹⁸ The Public Distribution System (Control) Order, 2001 came into effect on August 31, 2001.

§2(d) of the Public Distribution System (Control) Order, 2001 describes ‘Above Poverty Line Families’ as “those families who have been issued Above Poverty Line (APL) ration cards by the State Governments for issue of foodgrains under the Public Distribution System”. §2(g) describes ‘Below Poverty Line Families’ as ‘those families who have been identified by the State Government for issue of food grains at specially subsidised rates adopting the estimates of poverty given by the Central Government’. Apart from BPL and APL Families, the Order also extends to Antyodaya Families defined under §2(e) as ‘those poorest families from amongst Below Poverty Line (BPL) families identified by the State Governments and entitled to receive foodgrains under the Antyodaya Anna Yojana’. Therefore, Antyodaya Families were entitled to receive food grains at the rates specified by the Antyodaya Anna Yojana which are significantly less and this measure has continued under the NFSA and BPL families were entitled to get food grains at subsidised rates.

¹⁹ July 23, 2001 Order, *supra* note 15, at 4.

A. A QUESTION OF RIGHTS: PUCL V. UNION OF INDIA & ORS.

The Supreme Court engaged with the issues of starvation, malnutrition and hunger in a sustained manner for many years in the Right to Food case,²⁰ and developed an extensive jurisprudence for securing nutrition. Its approach is marked by the recognition of the interdependence of various socio-economic rights such as work, pension and food as well as a special concern for the protection of the most vulnerable groups. Most significantly, the Court was not satisfied by the mere existence of executive policies providing access to food. Rather, it ensured that the entitlements under the policies became justiciable and were implemented through the empowerment of the beneficiaries, based on a road map for transparency and executive accountability. Although the Court referred to Articles 21 and 47,²¹ it did not sufficiently theorise the basis of its orders to provide a stable anchor in Part III of the Constitution, for the adjudication of future claims. However, despite the absence of an explicitly articulated standard for adjudication of socio-economic rights, there was a conscious and deliberate attempt by the Court, to make entitlements incorporated in executive policies, justiciable. The jurisprudence developed by the Court, is significant, therefore, as a precedent for the role of constitutional courts in ensuring that social rights are effectively enforced.

Before embarking on a more detailed discussion of the orders passed in the Right to Food case, it is important to note some features of the PDS Order, which put in place the legal framework for the TPDS and was in force, when the Court came to be seized of the issue. The NFSA has also adopted the TPDS model and TPDS (Control) Order, 2015 has superseded but adopted the framework of the 2001 Order as supplemented by the guarantees of the NFSA

1. THE PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2001

The PDS Order defined and distinguished between different classes of beneficiaries, who became entitled to access food grains from Fair Price Shops through ration cards, thereby making the PDS targeted.²² These different classes are: APL Families, BPL Families and Antyodaya Families. The BPL Families were entitled to purchase grains at subsidised rates; whereas, no such provision for subsidy was made for APL Families.²³ Antyodaya Families were the poorest among the BPL Families and entitled to receive foodgrains under the Antyodaya Anna Yojana ('AAY'). AAY is a Central Government programme launched on December 25, 2000 for one crore poorest families, which has covered almost 2.5 crores households since 2005, entitling them to 25kg of food grains per family at Rs.2/kg for wheat and Rs.3/kg for rice.²⁴ This was subsequently enhanced to 35kg per family on April 1, 2002.²⁵ Guidelines for the identification of AAY Families were also laid down by the Central Government in 2004.²⁶ The State Government had to identify the beneficiaries

²⁰ See discussion *infra* Part II.A. on "A Question of Rights: PUCL v. Union of India & Ors."

²¹ The Supreme Court of India, People's Union for Civil Liberties ('PUCL') v. Union of India, Interim Order dated May 2, 2003, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/may203.html> (Last visited on July 9, 2020).

²² The Public Distribution System (Control Order), 2001, §2(1).

²³ *Id.*, §§2(d), 2(g).

²⁴ See Antyodaya Anna Yojana (AAY), Government of India, Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution, available at <https://dfpd.gov.in/pds-aay.htm>, Last visited on April 24, 2020.

²⁵ *Id.*

²⁶ The Central Government has laid down Guidelines with the following criteria for their identification:

- a. Landless agricultural labourers, marginal farmers, rural artisans/ craftsmen, such as potters, tanners, weavers, blacksmiths, carpenters, slum dwellers and persons earning their livelihood on daily basis in

under each category, for issuance of ration cards as per the estimates of the Central Government, within a period of three months from the issuance of the Order.²⁷ Before the criteria for identification of AAY families was stipulated by the Central Government, the State Government had to ensure that only the poorest among the BPL were issued Antyodaya cards.²⁸ List of identified beneficiaries prepared by an authority designated by the State Government, had to be finalised by the Gram Sabhas or local representative body.²⁹

Only ration card holders were entitled to buy food grains from the PDS.³⁰ State Governments had to ensure that ration card was not denied to any eligible person and distinctive cards had to be issued to APL, BPL and Antyodaya families,³¹ within one month of the date of receipt of the application.³² The Central Government had the obligation to provide the food grain required for distribution under the Order to the State Governments at prices decided by the Centre.³³ The Food Corporation of India ('FCI') was responsible for delivery of the food grain to the State Governments and State Governments had to ensure the delivery of the food grain to the Fair Price Shops.³⁴ The mechanism for monitoring of the functioning of the PDS was focused on functioning of fair price shops but did not create any accountability for denial of food grains to eligible persons.³⁵

The PDS (Control) Order, 2001 ushered the establishment of a legal framework for food and nutrition based on targeting and limited to provision of subsidised food grains. These limits were substantively expanded by the Supreme Court in the Right to Food case but, have, unfortunately, been restored under the NFSA. The impact of the pandemic has demonstrated that the approach adopted by the Court created a more robust protection against hunger and starvation.

2. THE RIGHT TO FOOD CASE

The public debate around the need for food security was galvanised by a writ petition filed by the People's Union of Civil Liberties ('PUCL') before the Supreme Court, colloquially known as the Right to Food case. The PUCL submitted that, drought in several parts of the country had led to the break-down of the PDS system, due to non-availability of food grains despite increased food production and accumulation of 50 million tonnes of food grains with the FCI.³⁶ It was stated that commercial prices of food had increased rapidly leading to acute shortage of food, for the poor and destitute. This had resulted in starvation of almost five crore people out of a below poverty line population of thirty-six crore people in the

the informal sector, like porters, coolies, rickshaw pullers, hand cart pullers, fruit and flower sellers, snake charmers, rag pickers, cobblers, destitute and other similar categories in both rural and urban areas;

- b. Households headed by widows or terminally ill persons/ disabled persons/ persons aged 60 years or more with no assured means of subsistence or societal support;
- c. Persons aged 60 years or more or single women or single men with no family or societal support or assured means of subsistence;
- d. All primitive tribal households.

²⁷ The Public Distribution System (Control Order), 2001, §4.

²⁸ Public Distribution System (Control) Order, 2001, Annexe, ¶1.

²⁹ *Id.*, ¶¶1(5)-(6).

³⁰ *Id.*, ¶¶2, 2(2).

³¹ *Id.*, ¶¶2(1), 2(3).

³² *Id.*, ¶2(4).

³³ The Public Distribution System (Control Order), 2001, §5; *Id.*, ¶3.

³⁴ The Public Distribution System (Control Order), 2001, §6; *Id.*, ¶¶4, 4(1), 4(6).

³⁵ The Public Distribution System (Control Order), 2001, §8; *Id.* ¶6.

³⁶ Writ Petition (Civil) No.196 of 2001. However, the complete text of the case is not available online.

country.³⁷ In this background, the PUCL prayed for greater drought relief work including provision of employment, raising of PDS entitlements and provision of subsidised food grains to all families.³⁸ For over a decade,³⁹ during which the writ petition was pending before the Court, it made entitlements under various food and nutrition, employment and pension-related schemes of the Central Government justiciable.⁴⁰ Through its interim orders, the Court adopted a comprehensive approach to attain nutritional security and not merely access to subsidised food grains by ensuring implementation of the Mid-day Meal Schemes, the Integrated Child Development Scheme and National Benefit Maternity Scheme for BPL pregnant women which culminated into their incorporation in the NFSA.⁴¹

The Court, in the very first hearing, took notice of the materials brought on record by the Petitioner and recorded that food was, in fact, available but not being distributed.⁴² On the same day, it directed opening of PDS shops within a week and provision of food to the most vulnerable, namely, ‘the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children’.⁴³ By the order passed on November 28, 2001, the Court directed the States to complete identification of beneficiaries under eight schemes and their implementation by January 1, 2002 making these entitlements justiciable.⁴⁴ Pertinently, as noted above, the State Governments had to complete the exercise of identification within three months from the date of the PDS Order, which into effect on August 31, 2001; and, the Court effectively enforced the time-line provided in the Order but expanded the purpose of identification beyond the Order which only provided for distribution of subsidised food-grains to the implementation of other schemes as well.

The PDS Order placed the responsibility for educating the ration card holders about their rights on the State Governments, by using print and electronic media as well as by display boards outside Fair Price Shops.⁴⁵ The Court enforced this measure by directing that a copy of its order be displayed in all Gram Panchayats, Govt School Buildings and Fair Price

³⁷ *Id.*, ¶3.

³⁸ See RIGHT TO FOOD CAMPAIGN, *Supreme Court Orders on the Right to Food: A Tool for Action*, October 4, 2005, available at <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders> (Last visited on July 9, 2020) (for a repository of prayers).

³⁹ The Writ Petition was closed vide order dated 10.02.2017 in view of the passing of the NFSA, see RIGHT TO FOOD CAMPAIGN, *Supreme Court Orders on the Right to Food: A Tool for Action*, available at <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders> (Last visited on July 9, 2020).

⁴⁰ The Court sought the response of Chief Secretaries regarding implementation of the Employment Assurance Scheme, Mid-day Meal Scheme, Integrated Child Development Scheme, National Benefit Maternity Scheme for BPL pregnant women, National Old Age Pension Scheme for destitute persons over 65 years, Annapurna Scheme, Antyodaya Anna Yojana, National Family Benefit Scheme and Public Distribution Scheme for BPL and APL families, see The Supreme Court of India, People’s Union for Civil Liberties (‘PUCL’) v. Union of India, Interim Order dated September 17, 2001, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/sept17.html> (Last visited on July 9, 2020).

⁴¹ The Court passed detailed directions for implementation of the 8 schemes, see The Supreme Court of India, People’s Union for Civil Liberties (‘PUCL’) v. Union of India, Interim Order dated November 28, 2001, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/nov28.html> (Last visited on July 9, 2020) (‘November 28, 2001, Order’). See also Arup Surendranath, *Life and Personal Liberty* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 771 (Oxford University Press, 2016).

⁴² July 23, 2001, Order, *supra* note 15, at 4.

⁴³ *Id.*

⁴⁴ November 28, 2001, Order, *supra* note 41, at 8.

⁴⁵ The Public Distribution System (Control Order), 2001, §6(7).

Shops.⁴⁶ It directed AIR and Doordarshan to publicise the order.⁴⁷ Whereas, under the PDS Order, Gram Sabhas and Gram Panchayats were only responsible for identification of BPL and Antyodaya beneficiaries;⁴⁸ the Court, directed Gram Panchayats to display a list of beneficiaries under the schemes.⁴⁹

The litigation was a watershed moment in the enforcement of social rights because during its course, the Court remained vigilant about ensuring that its orders were implemented on the ground and the various Government schemes actually reached the intended beneficiaries. In furtherance of this objective, the Court ensured that not only were beneficiaries made aware of the various entitlements but also created an elaborate accountability and grievance redressal mechanism.⁵⁰ The Court empowered Gram Sabhas to conduct social audits of the schemes and report on misuse of funds.⁵¹ Collectors became responsible for investigating into the complaints of the Gram Sabhas and for implementation of orders of the Court.⁵² Chief Secretaries were directed to ensure compliance.⁵³ Commissioners were appointed by the Court to address grievances regarding non-implementation of these directions.⁵⁴ The Court also directed that starvation deaths would constitute evidence of non-implementation of its order.⁵⁵ The emphasis on nutrition, transparency and accountability as also the formulation of a threshold to demonstrate non-implementation of the guarantee for provision of foodgrains are the areas in which the Court expanded the PDS (Control) Order, 2001 most significantly and paved the way for creation of a legislative regime which included these aspects.

As the article specifically raises the issue of coverage in the context of the NFSA, the Court's approach in the Right to Food case to calculating the number of BPL families entitled to access the PDS is relevant and is being discussed here. On the basis of reports that the new BPL census of 2002 was under-inclusive, the Court stayed the use of the census data and directed that no one should be removed from the previous BPL list of 1997.⁵⁶ This stay was vacated by the Court pursuant to an agreement arrived at between the Petitioner and the Central Government that the survey methodology of the new census will be decided in consultation with the Supreme Court appointed Commissioners.⁵⁷ By this order, the Court also directed that the food grain allocation by the Central Government should be made on the basis of poverty estimates of 1993-94 of the Planning Commission as applied to population projections as on March 1, 2000.⁵⁸ This approach was further revised by the Court when it

⁴⁶ July 23, 2001, Order, *supra* note 15, ¶9 at 4.

⁴⁷ *Id.*, ¶11.

⁴⁸ The Public Distribution System (Control Order), 2001, §1(7).

⁴⁹ July 23, 2001, Order, *supra* note 15, ¶10 at 4.

⁵⁰ The Supreme Court of India, People's Union for Civil Liberties ('PUCL') v. Union of India, Interim Order dated May 8, 2002, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/may8.html> (Last visited on July 9, 2020) ('May 8, 2002, Order')

⁵¹ *Id.*, ¶f.

⁵² *Id.*, ¶¶g, h.

⁵³ *Id.*, ¶i.

⁵⁴ *Id.*, ¶j.

⁵⁵ The Supreme Court of India, People's Union for Civil Liberties ('PUCL') v. Union of India, Interim Order dated October 29, 2002, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/oct29.html> (Last visited on July 9, 2020) ('October 29, 2002 Order').

⁵⁶ The Supreme Court of India, People's Union for Civil Liberties ('PUCL') v. Union of India, Interim Order dated May 5, 2003, Writ Petition (Civil) No. 196 of 2001, 53.

⁵⁷ The Supreme Court of India, People's Union for Civil Liberties ('PUCL') v. Union of India, Interim Order dated February 14, 2006, Writ Petition (Civil) No. 196 of 2001, available at <https://main.sci.gov.in/jonew/bosir/orderpdfold/290947.pdf> (Last visited on August 29, 2020).

⁵⁸ *Id.*, ¶1.

directed that allocation of food grains every year should be made on the basis of the population estimates for that year, as carried out by the Planning Commission or the Registrar General and Census Commissioner, in the absence of any official census figure. In fact, the Court agreed with the submission of the Central Government that allocation of food grains for 2011 should be made on the basis of the population figure for that year, projected by the Registrar General.⁵⁹ The approach of the Court on this aspect is also in line with its other orders and its guiding concern in the case which was to ensure effective protection against hunger and malnutrition.

The Court, therefore, effectively transformed a welfare driven executive approach to food security into a justiciable fundamental right under Article 21. It elevated ‘beneficiaries’ of welfare schemes to rights-bearing stakeholders, defined the scope of their entitlements and delineated the circumstances which would provide cause of action for seeking of legal remedies. The jurisprudence developed by the Court, therefore, departed from the fallacy of finding place for a socio-economic right under Article 21 but failing to follow through on its enforcement which is only possible by defining the contours of the right, laying down a standard for determining its violation and evolving a suitable remedy.⁶⁰ The lack of an elaborate explanation for situating its orders within the ambit of Article 21 does not alter the significance of the orders for other aspects of constitutional adjudication stated above.

B. A QUESTION OF NUMBERS: THE LEGISLATIVE APPROACH TO FOOD SECURITY

In stark contrast to the approach of the Supreme Court, the chief concern of the executive for incorporating these guarantees legislatively was the number of beneficiaries due to the ensuing obligation for procurement of food grains which even under the PDS (Control) Order, 2001 was of the Central Government.⁶¹ The explanation as offered by the Department of Food and Public Distribution before the Lok Sabha Standing Committee appears to be that the Central Government could only acquire enough food grains for covering a certain percentage of the population as any procurement beyond that extent would lead to distortion of food prices.⁶² The explanation was ostensibly based on the observation of an expert committee set up by the Central Government, namely, the Rangarajan Committee and was ultimately accepted by the Standing Committee which recommended the extent of coverage that has been incorporated in the NFSA.⁶³ However, the explanation hides more than it reveals because the Rangarajan Committee, although did express concern regarding distortion of food prices due to procurement of more food grain than was being done already by the Government, nevertheless did not recommend reducing coverage but only enhancing coverage under the Act

⁵⁹ The Supreme Court of India, *People’s Union for Civil Liberties (‘PUCL’) v. Union of India*, Interim Order dated May 14, 2011, Writ Petition (Civil) No. 196 of 2001, available at http://www.righttofoodindia.org/data/supreme_court_orders/tpds/tpds_aay_14_may_2011.pdf (Last visited on July 9, 2020) (‘May 14, 2011 Order’).

⁶⁰ Surendranath, *supra* note 41, 770-771 at 8.

⁶¹ STANDING COMMITTEE ON FOOD, CONSUMER AFFAIRS AND PUBLIC DISTRIBUTION, Fifteenth Lok Sabha, *Report on the National Food Security Bill, 2011*, Twenty Seventh Report, ¶2.4, 27 (January, 2013) (‘STANDING COMMITTEE’).

⁶² *Id.*, 29. The same explanation was also offered by the Minister of Consumer Affairs, Food and Public Distribution in the Lok Sabha. See COMPENDIUM ON PARLIAMENTARY ENACTMENTS ON THE NATIONAL FOOD SECURITY ACT, 2013, Rajya Sabha, *Synopsis of the Debate on the Statutory Resolution for Disapproval of the National Food Security Ordinance, 2013 and the National Food Security Bill, 2013*, 431, available at https://rajyasabha.nic.in/rsnew/publication_electronic/National_Food_security_Act2013.pdf (Last visited on August 25, 2020) (‘Synopsis of the Debate’).

⁶³ *Id.*

in a staggered manner.⁶⁴ Moreover, the concern of the Department does not reconcile with the position in India till 1997 when the PDS was universal. The Committee, however, failed to sufficiently examine the explanation of the Department and accepted the extent of coverage proposed by it on the ground that it was in line with the average procurement of food grains in the last five years, i.e., after implementation of the TPDS.⁶⁵ The Committee, therefore, failed to analyse the extent proposed by the Department in the context of the failures of the TPDS which had led to intervention by the Supreme Court.

The legislative precedents of the NFSA including the NAC's draft bill, the Rangarajan Committee Report and the bill proposed by the Ministry of Food, Consumer Affairs and Public Distribution have been discussed in detail in this segment.

1. DRAFT FRAMEWORK PREPARED BY THE NAC AND THE RANGARAJAN COMMITTEE REPORT

The National Food Security Bill, 2011 ('NFSB, 2011'),⁶⁶ which was cleared by the Empowered Group of Ministers ('EGoM') and placed before the Parliament claimed to be based on the draft framework of the Bill prepared by the National Advisory Council ('NAC').⁶⁷ However, the Bill differed significantly from the recommendations made by the NAC in terms of both extent of coverage, i.e. the beneficiaries, and entitlements.⁶⁸ The Government had set up a Committee, known as the Rangarajan Committee, to go through the draft framework submitted by the NAC.⁶⁹ Significantly, the Bill cleared by the EGoM deviated from the recommendations of the Rangarajan Committee as well.⁷⁰

The NAC in its draft, proposed coverage of at least ninety percent of the rural population and fifty percent of the urban population. It further recommended that the beneficiaries be divided into two categories: priority households consisting of forty-six percent in rural areas and twenty-eight percent in urban areas; and, general households consisting of forty-four percent in rural areas and twenty-two percent in urban areas.⁷¹ It recommended a monthly entitlement of 35 kilograms per household (equivalent to 7 kilograms per person) at a subsidised price of Rs.1 per kilogram for millets, Rs.2 per kilogram for wheat and Rs.3 per kilogram for rice for priority households.⁷² For general households, the NAC recommended 20 kilograms per household (4 kilograms per person) at a price not exceeding fifty percent of the minimum support price.⁷³ The NAC recommended distribution of these entitlements through the PDS. In addition to this, it recommended legal entitlements for child and maternal nutrition, destitute persons and other vulnerable groups.⁷⁴ For identification of beneficiaries, the NAC recommended that the Government of India should lay down the criteria for categorisation of households as priority and general on the basis of the Socio-Economic Census and Caste Census which was to be conducted by the Registrar General under the Ministry for Rural

⁶⁴ RANGARAJAN COMMITTEE, *Report of the Expert Committee on the National Food Security Bill*, ¶17, 9 (January 2, 2011), available at <http://www.environmentportal.in/content/324731/report-of-the-expert-committee-national-food-security-bill/> (Last visited on July 9, 2020) ('RANGARAJAN COMMITTEE').

⁶⁵ STANDING COMMITTEE, *supra* note 61, 31 at 10.

⁶⁶ The National Food Security Bill, 2013, 109 of 2013.

⁶⁷ Right to Food Campaign, *Right to Food*, Vol. 46(33) ECONOMIC AND POLITICAL WEEKLY, 22 (August 13, 2011).

⁶⁸ *Id.*

⁶⁹ RANGARAJAN COMMITTEE, *supra* note 64, at 10.

⁷⁰ Dreze, *supra* note 11, at 4.

⁷¹ RANGARAJAN COMMITTEE, *supra* note 64, ¶4, 2 at 10.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Development.⁷⁵ Pertinently, the Rangarajan Committee agreed with the recommendations of the NAC in so far as coverage as well as the entitlements were concerned. It, however, supported the implementation of the recommendations, in a calibrated manner.⁷⁶ It suggested legislative protection of forty-six percent of the rural and twenty-eight percent of the urban population which were considered to be the priority households, however, without supply of millets and recommended that general households should be covered on the basis of a varying quantum depending on the availability of food grains.⁷⁷ Contrary to the recommendation of the NAC, the Committee recommended that the criteria for identification for beneficiaries should be laid down by the Central Government, but the task of identification should be performed by the State Governments.⁷⁸ Moreover, while it supported computerisation of PDS, the Committee favoured replacement of the PDS with cash subsidy in the long-run.⁷⁹

2. THE NATIONAL FOOD SECURITY BILL, 2011

The NFSB, 2011 reduced the coverage of rural households as recommended by both the NAC as well as the Rangarajan Committee, from ninety percent to seventy-five percent and maintained the recommendation with regard to covering fifty percent of the urban households along with the division on lines of priority and general households.⁸⁰ As discussed earlier, the Committee recommended the reduced extent of coverage from ninety percent to seventy five percent but without the distinction on lines of priority and general households by accepting the explanation of the Government that enhancing coverage would require greater procurement and the apprehension of distortion of price of food.⁸¹ The Committee, therefore, sanctioned targeting and the National Food Security Bill, 2013 ('NFSB, 2013'), which was enacted as the NFSA adopted the coverage of seventy-five percent of rural and fifty percent of urban population.

The NFSB, 2011 also reduced the entitlement of general households from 4 kilograms per person per month to 3 kilograms.⁸² Cost-sharing was sanctioned for entitlements to special groups such as homeless and destitute persons and communities living in starvation.⁸³ While the Standing Committee recommended enhancement of entitlements to 5 kilograms of food grains per person per month, it did not recommend any change to the provisions for cost-sharing. The NFSA has incorporated the recommendation of the Committee for enhanced entitlements⁸⁴ and also retained the provision for cost-sharing.⁸⁵ Under the Bill, allocation of food grains for the priority and general households was the responsibility of the Central Government⁸⁶ and this has been retained under the Act.⁸⁷

Most problematically, under the NFSB, 2011, even the truncated entitlements were made subject to the absolute discretion of the Central Government which was empowered

⁷⁵ *Id.*, ¶15, 9.

⁷⁶ *Id.*, ¶17, 9.

⁷⁷ *Id.*, ¶20, 11.

⁷⁸ *Id.*, ¶27, 16.

⁷⁹ *Id.*, ¶24, 15.

⁸⁰ The National Food Security Bill, 2011, 132 of 2011, Cl.3(2).

⁸¹ STANDING COMMITTEE, *supra* note 61, at 10.

⁸² The National Food Security Bill, 2011, 132 of 2011, Cl.3(1).

⁸³ *Id.*, Cl.8, Cl.11.

⁸⁴ The National Food Security Act, 2013, §3(1).

⁸⁵ *Id.*, §7.

⁸⁶ The National Food Security Bill, 2011, 132 of 2011, Cl.30(2).

⁸⁷ The National Food Security Act, 2013, §22(1).

to update the list of priority and general households identified by the State Governments as it may prescribe.⁸⁸ This provision has unfortunately been retained in the NFSA.⁸⁹

The Bill incorporated some measure of protection for destitute persons who were entitled to one free meal,⁹⁰ and homeless persons who were entitled to affordable meals at community kitchens.⁹¹ State Government were required to identify persons living in starvation,⁹² and provide two meals free of charge.⁹³ All these provisions were to be implemented on cost-sharing basis. Even these limited guarantees have been omitted in the NFSA. The protection of special groups was removed on the basis of the recommendations of the Standing Committee which was of the view that inclusion in such groups can form the basis of the criteria for identification of beneficiaries under the Act.⁹⁴ Moreover, the Committee was of the view that the identification of such persons would be difficult and could lead to tearing of the social fabric as they may be forced out of their houses.⁹⁵ At the time of an emergency or a national disaster, the Bill provided that households will be entitled to two meals free of charge.⁹⁶ Despite no recommendation by the Committee against this provision, it too has been omitted in the NFSA. Yet, the NFSA retained the exception for situations of war, flood, drought, fire, cyclone, earthquake affecting regular supply of food grains or meals and the Central or State Governments shall not be liable for any claim under the Act under such circumstances.⁹⁷

The greatest shortcoming of the grievance redressal framework, adopted by the NFSA on the basis of the NFSB, is its absolute dependence on the State Government for appointment of officers designated for this purpose and the absence for the need to identify the officer of the local authority responsible for implementation as opposed to the approach of the Supreme Court which fixed accountability with incumbent officers in the State machinery;⁹⁸ a shortcoming in the framework of the Act which was also pointed out by the Standing Committee.⁹⁹ It is not being suggested that responsibility for violation of every enactment, should rest with the Collector or the Chief Secretary; however, the Act could have specified the officer in the State bureaucracy responsible for its implementation to obviate the possibility of such appointments being delayed which has come to be the case as acknowledged by the Court in Swaraj Abhiyan.¹⁰⁰

It is relevant to note Cl.30(3) of the Bill for the purpose of the present article, as it pertains to calculation of number of beneficiaries under the Bill. This clause mandated that the allocation of food grains by the Central Government “*shall be revised annually, in the prescribed manner, based on the actual or estimated population, as the case maybe*”.¹⁰¹ The NFSA has replaced Cl.30(3) with §9 which makes calculation of the beneficiaries dependent

⁸⁸ The National Food Security Bill, 2011, 132 of 2011, Cl.17.

⁸⁹ The National Food Security Act, 2013, §9.

⁹⁰ The National Food Security Bill, 2011, 132 of 2011, Cl.8(a).

⁹¹ *Id.*, Cl.8(b).

⁹² *Id.*, Cl.10.

⁹³ *Id.*, Cl.11.

⁹⁴ STANDING COMMITTEE, *supra* note 61, ¶2.12, 40-41 at 10.

⁹⁵ STANDING COMMITTEE, *supra* note 61, 104 at 10.

⁹⁶ The National Food Security Bill, 2011, 132 of 2011, Cl.9.

⁹⁷ The National Food Security Bill, 2011, 132 of 2011, Cl.52; The National Food Security Act, 2013, §44.

⁹⁸ May 8, 2002, Order, *supra* note 52, at 9; May 8, 2002, Order, *supra* note 53, at 9.

⁹⁹ STANDING COMMITTEE, *supra* note 61, ¶3.54, 142 at 10.

¹⁰⁰ Swaraj Abhiyan, *supra* note 14, ¶107, ¶128.2, at 4.

¹⁰¹ *Id.*, The National Food Security Bill, 2011, 132 of 2011, Cl.30(3).

on outdated census data. This provision was a part of the NFSB, 2013.¹⁰² Pertinently, this clause in NFSB, 2013 was not discussed by any member and from a synopsis of the debate it appears that only one member raised the issue of poverty estimates being calculated on the basis of outdated population estimates.¹⁰³

The scheme of the NFSA has been discussed in greater detail in the next section of this article.

III. SCHEME OF THE NATIONAL FOOD SECURITY ACT, 2013 AND THE PANDEMIC

“The NREGS is restricted. The PDS is targeted. Only exploitation is universal”.¹⁰⁴

In this section, the article discusses the scheme of the NFSA to demonstrate that it has adopted the targeted approach of the PDS Order and the impact of such an approach when situated in the context of a national disaster. The article will also discuss executive measures for relief announced during the currency of the pandemic to argue that they are geared towards protection of NFSA beneficiaries and therefore the exclusionary impact of provisions such as §9 is aggravated at such times.

A. BENEFICIARIES AND NATURE OF ENTITLEMENTS

1. BENEFICIARIES AND THEIR IDENTIFICATION

The NFSA seeks to benefit 3 specific categories of beneficiaries included in Chapter II of the Act:¹⁰⁵ “*eligible households*” which includes “*priority households*” and households covered under the AAY,¹⁰⁶ pregnant women and lactating mothers,¹⁰⁷ and children upto the age of fourteen years.¹⁰⁸ The guarantee of subsidised food grains has been extended only to “*eligible households*” possessing ration cards and not to the entire population in terms of the legal regime put in place by the PDS Order. This article focuses on the first category of beneficiaries included under §3(1) under the Act or “*eligible households*” which consists of “*priority households*” and households covered under the AAY.

2. NATURE OF THE ENTITLEMENT

AAY households are entitled to 35 kilograms of food grains at subsidised rates and “*priority households*” are entitled to 5 kilograms of food grains per person per month at

¹⁰² The National Food Security Bill, 2011, 132 of 2011, Cl.9.

¹⁰³ Mulayam Singh Yadav. *See* Synopsis of the Debate, *supra* note 62, 288, 296 at 10 in which many members made demands for universalisation of PDS such as Shri Prabodh Panda who moved the resolution for disapproval of the Bill on *inter alia* this ground. Other members who demanded universalisation of the PDS are Sharad Yadav, A Ganeshamurthi, S Semmalai, A Sampath, Bhartruhari Mahtab, Ganesh Singh, Dr.M Thambidurai, P Karunakaran. In fact, Praful Patel submitted that it will implemented throughout the country in the future.

¹⁰⁴ P Sainath, *Oliver Twist Seeks Food Security*, THE HINDU, August 11, 2010, available at <https://www.thehindu.com/opinion/columns/sainath/Oliver-Twist-seeks-food-security/article16127997.ece> (Last visited on July 9, 2020).

¹⁰⁵ Jean Dreze, *Modi Government’s doublespeak on food security is a recipe for chaos and corruption*, SCROLL, January 31, 2015, available at <https://scroll.in/article/703461/Modi-governments-doublespeak-on-food-security-is-a-recipe-for-chaos-and-corruption> (Last visited on August 28, 2020).

¹⁰⁶ The National Food Security Act, 2013, §§3(1), §2(3).

¹⁰⁷ *Id.*, §4.

¹⁰⁸ *Id.*, §5.

subsidised rates.¹⁰⁹ The food is distributed to ration card holders through fair price shops maintained as a part of the TPDS by the State Governments.¹¹⁰

B. NATURE AND EXTENT OF COVERAGE UNDER THE ACT

1. LEGISLATIVE FRAMEWORK

§3(2) of the Act artificially caps the total number of beneficiaries under this category to seventy-five percent of the rural population and fifty percent of the urban population. Under §9, the actual percentage coverage in rural and urban areas of different States, subject to this overall cap imposed by §3(2), is to be determined by the Central Government on the basis of population estimates as per the census of which the relevant figures have been published. In other words, seventy-five percent of the rural and fifty percent of the urban population is calculated on the basis of estimates published in the last census. Therefore, while the maximum extent of coverage under the Act is seventy-five percent of the rural population and fifty percent of the urban population, the Government can choose to extend the Act to a lower percentage of the population in different States. Moreover, the actual number of beneficiaries will be determined on the basis of the figures of the last published census results.

While Central Government has the power to determine the extent of the coverage, under §10 of the Act, it is the State Governments which have the responsibility to identify the actual beneficiaries under this category of ‘eligible households’ that consists of AAY households and priority households. After deducting the AAY beneficiaries from the total extent of coverage determined by the Central Government¹¹¹, the State Government can identify the remaining beneficiaries who are known as “priority households” on the basis of its own guidelines.¹¹²

The last published census figures are from 2011 when the Ministry of Rural Development and Ministry of Housing and Urban Poverty carried out the exercise of doing a Socio Economic Caste Census (‘SECC’).¹¹³ The results of the census were published on July 03, 2015, despite the Act having come into force on July 05, 2013, resulting in significant delay in its implementation.¹¹⁴ In the meantime, the Central Government had issued three notifications to postpone the implementation of the Act and the Petitioner in the Right to Food case had to approach the Supreme Court to challenge this practice and for release of the results of the census.¹¹⁵

2. TPDS (CONTROL) ORDER, 2015

The amount of food grains required to be allocated by the Central Government to the State Government for implementation of the NFSA as well as modalities for implementation of other measures specified under the Act have been notified by way of the

¹⁰⁹ *Id.*, §3(1).

¹¹⁰ *Id.*, §2(23).

¹¹¹ *Id.*, §10(1)(a).

¹¹² *Id.*, §10(1)(b).

¹¹³ Dreze, *supra* note 11, at 4.

¹¹⁴ BUSINESS STANDARD (ANI), *Jaitley releases new Socio-Economic and Caste Census in Delhi*, July 3, 2015, available at https://www.business-standard.com/article/news-ani/jaitley-releases-new-socio-economic-and-caste-census-in-delhi-115070300213_1.html (Last visited on August 28, 2020).

¹¹⁵ BUSINESS STANDARD (Nitin Sethi), *Delayed implementation of food law challenged in Supreme Court*, June 1, 2015, available at https://www.business-standard.com/article/current-affairs/delayed-implementation-of-food-security-act-through-executive-orders-challenged-in-sc-115052901251_1.html (Last visited on August 28, 2020).

TPDS (Control) Order, 2015 issued under §3 of the Essential Commodities Act.¹¹⁶ The extent of coverage in each State as well as the number of beneficiaries as determined by the Central Government have been notified under the Order.¹¹⁷ The cumulative coverage in all States comes to seventy-five percent of the total rural population and fifty percent of the total urban population, of India.¹¹⁸ In the implementation of this scheme, certain States have got coverage of less than the prescribed limits and in certain States the beneficiaries exceed the limit of seventy-five percent and fifty percent.¹¹⁹ The limits have been translated into actual figures on the basis of the 2011 census and ¶3(6) of the Order states that for the purpose of allocation of food grains from the Centre to the States, the total number of beneficiaries covered under the TPDS will not be revised till the date of the next population census.¹²⁰ ¶3(6) therefore implements the mandate of §9 of the NFSA and limits the obligation of the Central Government to provide food grains for beneficiaries calculated on the basis of the last published census figures.

A ration card is necessary for accessing any entitlement under the TPDS, the NFSA or a State scheme for distribution of essential commodities.¹²¹ Ration cards have to be issued to the eligible households identified by the State Governments within the limits stipulated in the order on the basis of the last published census.¹²² Separate ration cards have to be issued to priority and AAY households,¹²³ and the Order mandates that a ration card should be issued even for the purpose of availing a scheme of the State Government for distribution of essential commodities.¹²⁴ On the lines of the Order of 2001, the TPDS (Control) Order, 2015 also provides that the State Government shall prescribe the form to apply for a ration card as well as the authority which will process the application.¹²⁵ The time-limit of one month for issuance of new cards has also been retained.¹²⁶ A fact regarding the of issuance of ration cards which is relevant for the purpose of the present article and the suggestions made here is that it can only be issued by the State of residence of a person to be used for accessing the TPDS for the NFSA or any State scheme which restricts their use by migrant workers.¹²⁷

¹¹⁶ Ministry of Consumer Affairs, Food and Public Distribution, Targeted Public Distribution System (Control) Order, REGD.No. D.L.-33004/99, (March 20, 2015).

¹¹⁷ *Id.*, ¶3.

¹¹⁸ *Id.*, ¶3 read with Annexe 1.

¹¹⁹ States in which less than seventy-five percent of the rural population has been covered are:

Andhra Pradesh, Arunachal Pradesh, NCT of Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Kerala, Punjab, Rajasthan, Tamil Nadu, Tripura, Uttarakhand, West Bengal, A&N Islands, Chandigarh, Daman & Diu, Lakshadweep, Puducherry; States in which more than 75% of the rural population has been covered are Assam, Bihar, Chhattisgarh, Jharkhand, Karnataka, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Odisha, Sikkim, Uttar Pradesh, Dadra and Nagar Haveli; States in which less than 50% of the urban population has been covered are Andhra Pradesh, NCT of Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Kerala, Maharashtra, Mizoram, Punjab, Sikkim, Tamil Nadu, Tripura, West Bengal, A&N Islands, Chandigarh, Lakshadweep, Puducherry; States in which more than 50% of the urban population has been covered are Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Jharkhand, Karnataka, Madhya Pradesh, Manipur, Meghalaya, Nagaland, Odisha, Rajasthan, Uttar Pradesh, Uttarakhand, Dadra and Nagar Haveli, Daman and Diu. *See Id.*, Annexe 1.

¹²⁰ *Id.*, ¶3(6).

¹²¹ *Id.*, ¶4(3).

¹²² *Id.*, ¶¶4(1), 3(2).

¹²³ *Id.*, ¶4(5).

¹²⁴ *Id.*, ¶4(3).

¹²⁵ *Id.*, ¶¶4(7), 4(12).

¹²⁶ *Id.*, ¶4(17).

¹²⁷ *Id.*, ¶¶4(2), 4(3).

C. CENTRE AND STATE FUNCTIONS AND RELATIONSHIP

1. ROLE OF THE CENTRAL GOVERNMENT

Central Government has the power to determine the extent of coverage in the States subject to the overall cap of seventy-five percent in rural areas and fifty percent in urban areas.¹²⁸ It also has the responsibility to ensure availability of food grains. It has to procure, transport and allocate the quantity of food grains required for meeting the entitlements of “eligible households” under the Act to State Governments at the subsidised rates on which it is further supplied to the households.¹²⁹ It is also required to provide assistance to State Governments for costs on inter-State transport of food grains, handling of food grains and margins paid to fair price shops.¹³⁰

2. ROLE OF THE STATE GOVERNMENT

The State Government is responsible for identifying the actual beneficiaries,¹³¹ and for the implementation of all benefits under the Act through a TPDS.¹³² Under this system, they have to take delivery of food grains from depots of the Central Government at subsidised rates and ensure delivery of food grains to the door step of fair price shops in the State.¹³³ Moreover, State Governments also have the responsibility to ensure actual delivery and supply of food grains to the beneficiaries under the Act at subsidised rates.¹³⁴

D. §9 AND THE IMPACT OF USING OUTDATED POPULATION FIGURES

1. OPERATION OF §9

§9, as discussed above, provides a mechanism for calculating the actual number of beneficiaries under the NFSA. The mandate of the legislation under §3(2) is to provide food grains at subsidised prices to seventy-five percent of the rural population and fifty percent of the urban population. It is duty of the Central Government to procure and allocate the food grains required to fulfil the obligation under §3(2) to the State Governments at subsidised rates.¹³⁵ However, the actual amount of food grains that the Central Government is obliged to allocate to the State Government is dependent upon the total number of beneficiaries identified by them.¹³⁶ The identification of actual number beneficiaries has to be done by the State Governments under §10 and is made dependent upon the extent prescribed by §9 i.e. seventy-five percent of the rural population and fifty percent of the urban population as calculated on the basis of the population estimates of the last published census. The State Governments, therefore, cannot take into account the annual increase in population for calculating the number of beneficiaries under the Act due to the restriction placed by §9 and identify them by issuing fresh ration cards.¹³⁷ The actual extent of the obligation of the Central Government, which has

¹²⁸ The National Food Security Act, 2013, §9.

¹²⁹ *Id.*, §22(4)(a)-(c).

¹³⁰ *Id.*, §22(4)(d).

¹³¹ *Id.*, §10.

¹³² *Id.*, §24(1).

¹³³ *Id.*, §24(2)(a).

¹³⁴ *Id.*, §24(2)(b).

¹³⁵ *Id.*, §22(1).

¹³⁶ *Id.*, §22(2).

¹³⁷ Under §3(1), the entitlement of subsidised food grains, under the Act, is implemented through the TPDS. The TPDS is defined by §2(22) of the Act as the system for distribution of essential commodities to ration card holders through fair price shops. A ration card is, therefore, necessary for obtaining food grains at subsidised prices under

the obligation to procure and allocate the subsidised food grains, under §22 is, in turn, artificially suppressed.

Consequently, State Governments will receive less food grains than what they require to fulfil the needs of the beneficiaries as defined by the Act. The State Governments can, therefore, either meet the cost of additional beneficiaries on their own; or, not identify beneficiaries in excess of the assistance being provided by the Central Government. As discussed in the previous Section, in terms of the structure of the Act, though, identification of beneficiaries is on household basis, the entitlement of subsidised food grains is person-specific.¹³⁸ To not exceed the food grains allocated by the Central Government and increase its own burden, the State Governments can simply refuse to add new beneficiaries in old ration cards or not issue fresh ration cards to those who have gained majority and started new families.¹³⁹

2. MISSING BENEFICIARIES

The exclusionary effect of §9 is not just a theoretical but a practical reality. This can be analysed by comparing the estimates of coverage provided under the TPDS (Control) Order, 2015 which are based on the census figures of 2011 with the increase in population in the ensuing years. According to the census of 2011, India's population was approximately 1.22 billion.¹⁴⁰ The TPDS (Control) Order, 2015 calculates the total number of beneficiaries for allocation of food grains by the Central Government to the States on the basis of this figure.¹⁴¹

In the nine years that have passed since the last census was conducted, the population of India is estimated to have increased to 1.39 billion as per the United Nations.¹⁴² Moreover, if we take the delay in publication of the results of the last census as an indication for the future coupled with the shutting down of administration due to the current pandemic, it can be asserted with some degree of confidence that the publication of the results of the census proposed to be conducted in 2021 will be delayed by which time population will increase further. Without publication of the results of the next census, there is no obligation on the Central Government to recognise an increase in population and to assist State Governments in extending coverage under the Act on the basis of this increase. State Governments are, therefore, not incentivised to identify new beneficiaries who are entitled to be included in the TDPS.¹⁴³ However, the need to use current estimates has become more relevant due to the impact of the pandemic on the economy as a result of which many people who were otherwise not in need of PDS entitlements have become dependent on it.¹⁴⁴ On the basis of the census of

the Act and this becomes clear from its definition under §2(16) as a document issued by the State Government for purchase of essential commodities from fair price shops established under the TPDS.

¹³⁸ Every person belonging to a priority household will be entitled to receive five kilograms of subsidised food grains per person per month. *See* The National Food Security Act, 2013, §3(1).

¹³⁹ Jharkhand is one example where fresh ration cards were not being issued. However, Dreze et al have estimated rampant under-inclusion in all States. *See* Dreze et al., *supra* note 11, at 3.

¹⁴⁰ Office of the Registrar General & Census Commissioner, India, 2011 Census Data, *Population Enumeration Data, Population size (Number)*.

¹⁴¹ Total population is estimated at 1,210,327,463. *See* Ministry of Consumer Affairs, Food and Public Distribution, Targeted Public Distribution System (Control) Order, REGD.No. D.L.-33004/99, (March 20, 2015), Annex 1.

¹⁴² UNITED NATIONS, *Population*, available at <https://www.un.org/en/sections/issues-depth/population/index.html> (Last visited on August 28, 2020).

¹⁴³ Dreze et al., *supra* note 11, at 4.

¹⁴⁴ THE WIRE, *PM Extends Free Ration Scheme till Nov.: Experts Cite Food Surplus, Cloud Over Migrants Remains*, June 30, 2020, available at <https://thewire.in/government/modi-speech-china-free-ration-garib-kalyan-november> (Last visited on August 28, 2020).

2011, seventy-five percent of rural households and fifty percent of urban households or sixty-seven percent of the population, taking into account the rural and urban ratio, comes to 814 million people; whereas if the population of India is conservatively estimated at 1.37 billion in 2020, sixty-seven percent will translated into 922 million people leaving at least 100 million or ten crore people outside the coverage of the TDPS.¹⁴⁵

The cost of providing food to beneficiaries over and above this number has to be borne by the State Governments.¹⁴⁶ Due to the application of outdated census data, the Central Government is not providing assistance to the actual number of beneficiaries who are entitled to access food grains under the NFSA and the direct consequence of this is the exclusion of beneficiaries in the States, by freezing of fresh issuance of ration cards.¹⁴⁷

The importance of a ration card cannot be emphasised enough when analysed in the background of the provisions of the NFSA which make it the passport to access subsidised food grains. By adopting this targeted approach and omitting the measures proposed for relief during emergencies and national disasters which were there in the NFSB, 2011, the NFSA lacks any provision for securing supply of food grains without a ration card. The most enduring relief measures announced during the pandemic by the Central Government have been for NFSA beneficiaries and therefore targeting has been replicated even during a national disaster leaving large numbers of people without a ration card vulnerable. The article has discussed the measures announced by the Central Government in the next segment to demonstrate that relief during the pandemic was announced within the framework of the NFSA and therefore the exclusions resulting from §9 further prevented persons most in need of relief measures from accessing them.

E. THE RATION CARD IMPERATIVE: EXECUTIVE MEASURES ANNOUNCED DURING THE PANDEMIC

As discussed earlier, the entitlements under the NFSA are targeted towards ‘priority households’ and AAY households who are identified through a ration card. The only enduring relief measure announced against hunger during the pandemic by the Central Government was for NFSA beneficiaries i.e. ration card holders as ‘priority’ or ‘AAY’. While the procedure for obtaining a ration card is straightforward as described in the TPDS (Control) Order, 2015; its issuance was restricted during the pandemic due to two reasons: *first*, the cap placed by the NFSA; and, *secondly*, the lockdown and ensuing interruption of all public work. The second reason was sought to be countered by some State Governments, such as Delhi, Telangana, Jharkhand, Rajasthan and Uttar Pradesh by issuing e-coupons; however, as documented by right to food activists, the reach of such measures is restricted due to lack of access to a smartphone and the general inability of the population most in need of food to fill out application forms.¹⁴⁸

¹⁴⁵ Dreze et al., *supra* note 11, at 4.

¹⁴⁶ This is being done by the State Governments of Tamil Nadu, Andhra Pradesh and Telangana. See Dipa Sinha, *That food grain stocks lie in public godowns while people are going hungry is a scandal*, THE INDIAN EXPRESS, June, 26, 2020, available at <https://indianexpress.com/article/opinion/columns/india-coronavirus-lockdown-food-stock-supply-pds-scheme-6476514/> (Last visited on August 28, 2020).

¹⁴⁷ THE HINDU, *Outdated census data deprives over 10 crore of PDS: economists*, April 15, 2020, available at <https://www.thehindu.com/news/national/outdated-census-data-deprives-over-10-crore-of-pds-economists/article31350648.ece> (Last visited on April 28, 2020).

¹⁴⁸ Dipa Sinha, *Food for All During Lockdown: State Governments Must Universalise PDS*, THE WIRE, April, 20, 2020, available at <https://thewire.in/rights/covid-19-lockdown-food-supply-pds> (Last visited on August 28, 2020).

As a response to the present situation, the Central Government has announced three sets of measures to combat hunger aimed at:

- i. NFSA beneficiaries or “eligible households” (AAY and PHH) under the Pradhan Mantri Garib Kalyan Anna Yojana (‘PMGKAY’);
- ii. Non-NFSA beneficiaries having ration cards; and,
- iii. Migrant workers not possessing ration cards.

Under the Pradhan Mantri Garib Kalyan Anna Yojana, announced on March 30, 2020, the Central Government had initially announced additional allocation of 5 kg of food grains (rice or wheat) per person per month for NFSA beneficiaries i.e. all beneficiaries already covered under the TDPS or ‘eligible households’ free of cost initially for a period of three months i.e. till June, 2020.¹⁴⁹ This scheme has been further extended till November, 2020.¹⁵⁰ Under the scheme, every household will also get 1 kg of whole grams per month.¹⁵¹

It is relevant at this juncture, in the interest of providing a comprehensive overview of the relief measures announced by the Government, to discuss two measures announced by the Government outside the NFSA framework: one for non-NFSA ration card holders and another for non-ration card holders. Both measures were of relatively short duration and have already been discontinued. For non-NFSA beneficiaries who have ration cards, on March 30, 2020, the Government had directed the Food Corporation of India to provide 5 kg of food grains per person per month for 3 months at the rate of Rs.21/ kg for wheat and Rs.22/ kg for rice.¹⁵² The Government had also directed the FCI to provide food grains to NGOs and charitable organisations across the country on the same terms. The term of this measure came to an end on June 30, 2020 and it has not been extended. The first and only announcement to secure food for non-ration card holder migrant workers was made by the Central Government on May 15, 2020 whereby it decided to distribute 5 kg of food grains per person per month till June 30, 2020.¹⁵³ The term of this measure has not been extended after June 30, 2020.

Consequently, non-NFSA beneficiaries and non-ration card holders are acutely vulnerable to hunger today as there is currently no measure announced by the Central Government to allot free or subsidised food grains to them. This situation appears to be extraordinarily dire when analysed in the context of the impact of §9 of the NFSA which has effectively precluded issuance of ration cards to 100 million people who despite being entitled to guarantees under the NFSA are excluded from it. Indisputably, nutrition is the most essential facet of life and therefore of Article 21. Certainly no fetter can reasonably be placed on this

¹⁴⁹ Ministry of Consumer Affairs, Food and Public Distribution, Pradhan Mantri Garib Kalyan Anna Yojana – Additional allocation of foodgrain for distribution to all the beneficiaries under TPDS (AAY and PHH) @5kg per person per month free of cost for a period of three months, i.e. April-June, 2020, F No.7-1/2019(ii)-BP.III (Notified on March 30, 2020).

¹⁵⁰ Ministry of Consumer Affairs, Food and Public Distribution, Pradhan Mantri Garib Kalyan Anna Yojana – Additional allocation of foodgrain for distribution to all the beneficiaries under TPDS (AAY and PHH) @5kg per person per month free of cost for a period of five months, i.e. July-November, 2020, F No.7-1/2019(ii)-BP.III [371225] (Notified on June 30, 2020).

¹⁵¹ *Id.*

¹⁵² Press Release, MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION, *Food grains to be provided to non-NFSA beneficiaries with ration cards issued by State governments*, April 9, 2020, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1612712> (Last visited on August 28, 2020).

¹⁵³ Ministry of Consumer Affairs, Food and Public Distribution, Allocation of Food Grains to Migrants @5kg per person per month for two months free of cost as part of Economic measures (Atma Nirbhar Bharat), F No.7-1/2019(ii)-BP.III (Notified on May 15, 2020) (‘Notification of May 15, 2020’).

right nor can the obligation of the State to enforce it be whittled down by a sleight of hand of restricting coverage to a dated 2011 census.

Due to the impact of §9 on a certain section of intended beneficiaries of the NFSA, who despite being entitled to be covered under the NFSA, can be denied ration cards to access such benefits, it engages the general guarantee of the right to equality under Article 14.¹⁵⁴ In the next section, the article analyses §9 on the threshold of Article 14 and argues, first, that the scrutiny of legislations under Article 14 has, despite certain deviations, considered their impact. In furtherance of this argument, the article proposes that the impact of §9 impedes substantive equality and it should be held *ultra vires* of Article 14 on this ground alone. Secondly, the classification created by §9 will also fall foul of the standard for scrutiny under Article 14.

IV. A CONSTITUTIONAL OBLIGATION TO IMPLEMENT THE NFSA ON THE BASIS OF ACTUAL POPULATION ESTIMATES

“The law of the Constitution is not only for those who govern or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection”.¹⁵⁵

The NFSA has adopted a targeted, as opposed to universal, approach to food security by securing the limited entitlement to subsidised food grains to only seventy-five percent of the rural population and fifty percent of the urban population. This is translated into actual numbers under §9 on the basis of the last published census and does not take into account a yearly increase in population estimates.¹⁵⁶ In this section, keeping in view the operation of §9 under the overall framework of the Act which, as discussed in the preceding sections, leads to under-inclusion of intended beneficiaries, the article examines the interface of §9 with the general constitutional guarantee of the right to equality under Article 14.¹⁵⁷ The article articulates an impact-oriented challenge to §9, to the extent that it mandates use of published census data to calculate the actual number of beneficiaries under the NFSA, on the ground that §9 results in exclusion of intended beneficiaries from the entitlements under the NFSA by precluding them from obtaining ration cards and availing subsidised food grains.¹⁵⁸ The article

¹⁵⁴ Khaitan draws a distinction between the general constitutional guarantee of equality under Article 14 and the anti-discrimination provisions in Article 15(1), 16(2) and 29(2). See Tarunabh Khaitan, *Equality* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 699 (Oxford University Press, 1st ed., 2016).

¹⁵⁵ Anwar Ali Sarkar v. State of West Bengal AIR 1952 SC 75, ¶97 (per Vivian Bose, J).

¹⁵⁶ The National Food Security Act, 2013, §9 reads:

The percentage coverage under the Targeted Public Distribution System in rural and urban areas for each State shall, subject to sub-section (2) of section 3, be determined by the Central Government and the total number of persons to be covered in such rural and urban areas of the State shall be calculated on the basis of the population estimates as per the census of which the relevant figures have been published.

This paper is posing a constitutional challenge only to the underlined part of the provision.

¹⁵⁷ Khaitan, *supra* note 154, at 20.

¹⁵⁸ This is distinct from the “disparate impact” approach to challenge facially neutral measures which disproportionately impact vulnerable minorities. See Tarunabh Khaitan, *US Disparate Impact Law: A View From*

attempts to establish that courts have been receptive to an impact-based scrutiny of legislations under Article 14 and argues that §9 is susceptible to challenge on this ground. Moreover, on the basis of J Vivian Bose's opinion in *State of West Bengal v. Anwar Ali Sarkar*, ('Anwar Ali Sarkar')¹⁵⁹ and J Chandrachud's opinion in *Joseph Shine v. Union of India*, ('Joseph Shine')¹⁶⁰ the article proposes that impeding of substantive equality by a provision or legislation, should be a separate standard of review under Article 14 independent of the classification test, and §9 falls foul of such a standard.¹⁶¹

Thereafter, the article analyses that §9 results in the classification of the intended beneficiaries into those having access to subsidised food grains and those who are otherwise entitled to be covered under the NFSA but are not issued ration cards to exercise their rights under the Act. It is argued that this classification of intended beneficiaries cannot withstand scrutiny under the 'classification test' developed under Article 14,¹⁶² on the ground that it does not create a valid classification. For the sake of completeness, the 'rational nexus' prong of the classification test is also engaged with. To supplement the inquiry under the 'rational nexus' prong of scrutiny under the 'classification test', the article proposes to ask two further questions suggested by Dr. Tarunabh Khaitan pertaining to genuineness of the classification created by §9 and its legitimacy. These questions have been raised to evaluate §9 as they have the potential to expose the exclusionary nature of this provision which appears to have a neutral legislative aim. On the basis of this inquiry, it is argued that the classification created by §9 does not have a reasonable connection with the object sought to be achieved by it.¹⁶³ *Alternatively*, it is argued that §9 is 'manifestly arbitrary' because it determines the extent of coverage under the NFSA in a capricious manner and without adequate determining principle.

Across the Pond, OXFORD HUMAN RIGHTS HUB, July 1, 2015, available at <https://ohrh.law.ox.ac.uk/us-disparate-impact-law-a-view-from-across-the-pond/> (Last visited on August 28, 2020).

¹⁵⁹ *Anwar Ali Sarkar v. State of West Bengal* AIR 1952 SC 75 ('Anwar Ali Sarkar').

¹⁶⁰ *Joseph Shine v. Union of India* (2019) 3 SCC 39, ¶¶172, ¶174 (per Chandrachud J.) ('Joseph Shine').

¹⁶¹ The article does not propose to argue that §9 should be challenged on the basis of the "disparate impact" test which protects vulnerable minorities from discriminatory impact of facially neutral legislation. §9 is not susceptible to a "disparate impact" test because it does not create any differential impact as a result of identity of the beneficiaries such as caste, class or gender. In other words, it does not discriminate against a protected group. The article, as stated above, is merely seeking to begin the Article 14 inquiry by drawing emphasis to the operation of §9 and its consequences, or its "real impact", to demonstrate that despite having a neutral legislative aim, §9 results in exclusion. It is submitted that despite, the existence of some deviations, an analysis of the impact of legislations is considered to be a relevant factor by Courts undertaking scrutiny under Article 14 and this position has been settled by *Joseph Shine*. The article will argue that due to its impact, §9 impedes intended beneficiaries under the NFSA who are excluded from its benefits from achieving substantive equality as articulated by Chandrachud J. in *Joseph Shine*.

¹⁶² Khaitan, *supra* note 154, 699, 700 at 20.

¹⁶³ The article does not propose to all apply every suggestion made by Dr. Khaitan to expand the inquiry under Article 14. It seeks to draw on two recommendations made by him, regarding genuineness of objective of classification and its legitimacy, to expand the inquiry under the "rational nexus" prong of the classification test. Though the primary argument raised in the article is that the §9 cannot stand scrutiny even under the "classification test" as traditionally applied because it does not create a valid classification; however, the two recommendations proposed by Dr. Khaitan are more incisive for exposing the true nature of a provision like §9 and exposing its exclusionary nature. It is, therefore, that the article proposes to use the same for analysing §9 at the threshold of Article 14.

A. AN IMPACT-BASED CHALLENGE: THE SUBSTANTIVE EQUALITY STANDARD

§9 does not create a specific and well-defined class of persons who are excluded from entitlements under the NFSA on the basis of identity¹⁶⁴ or a cut-off date for identification of beneficiaries.¹⁶⁵ It is an insidious exclusionary mechanism which precludes intended beneficiaries from the purview of the Act by simply keeping the population estimates static for a decade and making invisible new beneficiaries as a result of the increase in population. §9, therefore, despite appearing to be a facially neutral provision for determination of the number of beneficiaries under the Act, actually results in under-inclusion of beneficiaries for entitlements under the Act.¹⁶⁶ It further results in the classification of intended beneficiaries into: ration-card holders who have access to PDS entitlements; and, those that cannot secure a ration-card because they fall outside the extent of coverage prescribed by the Act as calculated on the basis of outdated population estimates.

Despite its impact on certain intended beneficiaries, as demonstrated above, the NFSA will be unworkable without a provision for calculating the actual extent of coverage under the Act.¹⁶⁷ The issue that, therefore, arises for consideration is whether the impact of §9, despite its neutral legislative aim, engages the general constitutional guarantee of the right to equality under Article 14.¹⁶⁸ The Supreme Court has held that the touchstone for adjudicating the validity of State action is its impact and not intent.¹⁶⁹ However, it has traditionally ignored an impact-oriented analysis of legislations under Article 14 by resorting to the “classification test”.¹⁷⁰ A more recent exception to this phenomenon of relying on “classification test” has been the approach of the Supreme Court and High Courts in sex-based discrimination claims which have invoked the anti-discrimination guarantee under Article 15(1) along with Article 14 to invalidate State action which disparately impacts women.¹⁷¹ Courts have also extended the guarantee of Article 15(1) to disproportionate impact resulting from grounds analogous to sex.¹⁷² Since §9 does not result in any disproportionate impact on the basis of identity, it is not being challenged on the basis of the “disparate impact theory”. However, the impact of §9 on intended beneficiaries is central to this article for invoking a challenge to §9 on the basis of Article 14.

¹⁶⁴ Exclusion of all persons from historically dominant castes is an example of such a classification.

¹⁶⁵ Exclusion of all persons born after the Act came into effect is an example of such a classification.

¹⁶⁶ Dreze et al., *supra* note 11, at 4.

¹⁶⁷ As §3(2) merely defines coverage in terms of percentages i.e. seventy-five percent of the rural and fifty percent of the urban population.

¹⁶⁸ Khaitan, *supra* note 154, at 20.

¹⁶⁹ RC Cooper v. Union of India, (1970) 1 SCC 240, ¶43; Maneka Gandhi v. Union of India, (1978) 1 SCC 278, ¶19.

¹⁷⁰ GAUTAM BHATIA, *Classification and its Discontents in A TRANSFORMATIVE CONSTITUTION*, 43 (Harper Collins, 2019).

¹⁷¹ The Supreme Court held that legislation should not only be assessed on its proposed aims but rather on the implications and effects. *See* Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, ¶46 (‘Anuj Garg’); It also held that “[i]t is irrelevant that the Railways did not deny them the medical card *because the Appellants were women*, or that it is potentially possible that a male dependent may also be denied benefits under decision made by the Railways. The *ultimate effect* of its decision has a disparate impact on women by perpetuating the historic denial of agency that women have faced in India, and deny them benefits as dependents”. *See* Madhu v. Northern Railway, 2018 SCC OnLine Del 6660, ¶30; Dr.Sanghamitra Acharya v. State of (NCT) of Delhi, WP (CrI.) No.1804/2017, ¶66; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 400 (‘Navtej Johar’); Joseph Shine, *supra* note 160, ¶178 at 21; Secretary, Ministry of Defence v. Babita Puniya, CA Nos.9367-9369 of 2011, ¶ 54.

¹⁷² *Id.*, Navtej Johar; Though, J Patanjali Sastri in Kathi Raning Rawat opined that Article 15 consists of a closed list of 5 grounds which cannot be expanded as has also been pointed out by Gautam Bhatia. *See*, BHATIA, *supra* note 170, at 23.

In this segment, the article analyses the treatment of the issue of impact of legislations by Courts in scrutiny under Article 14 and concludes that despite certain deviations, impact is relevant for scrutiny under Article 14 and this position has been reaffirmed by the decision in *Navtej Johar v. Union of India* ('Navtej Johar') and Joseph Shine. However, the ride to this destination has not been smooth and the Court has the tendency to be overwhelmed by intent and to consider it determinative. The article will argue that J Vivian Bose's opinion in *Anwar Ali Sarkar* and J Chandrachud's opinion in *Joseph Shine* offer a tool for using the impact of a legislation to argue that it impedes the achievement of substantive equality under Article 14. As substantive equality has been invoked as an independent standard for review of legislation under Article 14, the opinions of both J Bose and J Chandrachud have been dealt with in some detail. Finally, the article, in this segment, will apply the test of substantive equality to test the validity of §9.

1. THE RELEVANCE OF IMPACT

The impact of a legislation has not featured consistently in the Supreme Court's scrutiny of legislation under Article 14. However, the Court has never explicitly favoured a legislative intent as opposed to impact approach and in fact, rejected such an approach as far back as in *Anwar Ali Sarkar*.¹⁷³ These contradictory outcomes have co-existed due to the Court's acceptance of the classification theory as the primary tool for analysing an alleged violation of equality.¹⁷⁴ The classification theory as applied by courts in India is highly formal and reductive because it only proceeds on the basis of two questions: whether the classification is based on intelligible differentia and whether the classification has a rational nexus with the object sought to be achieved?¹⁷⁵ The overshadowing of an impact-based analysis by the classification test has precluded the Court from striking down of facially neutral legislation which disproportionately impact a historically vulnerable community due to its protected characteristic¹⁷⁶; and, allows the State to discriminate independently of identity on the basis of a norm of seemingly universal application.

¹⁷³ See *Anwar Ali Sarkar*, *supra* note 159, at 21. The issue before the Court was the constitutional validity of 5(1) of the West Bengal Special Courts Act, 1950. Opinion of J Fazl Ali, J Mukherjea and J Mahajan (adopting the opinion of J Mukherjea) and J Das. J Sastri who gave the minority opinion clearly favoured an intent-based standard of analysis.

¹⁷⁴ See *Khaitan*, *supra* note 154, at 20. This became apparent in *Kathi Raning Rawat* when the Court upheld the constitutional validity of a provision which was almost identical to the one held to be unconstitutional in *Anwar Ali Sarkar*. Except J Vivian Bose who in *Kathi Raning Rawat v. State of Saurashtra*, 1952 SCR 435 ('*Kathi Raning Rawat*') clarified that he did not consider such a provision which allowed different persons accused of the same offence to be tried under different procedures to be legitimate. See H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA*, Vol.1 514 (4th ed., 2009) ('*Seervai*').

¹⁷⁵ *Chiranjeet Lal Chowdhury v. Union of India*, 1950 SCR 869; *State of Bombay v. FN Balsara*, 1950 SCR 62. Dr. Khaitan has stated that the classification test has resulted in lack of analysis of the impact of the classificatory rule by courts. See *Khaitan*, *supra* note 154, 709 at 20.

¹⁷⁶ *Air India v. Nargesh Meerza*, (1981) 4 SCC 335 ('*Nargesh Meerza*'); *Rajbala v. State of Haryana*, (2016) 2 SCC 445 ('*Rajbala*'); *State of Kerala v. B Surendra Das*, (2015) 12 SCC 101 ('*Surendra Das*'); *Kerala Bar Hotels Association v. State of Kerala*, (2015) 16 SCC 421 ('*Kerala Bar Hotels*'); *Hiralal P Harsora. v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165 ('*Harsora*'). A characteristic feature of cases which rely on the classification test and forsake the impact question even for vulnerable minorities is that the Court does not explicitly reject the consideration of impact but tacitly fails to frame that issue and adjudicate on it altogether. In *Nargesh Meerza*, the Court failed to appreciate the gender stereotypes underlying and being perpetuated by the classifications disproportionately impacting the group that has to bear their burden i.e. women. In *Rajbala* despite conceding that the impugned rule will disproportionately impact rural women and particularly those from Scheduled Castes (¶80), the Court upheld it by applying the classification test. It failed to conduct an impact inquiry for another impugned rule which, it was alleged will disproportionately impact small farmers (¶87). In

Anwar Ali Sarkar falls in the second category and J Vivian Bose' was an early voice to have recognised this fall out of conflating the guarantee under Article 14 with the classification test. He deliberately didn't apply the test to strike down the impugned legislative action and concluded that it was violative of Article 14.¹⁷⁷ J Bose held that the Constitution prohibits certain differentia absolutely and irrespective of the justification offered for them.¹⁷⁸ In the context of the issue before the Court in Anwar Ali Sarkar, the question posed by him was whether the impugned provisions which subjected persons accused of the same offence to different rules of criminal procedures fulfilled the ideal of Article 14 as analysed in the background of the history of this constitutional guarantee.¹⁷⁹ The opinion of J Bose in Anwar Ali Sarkar was concerned with not just legitimacy of certain forms of classifications but expressed the need for development of a standard of review under Article 14 which was concerned with guaranteeing substantive equality.

Despite being overshadowed by the classification test, an impact-based analysis has not been altogether absent in challenges under Article 14.¹⁸⁰ It has overlapped with the first

Surendra Das, the Court was blind to the assumptions underlying the impugned rule on the basis of class. In *Harsora*, by ostensibly reading down a provision to make it gender neutral, the Court lost sight of structural realities of patriarchy and the impact of reading down of the provision. The Court acknowledged the limitations of the classification test (¶205) but proceeded on the basis that the provision did not fulfil the purpose of the statute (¶206); Aparna Chandra, *Women as Respondents under the Domestic Violence Act: Critiquing Harsora v. Harsora*, LAW AND OTHER THINGS, October 14, 2016, available at <https://lawandotherthings.com/2016/10/women-as-respondents-under-domestic/> (Last visited on July 9, 2020); Sanjoy Ghose, *A Gender-Neutral Domestic Violence Law Harms Rather Than Protects Women*, THE WIRE, November 3, 2016, available at <https://thewire.in/law/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women> (Last visited on July 9, 2020).

¹⁷⁷ Anwar Ali Sarkar, *supra* note 159, ¶¶83,87 at 21. In *Kathi Raning Rawat*, J Bose reiterated his opinion in *Anwar Ali Sarkar*; however, characterised the basis of his decision to be that the classifications in both cases fell beyond the bounds of legitimacy. His reasons for striking down the impugned legislation in *Anwar Ali Sarkar* also incorporates a positive concern for substantive equality in addition to legitimacy of the classification.

¹⁷⁸ Anwar Ali Sarkar, *supra* note 159, ¶87 at 21.

¹⁷⁹ See Anwar Ali Sarkar, *supra* note 159, ¶¶91-92 ('substantially equal treatment'), ¶95 ('conscience of a sovereign democratic republic') and ¶96 at 21.

¹⁸⁰ *DS Nakara v. Union of India*, (1983) 1 SCC 305 ('*DS Nakara*'); *B Prabhakar Rao v. State of Andhra Pradesh*, (1985) Supp SCC 485 ('*Prabhakar Rao*') In these cases, the Court held that the classification was not based on intelligible differentia; *State of Maharashtra v. Indian Hotels and Restaurants Association*, (2013) 8 SCC 519 ('*Indian Hotels*'); Joseph Shine, *supra* note, 160 at 20. These cases overlap with the inquiry into presumptively illegal classifications. In *DS Nakara*, the application of the classification test by the Court was preceded by an analysis of the impact on persons who had been denied the benefit of the liberal formula. In *Anuj Garg*, the Court explicitly favoured an impact-based analysis under Articles 14 and 15 but did not analyse the arguments and conclusions under both separately (¶46). In *Indian Hotels*, instead of testing the statute on the basis of the classification theory, the Court went on to hold that different treatment meted solely on the basis of assumptions regarding the morality of a persons of different economic classes was in violation of Article 14 (¶123). The Court confused the inquiry under Article 15(1) with that under Article 14 to some extent. This is evident from ¶112 where the Court held that a classification on the basis of economic class was in violation of the prohibition of discrimination on the basis of caste, creed, religion, race or gender which in the scheme of the Indian Constitution has been incorporated under Article 15(1). However, the argument which was advanced by the counsel for the Respondents and was ultimately accepted by the Court was that a classification based on the presumptions regarding the social mores of different classes of persons violated Article 14. In *Navtej Johar*, *supra* note, 171 at 23, J Dipak Misra, writing for himself and J Khanwilkar, held that §377, IPC resulted in making members of the LGBTQ community vulnerable to harassment and exploitation (¶238). This understanding of the impact of the impugned provision, preceded J Misra's analysis of its *vires* under Article 14, 19 and 21. However, specifically in the context of Article 14 as well, J Misra noted that the provision led to social stigma and neglect (¶254). Justice Chandrachud framed the challenge as one to a provision which made second class citizens out of the LGBTQ and, like J Misra, the impact of the provision precedes his analysis as well (¶377). The most elaborate discussion of impact of §377, IPC in J Chandrachud's opinion, however, is under the challenge on the basis of Article 15(1)

prong of the classification test to evaluate the validity of the classification reminiscent of J Bose' opinion. The decision in Joseph Shine has established the place of impact as a relevant question in an inquiry to test the violation of Article 14.¹⁸¹

However, the test formulated by J Chandrachud in Joseph Shine for scrutiny under Article 14 gave primacy to the 'real impact' of the impugned legislation in order to determine whether it was perpetuating the 'subordination of a disadvantaged group of individuals'.¹⁸² He held that the impugned provision in issue before the Court impeded substantive equality as incorporated in Article 14 by institutionalising the conditions which led to subordination of the group.¹⁸³ Crucial for the purpose of this paper is his understanding of the mandate of the general constitutional guarantee of equality. According to J Chandrachud, the task of substantive equality is to reverse the conditions which had led to the historical subordination such as in this case before the Court, a "deeply entrenched patriarchal order".¹⁸⁴

2. THE SUBSTANTIVE EQUALITY STANDARD OF REVIEW UNDER ARTICLE 14

The opinion of J Vivian Bose in Anwar Ali Sarkar and J Chandrachud in Joseph Shine articulate the view that the content of the general constitutional guarantee of equality under the Constitution cannot be defined exclusively in a comparative sense and tested on the threshold of the classification test. Furthermore, the content of the general constitutional guarantees of equality as distilled from these opinions seeks to protect individuals or groups from State action which makes them vulnerable to historically unequal and unjust treatment such as trial by *ad-hoc* military tribunals or a subordinate status in the institution of marriage. In this vein, J Bose is motivated by the need to enquire into the historical precursor of the impugned provision and his conclusion is based on the incongruity between such practice and the constitutional guarantee in contrast to proceeding on the basis that the classification test is the sole standard of review under Article 14.¹⁸⁵

and he holds that the threshold under this Article is the impact of the impugned measure and not its intent (¶440). In his inquiry under this ground, J Chandrachud holds that the basis of §377 are gender stereotypes and gender roles which criminalise those who do not uphold these stereotypes and therefore a challenge to §377 was also a challenge to the perpetuation of these stereotypes (¶461).

¹⁸¹ Joseph Shine, *supra* note 160, ¶¶29, 30, 172, 174, 273.5 at 21. J Chandrachud also held the impugned provision to be a violation of Articles 15(1) and 15(3); however, unlike Anuj Garg, his analysis under Article 14 is separate from that under Article 15. J Mishra held the provision to be manifestly arbitrary. J Malhotra held that the classification was anachronistic.

¹⁸² *Id.*, ¶172; See Gautam Bhatia, *The Supreme Court decriminalises Adultery*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, September 27, 2018, available at <https://indconlawphil.wordpress.com/2018/09/27/the-supreme-court-decriminalises-adultery/> (Last visited on September 4, 2020) (Bhatia has argued that the approach of J Chandrachud supports the need for analysis under Article 14 to move beyond the traditional classification test and to address 'substantive disadvantage').

¹⁸³ Joseph Shine, *supra* note 160, ¶¶168-169 at 21. He also held the provision to be manifestly arbitrary on the ground that it criminalises the extra-marital relationship of the wife due to the understanding of her place in matrimony as property of the husband.

¹⁸⁴ *Id.*, ¶174.

¹⁸⁵ See, Anwar Ali Sarkar, *supra* note 159, ¶91 at 22.

"91. Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the judges and the courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary courts, many were acquitted, many who had been sentenced

It is submitted that J Chandrachud's opinion in *Joseph Shine* like J Vivian Bose's opinion in *Anwar Ali Sarkar* does not focus on the justification for unequal treatment offered by the State. J Bose rejected the argument that all persons to whom the provisions impugned before him would have been applied by the State Government were treated alike but was concerned by the fact that persons accused of the same offence could be tried by different courts. J Chandrachud also rejected the justification that the impugned provision protected women from prosecution but was concerned by its treatment of husband and wife within marriage. Instead of applying the classification test, they focus on the impact as evidenced by the operation of the impugned provision historically. J Bose examined the statute in the context of historic trials by ad-hoc tribunals; whereas, J Chandrachud analysed the provision through the status of women in a patriarchal order. On this basis, both opinions create a stand-alone test of substantive equality under Article 14 unencumbered by the doctrine of classification or arbitrariness.

At this stage, it is necessary to point out that §9 does not distinguish between persons on the basis of their identity and therefore the observations of J Chandrachud will not apply to its evaluation identically to the manner in which it was formulated in *Joseph Shine*. However, the relevance of a stand-alone ground of substantive equality as a standard of review under Article 14 lies in its focus on impact which can expose the mischief of provisions such as §9 resulting in the exclusion of intended beneficiaries. Replacing classification with 'real impact' as the starting point of the inquiry of judicial review of legislation under Article 14 will also assist in placing the challenge in the context of the larger constitutional ethos and values.

The 'real impact' of §9 is exclusion from the benefits of the NFSA of persons who are otherwise entitled to be covered by it. This was, in fact, recognised by the Central Government itself in the right to food case when it proposed that the beneficiaries under the TPDS be calculated on the basis of the population estimates for the relevant year which were projected on the basis of the last census.¹⁸⁶ The same method was recommended in the NFSB, 2011. The Standing Committee which discussed the Bill also did not recommend any changes to this provision. No reasons have been offered by the Central Government for changing the method incorporated in the NFSB, 2011 for calculating the number of beneficiaries and making it conditional upon published census figures under the 2013 Act. In this background, it is submitted that §9 impedes the promise of substantive equality which is inseparable from basic socio-economic entitlements such as freedom from hunger and malnutrition by depriving beneficiaries of the NFSA to its entitlements through suppression of the extent of its coverage on the basis of outdated population data. J Bose's opinion in *Anwar Ali Sarkar* and J Chandrachud's opinion in *Joseph Shine* afford a tool for arguing that §9 is unconstitutional due to its "real impact" on intended beneficiaries.

The endeavour in this segment of the article was to demonstrate that Indian jurisprudence under the general constitutional guarantee of equality conferred by Article 14 extends to protection against legislations having a neutral legislative aim which result in impeding substantive equality. §9 of the NFSA ostensibly provides a method for determining the actual number of beneficiaries under the legislation. However, it operates to suppress the coverage under the NFSA and denies its benefits to intended beneficiaries. This exclusion is manifested in the form of non-issuance of new ration cards which is the mode for claiming of

to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood."

¹⁸⁶ May 14, 2011 Order, *supra* note 59, at 9.

entitlements under the NFSA. §9, consequently, impedes access to subsidised food grains of beneficiaries who are unable to procure ration cards due to suppression of the actual extent of the NFSA. In the next segment of this section, the article argues that this classification among intended beneficiaries is unconstitutional.

B. THE CLASSIFICATION TEST

Despite being characteristic of a formal vision of equality, the classification test has been consistently applied by the Supreme Court as the test for violation of Article 14.¹⁸⁷ While challenges to classification on the basis of identity have led courts to reimagine application of the test under Article 14¹⁸⁸, it continues to be the dominant judicial approach to claims under Article 14 and particularly claims for access to a benefit which has been curtailed by a cut-off date.¹⁸⁹ §9 is structurally akin to such cut-off legislation as it provides a method for translating the coverage as mentioned in terms of percentage under the Act into actual numbers. However, in contrast to cut-off legislation which determine the extent of coverage, the extent under the NFSA is provided under §3(2) and §9 merely indicates a method to translate that into actual numbers. Since classification remains the dominant approach of the Court in adjudicating the claims under Article 14, in this section, the article will argue that §9 does not satisfy the classification test.

The standard formulation of the classification test as adopted by the Supreme Court involves two questions: (i) whether the classification is based on intelligible differentia (hereinafter referred to as “intelligible differentia”); and, (ii) whether the classification has a rational nexus with the object of the legislation (hereinafter referred to as “rational nexus”).¹⁹⁰ The classification test operates in the context of the purpose or object of the legislation. The purpose or object of a legislation is directed towards the mischief towards which it is directed and the remedy provided by it.¹⁹¹ It can be determined on the basis of the statement of objects and reasons, the preamble and the provisions of the enactment.¹⁹²

The Statement of Objects and Reasons of the National Food Security Bill, 2013 stated that the legislation sought to secure food security by moving away from a welfare approach to adopting a rights-based approach for providing subsidised food grains to 75 percent of the rural and 50 percent of the urban population.¹⁹³ The Statement does not mention that the said percentages will be converted to actual numbers on the basis of the last published census; however, under Cl.9 of the Bill incorporated the same scheme. Preamble of the NFSA is more far-reaching the provisions of the Act and states that it aims to provide food and nutritional security by ensuring access to adequate quantity of quality food.¹⁹⁴ It is relevant to reiterate

¹⁸⁷ Khaitan, *supra* note 154, 702 at 20; GAUTAM BHATIA, *supra*, note 170, 43 at 23.

¹⁸⁸ Naz Foundation v. NCT of Delhi, 160 DLT 277(2009); Navtej Johar, *supra* note 171, at 23; Joseph Shine, *supra* note 160, at 21; M/s United India Insurance Company v. Jai Prakash Tayal, Judgment dated 26.02.2018 in RFA No.610/2016, ¶D.1. (“Article 14 of the Constitution of India prohibits discrimination of any kind. This would include discrimination based on genetic heritage of an individual”).

¹⁸⁹ State of Punjab v. Amar Nath Goyal, (2005) 6 SCC 754; Government of Andhra Pradesh v. N Subbarayudu (2008) 14 SCC 702. The observation in ¶29 of Amar Nath Goyal that DS Nakara has been watered down is not correct as it is based on decisions which have distinguished DS Nakara on the ground that unlike DS Nakara the cases pertained to persons governed by different rules and therefore constituting different classes.

¹⁹⁰ Khaitan, *supra* note 154, 704 at 20.

¹⁹¹ Harosa, *supra* note 176, ¶13 at 24.

¹⁹² *Id.*, ¶12.

¹⁹³ The National Food Security Bill, 2013, Statement of Objects and Reasons.

¹⁹⁴ The National Food Security Act, 2013, Preamble.

that in terms of §3(2) of the Act, access to subsidised food grains is guaranteed to 75 percent of the rural and 50 percent of the urban population.¹⁹⁵

At this juncture, it is also pertinent to mention that NFSB, 2011 which was referred to the Standing Committee in Clause 30(3) provided for revision of annual allocation of food grains on the basis of ‘actual or estimated population’.¹⁹⁶ The NFSB, 2013 was never referred to a Select Committee and was based on the National Food Security Ordinance, 2013.¹⁹⁷ This legislative history suggests that §9 was, although, a part of the NFSB, 2013; was never referred to a Select Committee and the only provision regarding determination of the actual beneficiaries of the food security law which was discussed by a Select Committee was Cl.30(3) of the National Food Security Bill, 2011 which provided for revision of the number of beneficiaries in terms of the estimate of population. It is in this background that the article argues that the objective of the enactment was to cover 75 percent of the rural and 50 percent of the urban population and a provision such as §9 which suppresses the actual extent of these figures is contrary to the objective of the NFSB.

1. INTELLIGIBLE DIFFERENTIA

The impact of §9 as discussed in the beginning of the present Section is the creation of two classes of beneficiaries under the Act: one that can access subsidised food grains; and, another which is unable to get ration cards due to suppression of the actual extent of coverage under the Act and therefore unable to access subsidised food grains. This classification is not a consequence of the any difference between the beneficiaries in terms of their need for subsidised food grains or their eligibility for it.¹⁹⁸ It is submitted that this classification is the consequence of reduction in the actual extent of coverage under the NFSB due to the use of outdated census figures. Those beneficiaries who fall within the extent prescribed by the Act (75 percent of rural population and 50 percent of the urban population) on the basis of actual population estimates as revised on an annual basis will not be able to access the benefits of the Act due to a provision which sanctions the suppression of that extent by use of outdated population figures. The consequence of this is supply of lesser quantity (on the basis of outdated census figures) of food grains by the Central Government to the State Government and the inability of the State Government to recognise new beneficiaries under the Act.¹⁹⁹ It is submitted that the operation of the NFSB in this manner creates an artificial distinction between similarly situated persons which is impermissible in terms of the law laid down in *DS Nakara*²⁰⁰ and followed in *Prabhakara Rao*.²⁰¹ As discussed earlier, in *DS Nakara*, the Government sought to subject pensioners governed by the same rules to different methods for calculation of pension. Those who retired earlier were subject to a less beneficial method. In *Prabhakara Rao*, the State Government amended the relevant rule to decrease the age of

¹⁹⁵ The National Food Security Act, 2013, §3(2).

¹⁹⁶ The National Food Security Bill, 2011, 132 of 2011, Cl.30(3); For a critique of the Bill, see Right to Food Campaign, *Right to Food, a critique of the draft food security bill, and a brief outline of what any such bill must, at the very least, incorporate*, 33 ECONOMIC AND POLITICAL WEEKLY (2011).

¹⁹⁷ See COMPENDIUM ON PARLIAMENTARY ENACTMENTS ON THE NATIONAL FOOD SECURITY ACT, 2013, Rajya Sabha, *Synopsis of the Debate on the Statutory Resolution for Disapproval of the National Food Security Ordinance, 2013 and the National Food Security Bill, 2013*, 431, available at https://rajyasabha.nic.in/rsnew/publication_electronic/National_Food_security_Act2013.pdf (Last visited on August 25, 2020) (‘Synopsis of the Debate’).

¹⁹⁸ The eligibility is determined under The National Food Security Act, 2013, §10.

¹⁹⁹ Dreze et al., *supra* note 11, at 4.

²⁰⁰ *DS Nakara*, *supra* note 180, at 25.

²⁰¹ *Prabhakar Rao*, *supra* note 180, at 25.

retirement from fifty-eight to fifty-five years.²⁰² During the pendency the litigation, the State Government decided to raise the retirement again to fifty-five but sought to deprive persons who had retired due to amendment of the relevant rule at the age of fifty-five from this benefit.²⁰³ The Court held such a classification to artificial because there was no difference between persons who were being denied and those who were given the benefit of the amendment of the impugned rule apart from the fact that those who had already retired were older and therefore reached the age of age of fifty-five leading to retirement earlier.²⁰⁴

The decisions in DS Nakara and Prabhakara Rao demonstrate that the Court proscribed distinguishing between persons who were similarly situated in the context of the object of the differentia such as pension in DS Nakara and tenure in service in Prabhakara Rao. There was no ground to treat pensioners differently in Nakara because they were governed by the same pension rules and officers in Prabhakara Rao who were governed by the same service rules. In view of this, it is submitted that persons who are entitled to benefits under the NFSA on the basis of the criteria for identification of beneficiaries laid down by the State Governments cannot be treated differently merely on the ground of artificial suppression of the obligations of the Central Government by failure to take into account the increase in the number of beneficiaries.

2. RATIONAL NEXUS²⁰⁵

This segment of the article seeks to test §9 on the second prong of the classification test i.e. the rational nexus inquiry which poses the issue of whether there is a rational nexus between the differentia and the object sought to be achieved by the rule. To achieve this end, the article first applies the test in its traditional form to demonstrate that it makes invisible the impact of §9.²⁰⁶ The article proposes to ask two questions suggested by Dr.Khaitan to overcome this limitation: (i) whether the objective is genuine?; and, whether, it is legitimate?²⁰⁷ The article has invoked this line because the evaluation of the method proposed by §9 for determination of the number of beneficiaries under the NFSA in light of these two questions throws light on its exclusionary nature.²⁰⁸ The segment concludes with the recommendation to reformulate the rational nexus test as demanding a constitutional standard of rationality to create the space for raising questions such as genuineness and legitimacy which have traditionally been overlooked by the courts. It is submitted that such an approach will expose the “real impact” of the rule and further the objective of substantive equality.

The standard formulation of the rational nexus test is whether or not the classificatory rule has a causal connection with its objective.²⁰⁹ Based on this approach, a simplistic answer to the rational nexus inquiry for §9 will proceed the on the basis that it provides a feasible method for determining the extent of beneficiaries under the NFSA. To

²⁰² *Id.*, ¶6.

²⁰³ *Id.*, ¶10.

²⁰⁴ *Id.*, ¶¶18-19.

²⁰⁵ Ideally, there would be no need for a rational nexus analysis in the absence of satisfaction of the first prong of the classification test. However, for the sake of completeness, the article also seeks to demonstrate that a rational nexus between the classification of beneficiaries under the NFSA in terms of §9 and the object sought to be achieved by the legislation does not exist.

²⁰⁶ Khaitan, *supra* note 154, 708 at 20.

²⁰⁷ It is pertinent to clarify at the outset that these questions have been suggested in academic writing to expand the scope of inquiry under the rational nexus prong of the classification test but are not resorted to by the courts in review under Article 14.

²⁰⁸ The National Food Security Act, §9 deploys the last published census results to determine the number of beneficiaries under the NFSA.

²⁰⁹ DS Nakara, *supra* note 180, ¶11 at 25.

elaborate, the analysis can assert, *First*, that the purpose of the NFSA is to provide subsidised food grains to 75 percent of the rural and 50 percent of the urban population and it is the obligation of the Central Government to ensure that the requisite quantity of food grains required to fulfil this obligation is delivered. *Second*, §9 of the NFSA provides for a method to determine the actual number of beneficiaries so that the Central Government can fulfil its obligation of delivering the requisite quantities and the State Governments can deliver them to the beneficiaries.

This analysis fails to probe into the consequences of the method deployed by §9 which leads to massive exclusions from the NFSA.²¹⁰ In order to make this inquiry more meaningful by exposing the consequences of §9, the article proposes to ask two further questions regarding the genuineness and legitimacy of the objective of §9 of the NFSA.²¹¹

a. Genuineness

Testing genuineness of a rule requires comparing its ostensible purpose with its actual operation to determine whether the stated objective is correct or not?²¹² It is submitted that the inquiry undertaken by the Supreme Court under “legitimate purpose” in *Deepak Sibal v. Punjab University* (‘Deepak Sibal’)²¹³ and *Subramanian Swamy v. Director, CBI* (‘Subramanian Swamy’)²¹⁴ is undertaking the same task but to a narrower extent.²¹⁵ Genuineness seeks to understand whether the rule was motivated with the intention to discriminate and does in fact lead to discrimination or not.²¹⁶ The ‘legitimate purpose’ inquiry as formulated by the Court in the aforesaid cases seeks to analyse the classification created by the impugned rule in the context of its stated objective to expose the incongruity between them.²¹⁷ In this way, both genuineness and legitimate purpose have the potential to expose the discriminatory impact of the rule. However, it is submitted that ‘legitimate purpose’ is narrower than genuineness because the analysis of legislative intent is outside its scope and ambit and it only focuses on the operation of the rule. Under the legitimate purpose inquiry, any impact of the rule which is contrary to the objective has been characterised by the Court as ‘unreasonable and unjust’ in *Deepak Sibal*.²¹⁸ The Court held the impugned rule to be unconstitutional on this ground. In *Subramanian Swamy*, the Court held such classification which defeated the purpose

²¹⁰ Dreze et al, *supra*, note 11, at 4.

²¹¹ Khaitan suggests various questions which can be asked in the rational nexus inquiry which have traditionally not been asked by the Courts reducing the classification test to a highly formalistic one. Since, the article proposes to expand the scope of the rational nexus inquiry by raising issues proposed by Khaitan, this has not been done separately but as a part of the classification test.

²¹² Khaitan, *supra* note 154, 708 at 20. Khaitan’s definition of genuineness, “*Is the stated or apparent objective masking another, a more sinister, one?*”.

²¹³ *Deepak Sibal v. Punjab University*, (1989) 2 SCC 145 (‘Deepak Sibal’).

²¹⁴ *Subramanian Swamy v. Director, CBI* (2014) 8 SCC 682 (‘Subramanian Swamy’).

²¹⁵ Gautam Bhatia suggests that ‘legitimate purpose’ has been deployed as a distinct ground for challenge under Article 14 independent of classification test and arbitrariness doctrine. See GAUTAM BHATIA, *supra* note 170, 49 at 23. This article proposes that the ‘legitimate purpose’ test can expand the scope of the rational nexus inquiry under the classification test.

²¹⁶ Khaitan cites the question posed by J Sastri in *Anwar Ali Sarkar* as whether the law was ‘designed’ to operate in a discriminatory way as a part of the genuineness inquiry. See Khaitan, *supra* note 154, 707 at 20.

²¹⁷ See *Deepak Sibal*, *supra* note 213, at 31. In *Deepak Sibal*, the Court held the Rule which only allowed employees of Government/ semi-Government institutions affiliated colleges/ statutory corporations and government companies to take admission in evening classes of Punjab University to be contrary to the purpose of evening classes and unconstitutional on this ground.

²¹⁸ *Deepak Sibal*, *supra* note 213, at 31.

of the statute to be ‘discriminatory’ and therefore unconstitutional.²¹⁹ In view of the decisions in Deepak Sibal and Subramanian Swamy, it is submitted that the ‘legitimate purpose’ question is one of the issues which can be raised as a part of the genuineness inquiry. In addition to this, a genuineness inquiry could seek to understand legislative intent on the basis of the Bill preceding the provision, explanations of the executive before a standing committee, discussion in Parliament and contemporaneous historical material for evaluation of the intent.²²⁰ However, this is a proposal in as much as the genuineness test is not applied by courts of law in the classification test and therefore the material which will support a genuineness inquiry cannot be authoritatively stated at this stage. A rule which operates contrary to the stated purpose of the legislation itself cannot be considered as having an objective which is defensible and will fail the rational nexus prong *per se* based on the ‘legitimate purpose’ test. Whereas, a provision which ostensibly fulfils its stated objective but also results in consequences which are contrary to the intent and background of the statute (as opposed to its stated purpose which is the content of ‘legitimate purpose’) will fall within the broader realm of the ‘genuineness’ inquiry which has not been judicially applied and tested by courts in India.

The objective of the §9 is to determine the actual extent of the NFSA. However, the provision explicitly incorporates the use of census data to determine the actual extent of coverage. The issue that arises is whether in the background of the explicit language of the provision which mandates the use of census data, it is possible to argue that the provision is masking a more sinister objective than the one which is apparent? To answer this question, we propose that the evaluation of genuineness of the impugned rule should take place in the context of the legislation and its history.²²¹

In so far as §9 is concerned, it is submitted that, despite the fact that the provision itself incorporates the need to translate the extent of the coverage into actual numbers on the basis of the last published census; the provision is inconsistent with the stated objective and overall scheme of the NFSA. The NFSA is premised on the coverage of 75 percent of the rural households and 50 percent of the urban households and the only exception to this is a situation when the Central Government itself determines a smaller extent of coverage under the Act.²²² In this scheme, the latter part of §9 which is merely a modality for determining the actual number of beneficiaries falling within the percentages specified under the Act cannot be allowed to suppress the figure which would result from conversion of the percentages into actual numbers on the basis of contemporaneous population estimates.

Moreover, a provision such as §9 does not have any support in the legislative antecedents of the NFSA. In fact, its legislative history indicates that calculation of beneficiaries based on the annual population estimates was proposed by the Government itself before, both, the Supreme Court and in the NFSB, 2011. While it is conceivable that the legislature intentionally deviated from its proposals before the Supreme Court as well as in the NFSB, 2011 by enacting the NFSA, in the absence of material to demonstrate the reason for

²¹⁹ The issue before the Court was classification of officers under §6-A of the Delhi Special Police Establishment Act, 1946. §6-A prescribed different treatment for public servants of Joint Secretary level and above working with the Central Government and other public servants. The Court held that the classification defeated the purpose of the statute which was to investigate into allegations of graft. *See* Subramanian Swamy, *supra* note 214, ¶¶20, 58, 59, 68, 69 and 70 at 31.

²²⁰ However, this is a proposal in as much as the genuineness test is not applied by courts of law in the classification test and therefore the material which will support a genuineness inquiry cannot be authoritatively stated at this stage.

²²¹ Since, we have invoked the genuineness inquiry on the basis of academic writing, at this juncture, it is not possible to provide judicial authority in support of the material proposed by us applying a genuineness inquiry.

²²² The National Food Security Act, 2013, §9.

the deviation coupled with the unequivocal mandate of the Act that 75 percent of the rural households and 50 percent of the urban households are entitled to its benefits under the NFSA; it is argued that §9 being contrary to the stated objective of the NFSA, does not have a ‘legitimate purpose’. Moreover, its legislative history suggests that the Central Government was aware that the use of outdated census data will lead to exclusion from the benefits of the scheme as evident from its submissions before the Supreme Court.²²³ The incorporation in §9 of the need to determine coverage under the NFSA based on published census results only and the consequent exclusions are, therefore, not an unforeseeable outcome but motivated to impede the extent of coverage under the NFSA. It is, therefore, argued that §9 has consequences which are far more sinister than are apparent from viewing it disjunctively from the purpose and intent of the legislation and is not a genuine expression of the intention of the NFSA.

b. Legitimacy

It is necessary to clarify that the ‘legitimacy’ question as proposed by Dr. Khaitan is distinct from the ‘legitimate purpose’ test as applied by the Supreme Court in Deepak Sibal and Subramanian Swamy. While, legitimate purpose, as discussed above, is concerned with incongruity between the stated purpose of the legislation and the impugned rule; an inquiry into the legitimacy of the objective of a classificatory rule, on the other hand, should consider its consistency with the larger constitutional scheme and constitutional values such as non-discrimination on grounds of caste, secularism and universal adult franchise etc.²²⁴ Legitimacy, is, therefore, a broader inquiry than genuineness as it moves beyond the realm of the relevant legislation of the impugned rule.²²⁵ The social movement for the right to food and the constitutional jurisprudence affirming the right which were precursors to the NFSA become relevant for the legitimacy enquiry. Much prior to the enactment of the NFSA, the Supreme Court had recognised right to food as a part of the right to life and liberty.²²⁶ Thereafter, through orders passed in the Right to Food case, the Court significantly expanded its ambit by recourse to Article 21 and Article 47.²²⁷ Out of this emerge certain guarantees which are not subsumed within the Act and stand independently of it. One of these guarantees is that of ensuring that under-inclusion of beneficiaries is prevented.²²⁸ However, the exclusionary impact of §9 defeats this guarantee and is contrary to the spirit of the Court’s orders. Therefore, though, reliance on the last published census results for determining the extent of coverage under the NFSA has legislative sanction in the form of §9, such a provision is not legitimate.

c. The case for constitutional rationality

The rational nexus inquiry as traditionally applied under Article 14 merely seeks to establish a causal connection between the differentia and the objective of the rule. The consequence is a judicial blindness towards the impact of the classification. It is submitted that an inquiry into the genuineness and legitimacy of the objective of §9 can assist in unpacking its “real-world impact”²²⁹. The Court has successively transgressed a formulaic application of the classification test by evaluating the impact of the classificatory rule.²³⁰ It is therefore

²²³ May 14, 2011 Order, *supra* note 59, at 9.

²²⁴ Khaitan, *supra* note 154, at 20.

²²⁵ Khaitan, *supra* note 154, 708 at 20.

²²⁶ *M/s Shantistar Builders*, *supra* note 9, at 3.

²²⁷ See, *supra* Part II(A), “A question of Rights: PUCL v. Union of India & Ors.”

²²⁸ See *supra* Part II(A)(2).

²²⁹ Khaitan, *supra* note 154, at 20.

²³⁰ Anwar Ali Sarkar, *supra* note 159, at 21.

suggested that the second prong of the classification-test under Article 14 should be reformulated and should require demonstration of a constitutionally rational nexus between differentia and the objective. It is submitted that such a reformulation will create the space for raising of many questions outside the traditional formulation of the test which are necessary for striving for substantive equality.

C. MANIFEST ARBITRARINESS

In this segment, the article argues, briefly, that §9 is ‘manifestly arbitrary’. However, since this doctrine is of recent origin and its contours are not well-settled yet; it is being used only as an alternative to the principle arguments raised on the basis of impact and the classification test. The present article does not seek to engage with the critique of the doctrine but to utilise the standard applied by the Court as a facet of constitutional precedent for challenging §9.²³¹ It is argued that the impugned part of §9 is unconstitutional on the basis of the doctrine of ‘manifest arbitrariness’ because it is capricious and irrational²³²; and, it is based on an inadequate determining principle.²³³

Actions not motivated by reasons or by insufficient contemplation of their consequences and contrary to relevant contemporaneous evidence such as judicial precedent have been considered as capricious and irrational by the Court.²³⁴ In applying the test to §9, it is necessary to reiterate that the purpose of the legislation is to secure the beneficiaries that are explicitly covered by it i.e. 75 percent of the rural population and 50 percent of the urban population unless the Central Government specifies a smaller extent.²³⁵ Analysed in this context, the method sought to be relied upon by §9 is highly unsuited for achieving the objective of the Act because it merely reduces the actual number of people entitled to be covered by the legislation by relying on outdated census results.²³⁶ Moreover, the method adopted by §9 is directly contrary to the Court’s jurisprudence in the Right to Food case which consistently sought to prevent exclusion of beneficiaries.

In *Hindustan Construction Company v. Union of India* (‘Hindustan Construction Company’), the Court introduced the ground of “inadequate determining principle” as a ground for striking down of legislation under the doctrine of manifest arbitrariness.²³⁷ As stated above, this article proposes to use the ground of inadequate determining principle to argue that §9 is ‘manifestly arbitrary’. The conclusion in *Hindustan Construction Company* that the impugned amendment was without inadequate determining principle appears to be based on its finding that it sought to withdraw a benefit initially

²³¹ For the critique, See Dhruva Gandhi, *Rethinking “Manifest Arbitrariness” in Article 14: Part II – Disparate Impact and Indirect Discrimination*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 21, 2020, available at <https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/> (Last visited on July 10, 2020); Mihir Naniwadekar, *Rethinking “Manifest Arbitrariness” in Article 14: Part I – Introducing the Argument*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 6, 2020, available at <https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/> (Last visited on July 10, 2020).

²³² *Shayara Bano v. Union of India* (‘Shayara Bano’), (2017) 9 SCC SCC 1, ¶104.

²³³ *Hindustan Construction Company Ltd. v. Union of India*, Judgment dated November 27, 2019 in WP (C) No.1074 of 2019, available at <https://ibbi.gov.in/uploads/order/15d74df94a962203942eb75f5461b853.pdf>, last visited on 28.04.2020, ¶48 (‘Hindustan Construction Company’).

²³⁴ *Shayara Bano*, *supra* note 232, ¶104 at 34; *Hindustan Construction Company*, *supra* note 233, ¶48 at 34.

²³⁵ The National Food Security Act, 2013, Preamble, §3(2).

²³⁶ *Dreze et al.*, *supra* note 11, at 4.

²³⁷ *Hindustan Construction Company*, *supra* note 233, ¶48 at 34.

conferred on all persons from a certain class of decree holders without any basis²³⁸ and the harmful impact of such withdrawal.²³⁹ Hindustan Construction Company has therefore introduced an impact-based inquiry to ascertain whether a provision is without adequate determining principle. §9 has the effect of completely depriving intended beneficiaries from its guarantees by reducing coverage of the Act through use of outdated census figures. Moreover, the fact that making coverage dependent on outdated census figures is an inadequate determining principle as is sought to be done by §9 is also evident from legislative history of the Act. The Central Government itself proposed that allocation of food grains under the PDS should be based on current population estimates to the Supreme Court in right to food case. The approach of the NAC as well as the Rangarajan Committee at the pre-legislative stage was to enhance the number of beneficiaries. Cl.30(3) of the NFSB, 2011 reflected the same intention and was placed before the Standing Committee which did not propose any changes to it; whereas the method incorporated by §9 was neither recommended by any expert body nor placed before the Standing Committee. In this background, it is argued that §9 lays down an inadequate determining principle and is “manifestly arbitrary” on this ground as well in addition to its capricious, irrational and whimsical nature as discussed above.

On the basis of the aforesaid analysis, the article has argued that that §9 has a neutral legislative aim but, in fact, operates to cause exclusion of beneficiaries under the NFSA. The interpretation of the general guarantee of equality under Article 14 has considered impact of facially neutral or classificatory legislations which nevertheless result in discrimination against a certain section of people. Due to its impact, it is submitted that, §9 impedes intended beneficiaries under the NFSA to access their substantive right to equality and is therefore violative of Article 14. Moreover, §9 cannot withstand scrutiny under the classification test and is ‘manifestly arbitrary’.

V. INJUSTICES OF TARGETING: CHRONIC UNDERINCLUSION AND THE RISK OF FOOD INSECURITY

“Why should I who have no need to work for food, spin?” may be the question asked. Because I am eating what does not belong to me. I am living on the spoliation of my countrymen”.²⁴⁰

The analysis in section II and III has sought to demonstrate the limitations of the legal framework to address food insecurity in India including its adoption of a targeted approach to facilitate access subsidised food grains. Under-inclusion inherent to targeting is further aggravated by calculation of beneficiaries on the basis of outdated census figures due to provisions such as §9. In this section, the article will use the analysis in the preceding sections to make certain constructive suggestions with regard to the legal framework for attaining food and nutrition security during the time of an emergency or a national disaster such as the current pandemic; and, structural changes by way of amendments to the NFSA for expanding its coverage.

²³⁸ This was done by the impugned §87 introduced into the Arbitration and Conciliation Act, 1996 by the Amendment Act of 2019.

²³⁹ Hindustan Construction Company, *supra* note 233, ¶51 at 34.

²⁴⁰ Sabyasachi Bhattacharya, *MK Gandhi, The Great Sentinel* in *THE MAHATMA AND THE POET: LETTERS AND DEBATES BETWEEN GANDHI AND TAGORE*, 87 (1st ed., 1997).

A. ENSURING FOOD SECURITY DURING AN EMERGENCY OR A NATIONAL DISASTER SUCH AS A PANDEMIC

As discussed earlier, ration cards are a peremptory requirement for access to distribution of essential commodities under the NFSA or under any State scheme.²⁴¹ Moreover, as discussed earlier, the most enduring measures for distribution of subsidised food grains announced by the executive during the pandemic are also centred around NFSA beneficiaries.²⁴² Therefore, the situation as it stands today, is that the entire framework of food security in India is centred around the NFSA which protects only about 67 percent of the population or the “eligible households” who are identified on the basis of ration cards stating their status as “priority households” or “AAY households”.²⁴³ At the state level also, only ration card holders are entitled to distribution of subsidised food grains.²⁴⁴

Viewed in this context, it is evident that any disaster exposes non-NFSA beneficiaries and non-ration card holders to greater risk of hunger and starvation. The injustice of a provision such as §9 which has the direct effect of reducing ration-card holders, therefore, becomes more acute in such times. In fact, as discussed earlier, only 25 percent of the stock sent to the States by the Central Government for non-NFSA and non-ration card beneficiaries has actually been distributed which suggests that even the bare minimum done to alleviate the plight of non-NFSA beneficiaries and non-ration card holders was not successful.²⁴⁵

Based on this analysis, the article suggests universalisation of PDS by eliminating the distinction between NFSA and non-NFSA beneficiaries; and, ration-card holders and non-ration card holders during the currency of any disaster such as the COVID-19 pandemic.²⁴⁶ It is further recommended that High Courts should follow the precedent in Swaraj Abhiyan to actively support the elimination of these distinctions. Finally, we make structural suggestions in the form of amendment of the NFSA for expanding coverage of beneficiaries under it.

1. UNIVERSALISATION OF PDS BY ELIMINATION OF DISTINCTION BETWEEN NFSA AND NON-NFSA BENEFICIARIES AS WELL AS THE REQUIREMENT OF A RATION CARD DURING THE CURRENCY OF AN EMERGENCY OR A NATIONAL DISASTER.

- a. Reasons and justification

§9 restricts the coverage under the NFSA based on outdated census figures which has resulted in exclusion of almost 100 million beneficiaries from the net of the PDS.²⁴⁷ In ordinary times, sustenance without access to PDS is a possibility due to availability of casual jobs and a daily wage. This becomes uncertain during an emergency or a national disaster which can severely restrict economic activity and mobility making it harder to find any employment and the ability to buy food. Moreover, another feature of an extraordinary situation

²⁴¹ The Public Distribution System (Control Order), 2015, ¶4(3).

²⁴² See *supra* Part III(E), “The ration card imperative: Executive measures announced during the pandemic”.

²⁴³ See *supra* Part III.

²⁴⁴ The Public Distribution System (Control Order), 2015, ¶4(3).

²⁴⁵ HINDUSTAN TIMES, *Only quarter percent of 80 million migrants got Govt. food aid*, August 18, 2020, available at <https://www.hindustantimes.com/india-news/only-quarter-of-80-million-migrants-got-govt-food-aid/story-HBnQrzNtYhrrPqPn1npWvO.html> (Last visited on August 25, 2020). The Central Government had to allow the distribution of stocks till August as opposed to bringing it an end by June.

²⁴⁶ The authors are not engaging with universalisation generally as it is outside the scope of the present paper which focuses on §9.

²⁴⁷ Dreze et al., *supra* note 11, at 4.

such as a pandemic is shortage of regular stocks in the market and therefore sheer availability of food-grains in the open market. The schemes announced by the executive to supplement food entitlements under the NFSA as well as extending the access to non-NFSA beneficiaries during the current pandemic constitute evidence of the need for such measures during an emergency or a national disaster.²⁴⁸ It is to ensure that those left outside the NFSA due to operation of §9 or those who are without a ration card²⁴⁹ are also protected from hunger, in such a situation, that the present article recommends universalisation of PDS during an emergency or a national disaster. The implementation of such a measure by amendment of the Act or formulation of separate rules will merely reduce dependence on formulation of a policy by the executive as well as the opportunity cost of delay for formulation of such a policy and allow State administrations to fight the onset of food insecurity promptly.²⁵⁰ Moreover, it is suggested that the power to declare the existence of such an emergency or disaster should be available to both the State and the Central Governments. This will also address the gap created by deletion of Cl.9 of the NFSB which made provision for access to two meals for all affected households in a case of emergency or national disaster.²⁵¹

The first issue which requires consideration in this regard is the need and justification for suggesting such an amendment to the NFSA in light of the fact that India has a disaster management legislation which confers wide-ranging powers on executive authorities for implementation of relief during a disaster.²⁵² The NFSA guarantees the right to access subsidised food grains and other nutrition-related schemes. It legally secures the right to food and therefore, unlike the Disaster Management Act it specifically makes access to food and nutrition, howsoever limited, justiciable by strictly defining the obligations of the State on this issue. The Disaster Management Act, on the other hand, merely empowers the executive to take various measures considered to be necessary for effective management of disasters including relief measures such as providing food to disaster affected persons. Therefore, in order to further a rights-oriented access to food and nutrition during the time of an emergency or disaster, it is necessary to amend the NFSA and incorporate universalisation for times of emergencies and national disasters.

To further this objective and ensure that right to food remains justiciable it is also necessary to repeal §44 of the Act which exempts the State from liability under the NFSA during the time of “war, flood, drought, fire, cyclone or earthquake affecting the regular supply of food grains”. §44 is evidently contrary to the scheme and spirit of the NFSA and the constitutional guarantee to food as articulated and upheld the Right to Food case where the Court emphasised the need for executive measures to enhance access to food at such times and impelled the State to do so.

Moreover, the NFSA incorporates a mechanism for allocation of food-grains to the States and for the supply of food-grains to Fair Price Shops from which it can be accessed by the beneficiaries. In other words, the framework of the NFSA ensures availability of food-grains as well as its distribution through a localised system of Fair Price Shops. It is therefore

²⁴⁸ See *supra* Part III(E).

²⁴⁹ Since ration cards are issued by the State of which one ordinarily is resident and therefore migrant workers cannot get a ration card from the State in which they are working. See The Public Distribution System (Control Order), 2015, ¶4(3).

²⁵⁰ The relief for non-ration card holders was announced only on May 15, 2020 by the Central Government i.e. almost two months of the imposition of the national lockdown on March 24, 2020; See Khaitan, *supra* note 160, 709 at 21.

²⁵¹ The National Food Security Bill, 2013, 109 of 2013, Cl.9.

²⁵² The National Disaster Management Act, 2005. On the aspect of power to provide food, see, NDMA, 2005, §§ 12,24,34.

a more efficient structure for ensuring food security during the time of an emergency or disaster in which such shops remain accessible and can supplement the efforts taken under the Disaster Management Act.

b. Financial liability

The second issue which requires consideration in the context of any recommendation for universalisation of PDS is sustainability or financial implications of such a measure. As analysed by the Wire, at present 100 million tonnes of food grain is available in stock in India without including the procurement of *kharif* crop; whereas, the buffer norm is forty million tonnes.²⁵³ The requirement under PMGKAY is four million tonnes per month and therefore the total requirement under the scheme as well the NFSA for the next five months will be forty million tonnes. Since coverage under the NFSA is 75 percent of rural population and 50 percent of urban population, the amount of food grain required to cover non-NFSA beneficiaries should be ideally less than twenty million tonnes if calculated only at the rate of five kilograms per person for the next five months. Based on these estimates, the total amount of food grains required to provide non-NFSA beneficiaries as NFSA beneficiaries will be less than forty million tonnes leaving India with a sufficiently high buffer stock. In fact, the Minister for Agriculture has himself claimed that India has buffer stocks for two years to ensure food security ‘for the whole country’.²⁵⁴

However, a valid concern on the basis of the aforesaid analysis can be the situation in which the buffer stocks are not sufficiently high for universalisation. The possibility of such an occurrence will be dependent on the food production in India as the FCI procures stocks on the basis of the amount of production at the Minimum Support Price.²⁵⁵ Production of food grains and consequently procurement has consistently increased since 2015-16.²⁵⁶ The possibility that FCI will, therefore, not be able to procure sufficient food grains for universalisation is not viable when analysed in the background of these statistics.²⁵⁷

c. Mandate of Swaraj Abhiyan

In Swaraj Abhiyan, the Court directed that no distinction should be made between NFSA and non-NFSA beneficiaries in a drought stricken area and all households should be provided the food grains entitlement guaranteed by the Act.²⁵⁸ Given the excess stock available with FCI there is no reason why the same approach should not be adopted by the Central Government today to eliminate the distinction between NFSA and non-NFSA for entitlements under the PMGKAY and the NFSA. This situation warrants the measures which were directed to be taken by the Supreme Court in Swaraj Abhiyan in the context of a drought in certain parts of the country which was considered to be a national disaster.²⁵⁹

²⁵³ Aman et al., *supra* note 4, at 3.

²⁵⁴ THE WIRE, *India Has Enough Food Grain Stock for Two Years: Ram Vilas Paswan*, June 30, 2020, available at <https://thewire.in/government/ram-vilas-paswan-interview-food-grain-distribution> (Last visited on July 11, 2020).

²⁵⁵ *Agriculture and Food Management*, Vol. 2 ECONOMIC SURVEY OF INDIA 2019-20 209 (2020).

²⁵⁶ *Id.* See Table 10: Foodgrains Production, Offtake and Stocks, 213.

²⁵⁷ *Id.*

²⁵⁸ Swaraj Abhiyan, *supra* note 14, Direction No.3 at 4.

²⁵⁹ The Central Government has invoked the National Disaster Management Act, 2005 to issue directions for management of the pandemic.

The judgment in *Swaraj Abhiyan* is all the more significant since it directed that the entitlement to food grains at the time of a drought should not be made dependent on ration cards.²⁶⁰ The Central Government has not only announced distinct measures for NFSA and non-NFSA beneficiaries²⁶¹; but, the measures announced for non-NFSA beneficiaries were also confined only to ration card holders which have not been extended after June 30, 2020.²⁶² The measures announced for non-ration card holder migrant holders were announced belatedly on May 15, 2020 and have not been extended after June 30, 2020.²⁶³

Any national disaster, such as the present pandemic, by definition, is a time of extraordinary and unprecedented misery. Many who would otherwise not fall within the NFSA net or other the ambit of similar schemes provided by the State Government could require social security at the time of a disaster. Due to the restrictions on travel imposed as a result of the lock down, scores of migrant workers have been marooned miles away from the little safety and comfort that their places of origin may have afforded, while being deprived of the means to eke out a living or ration cards which are usually kept at their place of residence.²⁶⁴ Therefore, to insist on making the ration / food card the gateway to obtaining food only aggravates exclusion and deprivation of already vulnerable persons. Following the precedent of *Swaraj Abhiyan* even if the Central Government does not extend the PMGKAY to non-NFSA beneficiaries, it should extend benefits under the NFSA of five kilograms of food grains per person per month to all without any requirement to produce ration cards.

It is, therefore, submitted that the Government ought not to seek refuge behind a distinction (between NFSA and non-NFSA beneficiaries) or conditions (need for ration cards), albeit statutorily prescribed and should, instead, imagine and implement the most far-reaching solutions to combat hunger at the present time and at the time of any national disaster. To supplement this argument, it deserves to be pointed that neither of the two directions made by the Court in *Swaraj Abhiyan* as discussed above were explicitly traced to the statutory provisions of the NFSA itself. The decision is based on the Court's recognition of the right to food as not merely a statutory but a constitutional guarantee. Though it rejected the prayer for enhancing the extent of the guarantees under the Act in so far as the variety of food grains to be provided was concerned, it passed the aforesaid directions to eliminate the distinction between NFSA and non-NFSA beneficiaries and to do away with the requirement for holding a ration card in order to access the entitlements under the Act because these requirements strike at the exercise of the right in its most bare and basic form for certain persons; whereas, rejection of the demand for additional varieties of food grains did not deprive any person of the right to food altogether. *Swaraj Abhiyan*, therefore, indicated that despite the fact that right to food has been incorporated into a legislation which has placed certain restrictions on its implementation, such as extent of coverage and manner of identification of beneficiaries, the Supreme Court has not accepted an interpretation of the statute which deprives persons of the right itself.

3. JUDICIAL WAY FORWARD

The issue of universalisation came up before the Supreme Court twice in the context of the present pandemic prior to the announcement of any executive measure for

²⁶⁰ *Supra* note 259, Direction No.4.

²⁶¹ Only NFSA beneficiaries have been covered under the PMGKAY. *See* Part III(E), "The ration card imperative: Executive measures announced during the pandemic".

²⁶² Notification of May 15, 2020, *supra* note 153, at 20.

²⁶³ *Id.*

²⁶⁴ Kabir Agarwal, *Coronavirus Lockdown: As Hunger Grows, the Fear of Starvation is Real*, THE WIRE, April 16, 2020, available at <https://thewire.in/rights/covid-19-100-million-hunger-pds-universal> (Last visited on April 26, 2020).

provision of food grains to non-NFSA beneficiaries. The two precedents before the Court on this issue were of the Right to Food case and Swaraj Abhiyan. As noted earlier, the orders in the Right to Food case went far ahead of the executive policies in place to ensure enforcement of access to food.²⁶⁵ In Swaraj Abhiyan, the Court had already directed the executive to universalise the provision of food-grains unconditionally and without dependence on existence of a ration card.²⁶⁶ Despite precedent favouring an expansive interpretation of the legislation to ensure access for the maximum number of people, the Supreme Court failed to follow its own precedent as it refused to pass any direction in two petitions for universalisation of PDS and diluted the outcome of Swaraj Abhiyan.²⁶⁷

The Court did not pass an order for universalisation on April 30, 2020 on the ground that it was a policy issue.²⁶⁸ The reason given by the Court for not passing any order on May 5, 2020 and allowing the Petitioner to make a representation before the Central Government instead also appears to be twofold: its understanding of the issue being a policy decision and the reasoning that the exclusion was of migrant labour stranded without a ration card who had been allowed to go back and could now be protected by the State Governments.²⁶⁹ The short-sightedness of this approach became apparent within the next ten days when the Central Government decided to allocate five kilograms of food grains per person per month for two months to migrant workers.²⁷⁰ The Court eventually directed that migrant workers who were returning will be provided food and water by the originating State.²⁷¹

However, for the purpose of the present case, we are concerned with the Court's approach to the pleas for universalisation of PDS. It is submitted that orders dated April 30, 2020 and May 5, 2020 effectively negate the work done by the Court in the Right to Food case which transformed the access to food into a justiciable right and have brought protection against hunger back within the domain of policy to be scuttled at the whim of the executive. The Court's disinclination to even consider the issues did not provide any opportunity to place the exclusions because of §9 before it. In view of this, it is submitted that Swaraj Abhiyan being a reasoned and reported decision is a more suitable guiding precedent as opposed to the orders dated April 30, 2020 and May 5, 2020 passed by the Court.

Non-NFSA beneficiaries will be haunted by the spectre of having no access to food at the time of a disaster and though they are excluded from the purview of the statute implementing the right to food, one hopes that all Courts, following the precedent in Swaraj Abhiyan, will extend protection of the statute to them on the basis of the broader constitutional jurisprudence of the right to food case which has made the right justiciable with or without a statute. The order passed by Delhi High Court on April 27, 2020 eliminating the distinction

²⁶⁵ See *supra* Part II.

²⁶⁶ Swaraj Abhiyan, *supra* note 14, Direction Nos. 3 and 4 at 4.

²⁶⁷ Aayom Welfare Society v. Union of India, WP (C) Diary No.11031/2020, Order dated April 30,2020 (Supreme Court of India) (Unreported); THE TIMES OF INDIA, *Jairam Ramesh withdraws plea in Supreme Court, writes to Ram Vilas Paswan*, May 5, 2020, available at <https://www.thehindu.com/news/national/food-security-jairam-ramesh-withdraws-plea-in-supreme-court-writes-to-ram-vilas-paswan/article31512381.ece> (Last visited on May 6, 2020).

²⁶⁸ *Id.*

²⁶⁹ BAR AND BENCH, [*COVID-19*] *Jairam Ramesh withdraws plea seeking ration for migrant workers amid lockdown after SC asks him to send representation to Govt*, May 5, 2020, available at <https://www.barandbench.com/news/litigation/covid-19-jairam-ramesh-withdraws-plea-seeking-ration-for-migrant-workers-amid-lockdown-after-sc-asks-him-to-send-representation-to-govt> (Last visited on May 6, 2020).

²⁷⁰ Notification of May 15, 2020, *supra* note 153, at 20.

²⁷¹ In Re: Problems and Miseries of Migrant Labourers, *Suo Motu* WP (C) No.6/2020, Order dated May 28, 2020 (Supreme Court of India) (Unreported).

between PDS and non-PDS beneficiaries and universalising access to PDS is the right step for the present times and for constitutional jurisprudence in the time to come.²⁷² The need of the hour is to move away from the shackles of the legislatively imposed artificial cap that is impeding the fulfilment of one of the fundamental demands of *swaraj* and to ensure access to food and nutrition to everyone.

B. STRUCTURAL CHANGES TO EXPAND COVERAGE UNDER THE NFSA

Based on the issues analysed in the present paper, we would like to recommend three structural changes to the NFSA. Due to the unprecedented hardships caused by the pandemic, we propose that the NFSA should be amended to ensure universalisation at the time of national disasters through an appropriate provision in the Act or rules framed under it. Both State and Central Governments should have the power to declare the existence of such an event. As discussed earlier, NFSA is the most efficient mechanism to ensure availability and distribution of food-grains and therefore its amendment to ensure universalisation at the time of a national disaster or emergency is a viable mechanism for fighting food insecurity. In light of this, §44 deserves to be repealed and the State should, in accordance with constitutional precedent, be held accountable for violation of its obligations during national disasters at which time food insecurity is only aggravated.

We further recommend that §9 of the NFSA should be amended on the lines of Cl.30(3) of the NFSB, 2011 to ensure that the actual number of beneficiaries under the legislation are calculated on the population estimated for each year by the Registrar General and Census Commissioner. Consequently, we also propose amendment of TPDS (Control) Order, 2015 to ensure that the number of beneficiaries are revised annually, and ration cards are issued in accordance with the revised numbers.

Finally, it is suggested that the NFSA and the TPDS (Control) Order, 2015 should be amended to ensure ration card portability and the ability of persons to access food-grains based on ration cards issued in another State. In this regard, it is necessary to discuss the one-nation one-ration card scheme of the Central Government which has been formulated with the same objective of ration card portability to ensure that beneficiaries can collect food grains from any electronic point of sale ('ePOS') enabled FPS shop by identification of beneficiaries through their biometric indicators made possible by seeding of ration cards with Aadhaar numbers.²⁷³ As of date twenty-four States and Union Territories or 80 percent of the NFSA population has been included within the scheme.²⁷⁴ Therefore, a substantial section of the beneficiaries are yet to be integrated. Moreover, due to the reliance of the scheme on biometric indicators and the requirement for installation of ePOS, the implementation of the scheme and its smooth functioning is bound to face infrastructural issues outside metropolitan areas. It is, therefore, argued that the scheme is not a robust substitute for changing the legal regime to permit use of ration cards outside the State of residence. In fact, such a provision will only

²⁷² Delhi Rozi Roti Adhikar Abhiyan v. Union of India, WP (C) No.2161/2017, Order dated April 27,2020 (High Court of Delhi at New Delhi) (Unreported). For a discussion of the judgment, See Sanjay Parikh and Sanjana Srikumar, *Guest Post: Coronavirus and the Constitution-XXIII Judicial Approaches towards the Right to Food*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 5, 2020, available at <https://indconlawphil.wordpress.com/2020/05/05/coronavirus-and-the-constitution-xxiii-judicial-approaches-towards-the-right-to-food-guest-post/> (Last visited on September 3, 2020).

²⁷³ Press Release, MINISTRY OF CONSUMER AFFAIRS, FOOD & PUBLIC DISTRIBUTION, August 7, 2020, *Union Minister Shri Ram Vilas Paswan urges States and UTs to fully implement One Nation One Ration Card scheme without any delay*, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1644148> (Last visited on August 26, 2020).

²⁷⁴ *Id.*

constitute a legal guarantee for the aims of the scheme and can aid in its effective implementation.

VI. CONCLUSIONS

§9 of the NFSA determines the method for calculating the actual number of beneficiaries under the Act. In its extant form, it makes the calculation of the actual number of beneficiaries under the Act dependent on outdated census figures and therefore reduces the actual number of beneficiaries. In the scheme of the NFSA, such an artificial reduction operates to suppress the obligation of the Central Government to provide the food grains required to meet the entitlements under the Act to the State Governments. State Governments consequently identify fewer beneficiaries than mandated by the Act. §9, therefore, results in creating an artificial distinction between the intended beneficiaries under the NFSA: those who are recognised as beneficiaries and those that are not so identified by due issuance ration cards, although, they fall within the total extent mandated by the Act. This has led to large scale of exclusions from entitlements under the TPDS and the operation of §9, therefore, being an impediment to attaining substantive equality is violative of the general constitutional guarantee under Article 14. Moreover, §9 cannot withstand constitutional scrutiny under Article 14 on the ground of the classification test since it creates a wholly artificial classification between the intended beneficiaries of the NFSA which is neither intelligible; nor, has a rational nexus with its stated objective under the Act i.e. to determine the actual number of beneficiaries in terms of the extent prescribed by the Act.

Relief measures for protection against hunger and starvation at the time of a national disaster such as the present COVID-19 pandemic tend to be conditional on ration cards. The impact of the exclusions resulting from the application of §9 has only made the present situation more dire for the most marginalised and vulnerable sections of society. The Supreme Court, ideally, should have followed its precedent in the right to food case and Swaraj Abhiyan to universalise PDS entitlements. It has, indefensibly, failed to intervene and has set back constitutional jurisprudence which had elevated the guarantee against hunger and starvation to a fundamental right. It is, therefore, necessary to learn from the present situation and suitably amend the NFSA to address certain structural issues in the legislation which have come to fore in the present pandemic.