

## Socio-Economic Rights in India: Democracy Taking Roots

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### A. Introduction

Human rights are inalienable and indispensable for dignified existence of human being. Over a period of time they have acquired global appeal. Societies and their people across the globe are gradually realizing the direct linkage of human rights to human dignity. Experience clearly indicates that human dignity is the first and the foremost casualty in conditions of large scale violations of human rights. Human rights are delineated into different categories depending on their characteristics of enforcement.<sup>1</sup> One of the most striking features of contemporary human rights is the juridical marginalization of socio-economic rights. The extent of this marginalization may be gauged by the fact that the absence of any effective enforcement mechanism in respect of social and economic rights has led to the denial of rights' status to these rights. Marginalized within legal systems, socio-economic rights represent one of the greatest challenges confronting the human rights community in the twenty-first century. At the practical level this marginalization has resulted in catastrophic effects in developing and underdeveloped countries of the world. There are the people whose lives are mired in the vicious trap of poverty, hunger and illiteracy.

Another promising feature of modern era is the increasing acceptance of democracy as a system of political organization of societies leading to participatory governance therein. Acceptance is increasing because the process begins by attaining political democracy and is taken to its logical end in the form of making strenuous efforts for achieving economic and social democracy. That is how democracy as a system of governance is perfectionalised. When so conceptualized in this manner, democracy holds the biggest hope for fulfillment of the dream of realization of socio-economic rights.

India, a leading ancient civilization, made her tryst with destiny through establishing democratic society on her independence when her people gave to themselves the constitu-

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<sup>1</sup> Initially, human rights were recognized with non-interventionist feature refraining state to not to interfere in the realization of rights. The implementation of human rights was largely depended upon abstention of state. Such rights were categorized as 'civil and political rights'. In this process, rights depended upon intervention of state in terms of resources were excluded from the discourse of human rights. These rights were known as 'socio-economic rights' deprived of their due position in the landscape of human rights.

tion of India. Aspirations and hopes of millions of Indians are being nurtured around the constitutional principles of political participation, social cohesion and economic prosperity. These principles are embedded in fundamental rights and directive principles of the Constitution of India which solemnly pledge to change the destiny of Indians. They worked it so well that it is regarded as the greatest/largest and the most vibrant democracy in the world.

This paper attempts to analyse her journey on the path of realization of socio-economic rights. The paper discusses the deliberations of framing of fundamental rights and directive principles in the Constituent Assembly. It explains the position of fundamental rights and directive principles in the Constitution of India. Further, it examines the judicial approach of dealing the relationship between fundamental rights and directive principles. The paper goes beyond the judicial domain and investigates the contribution of judicial institution in realization of socio-economic rights. In this light it looks into the enforceability of socio-economic rights and suggest establishment of independent institution for enforcement of socio-economic rights. Socio-economic rights constitute inalienable interest of every individual promised by the Indian Constitution in the chapter of directive principles. The reference of directive principles are primarily related to socio-economic rights included therein.

## **B. Socio-Economic Rights in India**

### **I. Framing of the Indian Constitution: a formidable challenge**

The stupendous task that the framers of the Indian Constitution undertook needs to be seen in the context of history of deprivation and sufferings. The oppressive regime of Britishers not only deprived citizens of their autonomy but also reduced them to a life of abject poverty. The framers of the Indian Constitution were therefore determined to build a nation where individual can possess everything essential for dignified existence. The lessons from the past encouraged them to incorporate human rights in the Constitution. The founding fathers of the Indian Constitution were anxious to ensure not only political freedom after independence but social and economic freedom to large sections of the community bound by traditions of caste-system and the scourge of untouchability. In this light, there is a need to understand the place and importance of socio-economic rights in the Constitution for fulfillment of shattered hope of those who are living at the periphery. The constitutionalisation of socio-economic rights in the Indian Constitution was very natural and outcome of values of the Indian society. Socio-economic needs of people is essential for vibrant democracy. Political democracy will not survive long in the absence of social and economic democracy. Social and economic democracy is availability and accessibility of material needs and opportunities to every individual. The founding fathers were conscious of the

fact that mere political democracy, i.e., getting the right to vote once in five years or so was meaningless unless it was accompanied by social and economic democracy.<sup>2</sup> Democracy will become real when in practice there is sharing of power and responsibility by all sections of the people and it becomes illusory when it is about pursuit of power by the dominant sections alone. The directive principles, which are in the form of directives to state differs from fundamental rights as they are not enforceable in court of law, cannot be confined to mere rhetoric or to adhoc policies of electoral appeasement.<sup>3</sup> Constitutionalisation of socio-economic rights does not owe its allegiance to alien source. It is very much imprinted and inscribed in the tradition of Indian society. In fact, the Indian Constitution without social and economic rights would have been a betrayal of aspirations and hopes of millions of people of this country.

The idea of incorporating socio-economic rights at par with civil and political rights floated during the debate of making of the constitution. Some of the members were doubtful about the effectiveness of directive principles in the absence of enforceability. It was suggested by Krishna Chandra Sharma to include a provision to the directive to the effect that 'any law made in contravention of these principles shall to that extent be void'. He said such an addition would not affect the nature of directives as such. It would give jurisdiction to a court of law, though only a negative right to the people, to move a court that a law which went against the interests of the people, against providing primary education for the children and against providing work and employment for people, should be declared void, he added.<sup>4</sup> R K Sindhwa was of the opinion that unless the directive principles were made justiciable, they would not give any satisfaction to the common man in India.<sup>5</sup> K M Munshi in his initial working draft articles VII and VIII tried to secure right to food, living wage, conditions of work necessary to ensure a decent standard of life and primary education.<sup>6</sup> It was suggested to use 'fundamental' in the place of 'directive' to reflect no difference between the rights contained in chapter on directives and in the chapter on fundamental

<sup>2</sup> B. Shiva Rao, *The Framing of India's Constitution*, Volume IV, 943

<sup>3</sup> The Report of National Commission on Review of Working of the Constitution (NCRWC), Volume I, p 100. The Commission was constituted to review the working of the Constitution by the Government of India in the year 2000. The Report was published by the Government of India in the year 2002. For Report visit, <http://lawmin.nic.in/ncrwc/finalreport.htm>.

<sup>4</sup> Constituent Assembly Debates (CAD), Volume V, pp 369-370. The Debates contain the proceeding and deliberations of making of the Indian Constitution. The Constituent Assembly Debates are available at <http://parliamentofindia.nic.in/ls/debates/debates.htm>.

<sup>5</sup> CAD, n. 3, pp 362-64.

<sup>6</sup> B. Shiva Rao, *The Framing of India's Constitution*, Volume II, p 77.

rights except for the fact that the former is non-justiciable and the latter justiciable.<sup>7</sup> There was a plea of Promotha Ranjan Thakur, a member to give similar effect to socio-economic rights, when he said that, “I do not know why economic fundamental rights should not be included in these justiciable rights. Economic rights are essential while framing a country’s constitution and they must also be made justiciable.”<sup>8</sup> Similar concern was shown by B Das, a member of the Constituent Assembly, “I think it is the primary duty of Government to remove hunger and render social justice to every citizen and to secure social security ... I am not satisfied, although portions of the Soviet Constitution or the Irish Constitution are somehow made into a jumble and included in these twelve paragraphs, that they bring any hope to us.”<sup>9</sup>

Nevertheless, the Constituent Assembly decided to not to make them enforceable in court of law due to the nature of directives. The wordings of Article 37 are binding directions for the executive and the legislature.<sup>10</sup> The duty imposed is not obligatory but mandatory in nature. It is imperative upon State to respect the ideals and infuse these ideals into the living law of the land. The formulation of Article 37 reflects that impetus has been attached to the principles enshrined therein. The expressions “*fundamental in the governance of the country*” and “*it shall be the duty of the State to apply these principles in making laws*” attracts broad and purposive interpretation to it. The expressions in different articles of directive principles such as ‘endeavour’,<sup>11</sup> ‘primary duties’,<sup>12</sup> ‘strive’,<sup>13</sup> ‘in particular, direct’,<sup>14</sup> ‘secure’,<sup>15</sup> ‘shall take steps’,<sup>16</sup> and ‘obligation’,<sup>17</sup> strongly reflects the duty-full purpose of the directives. The language of the various provisions of the directives shows the mandatory nature of duties imposed upon the State. It would be wrong to

<sup>7</sup> Constituent Assembly Debates (CAD), Volume VII, pp 473-475.

<sup>8</sup> Constituent Assembly Debates (CAD), Volume III, p 383.

<sup>9</sup> *The Report*, n. 3 p 361.

<sup>10</sup> Article 37 of the Constitution of India states that “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

<sup>11</sup> Articles 43, 44, 45, 48 and 48 A of the Constitution of India.

<sup>12</sup> Article 47 of the Constitution of India.

<sup>13</sup> Article 38 of the Constitution of India.

<sup>14</sup> Article 39 of the Constitution of India.

<sup>15</sup> Articles 39A and 41 of the Constitution of India.

<sup>16</sup> Articles 43 A and 50 of the Constitution of India.

<sup>17</sup> Article 49 of the Constitution of India.

describe the objectives as ‘pious expressions’,<sup>18</sup> ‘resolutions made on New Year’s Day which are broken at the end of January’,<sup>19</sup> ‘vague’,<sup>20</sup> or ‘cheque on a bank payable when able’.<sup>21</sup> They are command to the government to act in conformity with socio-economic goals enshrined in Part IV of the Constitution. The ethos of ‘fundamental’ and ‘duty’ runs through all the provisions enumerated in the Part IV. A claimable expectation emanates from the duty imposed on the State. The claim becomes more prominent in the light of enumeration of certain socio-economic rights in the principles. Dr. Ambedkar on speaking on the importance of social order based on justice, social, economic and political observed that the State shall not be allowed to take any defence for non-implementation of the directives. He said that “...in framing this Constitution was really two fold: (1) to lay down the form of political democracy; and (2) to lay down that India’s ideal was economic democracy with the prescription that every Government, whatever, in power, would strive to bring about economic democracy. The use of the word ‘strive’ in the Draft Constitution was important because it was the intention of the framers that even if there were circumstances which prevented the government or which stood in the way of the Government giving effect to these Directive Principles, they would, even under hard and propitious circumstances always strive in the fulfillment of these directives.”<sup>22</sup> These wordings of framers left no doubt in the mind about significance and importance of the Directives in reaching to the ideals. It is imperative on the State to pursue the policies in the directions of these directives. It would be disastrous to confer inferior meaning to these principles over individual rights.<sup>23</sup>

## II. Indian Constitution: challenge negotiated

The Indian Constitution was framed on the edifice of equality, liberty and fraternity.<sup>24</sup> To strengthen these edifices, the framers included fundamental rights and directive principles in the new dispensation of the Country. The rights and principles thus connect India’s future, present and past, adding greatly to the significance of their inclusion in the Consti-

<sup>18</sup> *Shiva Rao*, n. 6 p 225.

<sup>19</sup> *Shiva Rao*, n. 6, pp 475-476.

<sup>20</sup> *Shiva Rao*, n. 6, p. 244.

<sup>21</sup> *Shiva Rao*, n. 6, pp. 479-480.

<sup>22</sup> *CAD*, n. 7 p 384.

<sup>23</sup> *R. Dhavan.*, Ambedkar’s Prophecy: Poverty of Human Rights in India, 36 JILI (Journal of Indian Law Institute) (1994), p 13.

<sup>24</sup> See, Preamble of the Constitution of India.

tution, and giving strength to the pursuit of the social revolution in India.<sup>25</sup> The Indian Constitution provides for both the civil and political rights and the socio-economic rights. While the former are grouped as fundamental rights in Part III,<sup>26</sup> the later are placed along with other directives as the directive principles of State Policy, in Part IV of the Constitution<sup>27</sup>. The directives partake the nature of the rights but are different from the rights contained in the chapter on fundamental rights. Part IV confers on the people positive rights – rights connected with tangible benefits while Part III grants to the people negative rights – rights not to be harmed and it is easier for the law to prevent infliction of harm than to enforce these positive benefits.<sup>28</sup> The Fundamental Rights Sub-Committee recommended that the ‘list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of directive principles of social policy...’<sup>29</sup>

It is significant to reassert here that the scheme of human rights in the Indian Constitution is not entirely based upon the international discourse and it has given significant place to domestic concepts as well as exigencies.<sup>30</sup> A close scrutiny of Part III and Part IV demonstrates overlapping of socio-economic rights with civil and political rights.<sup>31</sup> The distinction between fundamental rights and directive principles is primarily based upon justiciability. Fundamental rights are made justiciable, in fact, the right to constitutional remedies itself is guaranteed as fundamental rights.<sup>32</sup> Whereas directive principles are made

<sup>25</sup> *Granville Austin*, *The Indian Constitution Cornerstone of a Nation*, Delhi, 1966, p 50.

<sup>26</sup> Part III contains six sub-heading of fundamental rights. The fundamental rights are grouped as right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies.

<sup>27</sup> Part IV contains directive principles of state policy which includes socio-economic rights and other directives to the State.

<sup>28</sup> *K C Markandan*, *Directive Principles of State Policy in the Indian Constitution*, Jalandhar, 1987, p 170.

<sup>29</sup> *CAD*, n. 8 p 422.

<sup>30</sup> The Country was recuperating from the wounds of bloodiest partition human society has ever witnessed. Both of safety of life as well as property was threatened by this partition. Therefore, the first priority for the Indian polity was to accord protection to life and property.

<sup>31</sup> For instance, while the right to equal opportunity of work and the freedom to carry on trade, business, occupation and intercourse are placed along with civil and political rights, at the same time, right to legal aid is recognized as a socio-economic right in Part IV. It is also pertinent to mention that cultural rights are protected as fundamental rights in the Constitution and enjoy the status of civil and political rights.

<sup>32</sup> Article 32 of the Constitution of India, itself a fundamental rights, guarantees constitutional remedies in case of violation of fundamental rights. Under this article, the Supreme Court of India

non-enforceable in the court of law and left its implementation on the executive and legislature.<sup>33</sup> Individuals are entitled to approach High Courts or the Supreme Court to protect their fundamental rights, whereas the protection and promotion of socio-economic rights have been entrusted to the legislature and the executive. It indicates emulation of prevailing position of human rights at international level.<sup>34</sup> Human rights in India cannot be claimed as completely based on the pattern of international human rights or constitutional scheme of any country. During the framing of the Constitution, the framers of the Constitution had referred to the constitution of the countries of the world. It would be wrong to say that the Indian Constitution is based on the scheme of one or the other constitution of the countries of the world. Rights are conditioned for a social order. While submitting the report of the Sub-Committee to the Advisory Committee, Chairman of the Sub-Committee Acharya J B Kriplani has observed, *inter alia*, that “when the Committee began its work, it was resolved that a difference should be drawn in the list of fundamental rights between which are enforceable by appropriate legal process and provisions which are in the nature of fundamental principles of the social policy that is to regulate the Governments concerned. In this respect, the Committee has followed the Irish model and adopted a middle course between the one adopted by the framers of the American Constitution and the one pursued in recent European Constitutions, which have mixed up the two set of rights ... While the Committee has drawn upon the American and Irish Constitution as also upon the recent European Constitutions, the Committee has throughout kept in view the complexity of Indian conditions and the peculiarities of the Indian situation and has made appropriate changes.”<sup>35</sup> Fundamental rights were those conditions which every man must have if the purpose of human life was to be fulfilled and attained. They are based on the social values of the society. The type and nature of rights enumerated in Part III of the Constitution and the tenor of certain provisions included therein hardly support the proposition that the fundamental rights are listed in the Indian Constitution are rooted in the enigmatic, abstract and divine-willed doctrine of law of nature.<sup>36</sup>

The object of fundamental rights is not merely to ensure development of personality of the individuals but it also aims at adjustment of the rights of individuals with the level of national existence. The striking feature of the provisions of Part III is that they expressly

can issue appropriate writ in the nature of mandamus, prohibition, certiorari, habeas corpus and quo warranto.

<sup>33</sup> Article 37, n. 10.

<sup>34</sup> The Report, n. 3. p. 93.

<sup>35</sup> CAD, n. 7.

<sup>36</sup> Krishna Shetty, K P., *Fundamental Right and Socio-Economic Justice in the Indian Constitution*, 1969, p 27.

seek to strike a balance between written guarantee of individual rights and collective interests of the community.<sup>37</sup> The rights guaranteed by the Constitution can be taken away in the interest of individual, society and nation. For instance, freedoms guaranteed under Article 19(1) can be curtailed on the grounds of national interest enumerated in clauses 2 to 6. It may be noted that Article 27 guarantees right against any compulsion to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion, Article 30(1) guarantees to all minorities the right to establish and administer educational institutions of their choice. There are provisions in the fundamental rights to remedy the malaise existing in the Indian society. Article 17 has abolished untouchability and forbidden its practice in any form. Article 24 prohibits employment of children below the age of fourteen in hazardous industry and mine. These provisions can be hardly grouped as civil and political rights; they are in form of injunction to the state. Moreover, the provisions relating to preventive detention by no imagination fit into the scheme of fundamental rights. The concept of fundamental rights included in the Indian Constitution must of necessity be ascertained from the types and nature of rights included therein and from the discernible intention of the framers.<sup>38</sup> The rights enumerated in the Constitution must be understood in relation of social values of the prevailing in the society.

The foregoing discussion establishes the point that the human rights discourse in India is inked in its social and political values. It has been affirmed the Supreme Court, in *Maneka Gandhi v Union of India*,<sup>39</sup> Bhagwati J., emphasizing on the importance of fundamental rights observed: "These Fundamental Rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights and impose negative obligation on the state not to encroach on individual liberty in its various dimensions." In addition of universality of rights, the Indian constitution has structured rights of individual in accordance with its own values and social mores. Individual's right signifies conferment of human rights on an individual not only as an individual only but also as a member of society. It is part of a community ordering. Therefore, an individual can not waive a fundamental right.<sup>40</sup> The importance of social order cannot be ignored in interpreting rights of individual. Human rights in India must be

<sup>37</sup> A K Gopalan v State of Madras, All India Reporter 1950 Supreme Court 74.

<sup>38</sup> *Shetty*, n. 37 p 25.

<sup>39</sup> All India Reporter 1978 Supreme Court 597.

<sup>40</sup> *Basheswhar Nath v CIT*, All India Reporter 1959 Supreme Court 149.



viewed to bring prosperity to a society through empowering individual. It is also evident from the fact that members of the Constituent Assembly were arguing to include right to education in the chapter of fundamental rights whereas right was placed in the directives.<sup>41</sup> Hence, the significance of rights relating to decent existence of individual to establish egalitarian society is very central to the discourse in India.

There is a need to focus on characteristic way of formulation of human rights in India. Fundamental rights are not necessarily referring to restrain by the government. Rights enumerated under Article 17 which refers to abolition of “untouchability” and Articles 23 and 24 refer to Right against exploitation impose positive duties on State. The rights guaranteed under those provisions cannot be fulfilled in the absence of a determinate action by the State. In addition, there are provisions in the fundamental rights which lay down duty of State as well as of individuals. The rights provided under Article 15(2), 17, and 18(2) refers to restrain individuals also. Interestingly, there are provisions in the list of fundamental rights which are in the nature of directives to Parliament<sup>42</sup> or doesn’t refer to rights at all<sup>43</sup>. Therefore, the listing of rights in the Constitution shows that it is not based only on western principles but on duty-oriented jurisprudence of east as well.

The reason of dividing rights into a group of fundamental rights and directive principles is to obviate administrative and practical difficulties in enforcing such rights depend upon economic development.<sup>44</sup> The Advisory Committee on formulation of Fundamental Rights in its supplementary report submitted a chapter on directive principles. The first clause of the report stated: “The principles of policy set forth in this chapter are intended for the guidance of the State. While these principles shall not be cognizable by any Court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.”<sup>45</sup> The idea underlying in the incorporation of non-justiciable directive principles was taken from the advice tendered by Mr. B N Rau,

<sup>41</sup> Austin, n. 25 p 79. Now, right to education is given a status of fundamental rights by inserting Article 21 A under the Part III through Constitution (Eighty-Sixth Amendment Act), 2002.

<sup>42</sup> Articles 33, 34 and 35 of the Constitution of India.

<sup>43</sup> Articles 31A, 31B, 31C of the Constitution of India.

<sup>44</sup> Interestingly, In the Commission on Human Rights, a body entrusted to draft the international human rights covenant, the Indian delegate suggested to bifurcate two categories of right on ‘justiciable’ ground. India argued that civil and political rights were ‘justiciable’ whereas economic, social and cultural rights were not. This required different measures of implementation, which could best be done through separate instruments. (see Summary Report of 248<sup>th</sup> Meeting, Commission on Human Rights, ESOR, 7<sup>th</sup> Sess., UN Doc.E/CN.4/SR.248, 6 (10<sup>th</sup> July 1951), for detail refer, Daniel J Whelan & Jack Donnelly, *The West, Economic, and Social Rights*, and the Global Human Rights Regime: Setting the Record Straight, 29 HUM.RTS.Q. 908-949.

<sup>45</sup> CAD, n. 4 p 406.

Constitutional Advisor to the Advisory Committee. He suggested that such of those rights as were normally enforceable should be listed as justiciable fundamental rights and those which required administrative action should be incorporated in the Constitution as non-justiciable directives to the State.<sup>46</sup> From this it is evident that distinction was made between fundamental rights and directive principles for the purpose of avoiding administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens. Therefore, the provisions in the first part of Article 37, which make the directive principles unenforceable, are solely intended to make these directives unenforceable in court of law. Justiciability does not constitute indispensable characteristics of human rights.<sup>47</sup> Therefore, non-justiciability of the principles does not mean that the Constitution makers considered them less important than the fundamental rights.<sup>48</sup> It would be fatal to read rights enumerated in Part IV as pious aspirations.

The formulation of rights in the Indian Constitution was a unique attempt to resolve the conflict between the two groups of rights. It was a remarkable effort to balance the conflicting rights. The rights are not categorized solely on the basis of its affiliation to a particular group of rights. The whole scheme was based on philosophy postulating a dialogue between individualism and social control. The Constitution makers believed in the equal importance of two sets of rights as a cardinal tenet of their philosophy. Human rights for them were indivisible and civil and political as well as social and economic rights had got to co-exist to make for true human happiness and lead to the fullest flowering of each human personality not only in individual but also in wider community interest.<sup>49</sup> These two groups of rights are part of one scheme of human rights. They are means to achieve an end of social order envisaged by the framers of the Constitution. The core of the commitment to the social revolution lays in Part III and Part IV. These are the conscience of the Constitution.<sup>50</sup>

The scheme of the Constitution of India places both the rights on the same sphere. The harmony and balance between both groups of rights is a basic feature of the Constitution.<sup>51</sup> Social and political order cannot be achieved in the absence of either. On the one hand fundamental rights are important for democracy on other hand directive principles is indis-

<sup>46</sup> *Shiva Rao*, n. 6 pp 248-50.

<sup>47</sup> *H J Steiner and P Alston*, *International Human Rights in Context*, 1966, p 298.

<sup>48</sup> *M P Singh*, *Directive Principles of State Policy in the Constitution of India*, in *B V Lal and T R Vakotra*, *Fiji and the World*, Vol. 2, Suva, 1997, p 269.

<sup>49</sup> *T S R Sastry*, *A Perspective on Human Rights, in India and Human Rights*, New Delhi, 2005, p 27.

<sup>50</sup> *Austin*, n. 25.

<sup>51</sup> *Minerava Mills v Union of India*, AIR 1978 Supreme Court 1789, 1847.

pensable for socio-economic justice. Individual liberty should not be a cherished value for a few. It is the directive principles which nourish roots of democracy and liberty, provide strength and vigour to it and attempt to make it a real participatory democracy. The objective underlying in the socio-economic rights of directive principles is to advance a holistic approach to human rights. Individual human rights enshrined in Part III will evaporate in the absence of socio-economic rights. The significance of socio-economic rights along with fundamental rights has to be understood in the Indian context where large number of populace is struggling to eke out their existence. The denial of socio-economic rights will take away spirit of the Constitution embedded in the Preamble.

### C. Socio-Economic Rights: Judicial Approach

In India, the judiciary has been empowered to enforce rights enumerated in Part III whereas judicial intervention is forbidden with regard to rights in Part IV of the Constitution. The absence of power to enforce socio-economic rights is not to offend the prime role of protector and guardian of the Constitution. The realization of the directive principles, including socio-economic rights, involves factors of budget, human resources, and infrastructure and like. It is arising out of this fact that the nature of rights requires different mechanism and institution of its enforcement. The judiciary has been kept away to arbiter on the matters where the State seeks to formulate policies for the society as a whole in respect of social and economic matters.

The Indian Constitution keeps judicial organ of the state away from the matters relating to implementation of the directive principles. In doing so the framers of the Constitution had also kept socio-economic rights along with other principles of the fundamental importance out of the purview of the Court. However, the Supreme Court of India has designed a role for itself in the matter of socio-economic rights. The Court has been adopting different methodologies to deal with the conflict between the fundamental rights and the directives. The author proposes to travel the judicial journey of dealing the conflict between the fundamental rights and the directive principles in four different ways. The approaches analyses the different stages of relationship between fundamental rights and directive principles which are adopted by the court in last six decades.

First, the judiciary has been reading the meaning of “shall not be enforceable” under Article 37 in *strictu sensu*. In doing so, it had conferred higher status to the fundamental rights over the directive principles. Second, it has been reading the reason of incorporating the directive principles in the Constitution in a sacrosanct manner. The directive principles are aspirations of millions of people to establish socio-economic order. Therefore, the fundamental rights must pave way and can be sacrificed for its effective implementation. Third, the court has been reading both fundamental rights and directive principles as a part of integrated constitutional scheme to achieve welfare for all. In pursuance of this approach, it is giving harmonious interpretation to the conflicting legislation. The fourth

approach witnesses assimilation of socio-economic rights into fundamental rights. The court has been reading various socio-economic rights as a component of justiciable fundamental rights.

## **I. Fundamental Rights and Directive Principles: Relationship Negotiated**

In relation to the first approach, the Court has been interpreting provisions of Article 37 vis a vis Article 13<sup>52</sup> of the Constitution to give precedence to Fundamental Rights over Directive Principles. Thus, the judiciary was critical in conferring status to socio-economic rights at par with civil and political rights.<sup>53</sup> The Court has opined that the rights guaranteed under Part III of the Constitution can not be taken away in any circumstances in the light of Art. 13(2).<sup>54</sup> In *State of Madras v Champakam Dorairajan*,<sup>55</sup> the Supreme Court solemnly declared that “The Directive Principles of the state policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in part III, which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The chapter of fundamental rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of fundamental rights.” The Court was not willing to accept the significance of the ‘directives’ in the laying of constitutional scheme. It maintained the position that the directives runs subsidiary to the fundamental rights. The observation of the Court caused irreparable damage to the growth of socio-economic rights enshrined in Part IV of the Constitution. It is a matter of fact that the matters in which the court declared primacy to fundamental rights were related to general guidelines of the directive principles to be followed by the Government. As such, they were not conflicting to the socio-economic rights enumerated in Part IV.

The court was erred in preferring individual interest over interest of the society. It failed to reconcile competing interests. The court, in declaring directives subordinate to fundamental rights, had given its verdict primarily on the interpretation to the clause “shall not be

<sup>52</sup> Article 13 of the Constitution of India states that the pre-constitutional or post constitutional law shall not contravene or take away fundamental rights guaranteed in Part III. Such law shall be declared void to the extent of inconsistency with fundamental rights.

<sup>53</sup> See, e.g., *Chmapakam Dorairajn*, All India Reporter 1951 SC 226; *M H Quershi v State of Bihar*, (1959) Supreme Court Reporter 629; *In re Education Bill*, (1959) Supreme Court Reporter 995.

<sup>54</sup> Article 13 (2) of the Constitution of India provides that post-constitutional law shall be declared unconstitutional if it takes away or abridges fundamental rights.

<sup>55</sup> All India Reporter 1951 Supreme Court 226.

enforceable in any court of law".<sup>56</sup> The interpretation to treat guidelines relating to general welfare subsidiary to fundamental rights stifled the growth of the former. It leads to the surrendering of rights of teeming millions.<sup>57</sup> The deprioritisation of socio-economic rights and the weak pressure of political necessity have marginalized the impetus to bring them into being even though there has been an increase of unequal social and economic differentials within and across nation-states. Socio-economic rights have become optional rather than imperative.<sup>58</sup>

## II. Fundamental Rights and Directive Principles: Harmony Realized

In the second approach, the Apex Court realized that the directive principles must be read in much constructive fashion for its meaningful inclusion in shaping the life of individual. There was recognition of the fact that although the directives were non-justiciable in character the courts should recognize the importance for the simple reason that the directives formed a vital part of the Constitutional document. The court resorted to the 'directives' for the purposes of interpretation, maintainability or otherwise of a law. The court observed that legislation enacted in furtherance of the directives must be understood as reasonable restrictions in the exercise of fundamental rights. The Land Reforms legislation was validated on the ground of 'public purpose'. It was observed that the legislation is giving effect to the interest of the community over the interest of individual.<sup>59</sup> The principles were drawn to define the content of reasonable restriction to limit the freedom guaranteed under article 19.<sup>60</sup> It was evident that the court has changed its approach towards the directives. Unfortunately, the court continued to deny equal status to the Directives. The Court maintained that the directives should conform to and run as subsidiary to the chapter on fundamental rights. The Court said that "A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that State should certainly implement the Directive Principle but must do in such a way that its laws do not take away or abridge the Fundamental Rights, for otherwise the protecting provisions of Chapter III will be a mere rope of

<sup>56</sup> See, e.g., *Jagwant Kaur v State of Bombay*, All India Reporter 1951 Bombay 461; *Ajaib Singh v State of Punjab*, All India Reporter 1952 Punjab 309; *Biswambhar v State of Orissa*, All India Reporter 1957 Orissa 247.

<sup>57</sup> See, P K Tripathi, *Directive Principles of State Policy: The Lawyer's Approach to Them Hitherto*, *Parochial, Injurious, and Unconstitutional*, 17 *Supreme Court Journal* 7 (1954).

<sup>58</sup> *Dhavan* n.23 p 19.

<sup>59</sup> See, e.g., *State of Bihar v Kameshwar Singh*, All India Reporter 1952 Supreme Court 252; *Bijay Cotton Mills v The State of Ajmer*, (1955) 1 *Supreme Court Recorder* 752.

<sup>60</sup> *Nuserwanji Balsara v State of Bombay*, All India Reporter 1951 Supreme Court 318.

sand”<sup>61</sup> It has also pledged to adopt the principle of harmonious construction to give effect to both as much as possible.<sup>62</sup> This approach reflects the admission on the part of the court that it was ignoring the importance of the directives in its judicial pronouncements.

### III. Fundamental Rights and Directive Principles: Harmony Acknowledged

In the third approach, the Court adopted a purposive construction to read the provisions of the directives while interpreting various legislations. It started referring to the principles when there was no conflict between the Part III and Part IV of the Constitution. The application of the principles was brought in to examine the validity of legislation. It was observed that though principles are not enforceable by courts of law are nevertheless a part of the Constitution. The harmonious construction extended much needed respect to the directives. The directives have been conceived as an inherent quality to enhance the quality of life of individuals. In *UP State Electricity Board v Hari Shankar Jain*,<sup>63</sup> referring to Article 37, the Court reminded itself that, “... what the injunction means is that while courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.”

The error of early days was corrected by the Court in *Keshvanand Bharti v State of Kerala*,<sup>64</sup> a Bench of 13 judges asserted the importance of the directive principles. The Court said that the “...what was fundamental in the governance of the country could be no less significant than that which was fundamental in the interest of an individual and therefore fundamental rights and DPSP were complementary.”<sup>65</sup> Justice Krishna Iyer has summed up the development in his characteristic way in *State of Kerala v N M Thomas*,<sup>66</sup> that “*Keshvanand Bharti* has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the Court must wisely read the collective Directive Principles of State Policy mentioned in Part IV into individual fundamental rights of Part III, neither Part being superior to the other! Since the days of *Dorairajan*, judicial opinion has hesitatingly tilted in favour of Part III but in *Keshvanand*

<sup>61</sup> *M H Quershi v State of Bihar*, (1959) Supreme Court Reporter 629.

<sup>62</sup> *In re The Kerala Education Bill*, (1959) Supreme Court Reporter 995.

<sup>63</sup> *All India Reporter* 1979 Supreme Court 65.

<sup>64</sup> (1973) 4 Supreme Court Cases 225.

<sup>65</sup> *Ibid* at 879.

<sup>66</sup> *All India Reporter* 1976 Supreme Court 490.

Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy.” In *Minerva Mills*, the Court observed that “those rights (fundamental rights) are not an end in themselves but are means to an end. The end is specified in Part IV.”<sup>67</sup> The Court reflected a ‘perceptible shift’ in its approach when it observed in *J P Unnikrishnan v State of AP*<sup>68</sup> that, “It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but means to achieve the goals indicated in Part IV of the Directive Principles.” The Court expressed that “the directive principle now stand elevated to inalienable fundamental human rights.”<sup>69</sup> Hereinafter, the directive principles started gaining recognition in the sphere of judicial interpretation. In *State of Karnataka v Ranganatha Reddy*,<sup>70</sup> Krishna Iyer, J. propounded the thesis that “the dialectics of social justice should not be missed if the synthesis of part III and part IV is to influence state action and court pronouncements. Constitutional terms cannot be studied in a socio-economic vacuum, since socio-cultural changes are the process of the newly equity-loaded. The judge is a social scientist in his role as a constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.” In *Kasturi Lal v State of Jammu and Kashmir*,<sup>71</sup> Bhagwati, J. while propounding the concept of reasonableness observed that, “this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles.” Interestingly, the court completely transformed its approach towards the directives. It initiated a method of reading the directives to justify the legislative measures of the State. It started interpreting the various directives to provide meaningful content to welfare legislations like labour laws.<sup>72</sup> The involvement of the court was justified by referring to the role directive plays in bringing harmony to the society.<sup>73</sup> The interpretations given advance the constitutional goal of attaining socio-economic justice to all.

<sup>67</sup> *Minerva*, n. 51.

<sup>68</sup> *J P Unnikrishnan v State of AP*, All India Reporter 1993 Supreme Court 2178.

<sup>69</sup> *Air India Statutory Corporation v United Labour Union*, All India Reporter 1997 Supreme Court 645.

<sup>70</sup> All India Reporter 1978 Supreme Court 215.

<sup>71</sup> All India Reporter 1980 Supreme Court 1992.

<sup>72</sup> *Bijay Cotton Mills v State of Ajmer*, All India Reporter 1955 Supreme Court 33; *Crown Aluminium Works v The Workmen*, All India Reporter 1958 Supreme Court 30; *Express Newspaper Ltd v Union of India*, All India Reporter 1958 Supreme Court 578.

<sup>73</sup> *Standard Vacuum Refinery Co. v Its Workmen*, All India Reporter 1961 Supreme Court 895.

#### IV. Fundamental Rights and Directive Principles: Integrated Approach

In the fourth approach, the court ushered into a new era by interpreting socio-economic rights as a scheme of fundamental rights. The court started reading the various rights of Part IV into Part III of the Constitution. The court expanded the meaning of 'life' by brining 'dignity' component into it.<sup>74</sup> This judicial tool proved to be very handy for the court to read many of socio-economic right an inherent part of right to life enshrined under Article 21 of the Constitution.<sup>75</sup> On one hand the judicial activism strengthen the importance of socio-economic rights in the structure of human rights, on the other hand raised serious doubts about the commitment of law-makers. It also casts doubt on the propriety of judicial decisions with regard to the constitutional scheme.

In *Randhir Singh v Union of India*,<sup>76</sup> the Court read the objective of equal pay for equal work enshrined in the Directive Principles into Article 14 and 16 (1) of the Constitution. The principle relating to right to free legal aid under Article 39 A has been read into Article 21 in *M M Hoskot v State of Maharastra*.<sup>77</sup> Right to free and compulsory education up to the age of 14 years was read into right of life and liberty.<sup>78</sup> The Court observed that "the citizens of this country have a fundamental right to education. The said right flows from Article 21. This is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41 ... the right to education further means that

<sup>74</sup> *Olga Tellis v Bombay Municipal Corporation*, All India Reporter 1986 Supreme Court 180 the court stated that The right under Article 21 is the right to livelihood, because no person can leave without the means of living i.e., the means of livelihood. If the right to livelihood were not treated as part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. There is thus a close nexus between life and livelihood. And as such that which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life; *Francis Coralie v Union Territory of Delhi*, AIR 1981 SC 746 the court held that "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."; *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802, in addressing the right to release and rehabilitation of bonded labor, has observed that "...these are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State...has the right to take any action which will deprive a person of the enjoyment of these basic essentials

<sup>75</sup> Article 21 of the Constitution of India states that "No person shall be deprived of his life and person liberty except according to procedure established by law."

<sup>76</sup> All India Reporter 1978 Supreme Court 1548.

<sup>77</sup> (1978) 3 Supreme Court Cases 544.

<sup>78</sup> *Unnikrishnan*, n 68.



a citizen has the right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. By saying so we are not transferring Article 41 from Part IV to Part III – we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21.”<sup>79</sup> The whole gamut of environmental jurisprudence has been developed by interpreting Article 21 along with Article 48 A of the Constitution.<sup>80</sup> The right to life was read including right to doctor’s assistance<sup>81</sup> and shelter.<sup>82</sup> In *Paschim Banga Khet Majdoor Samity v State of West Bengal*,<sup>83</sup> the Supreme Court carved out the right to emergency medical care for accident victims as forming core component of the right to health, which in turn was recognized as forming an integral part of the right to health. The significance of this decision lies in the implicit recognition of emergency medical care as a core minimum within the larger domain of the right to health.

In *Sodan Singh v NDMC*, the Supreme Court had held that in view of the global development in the sphere of human rights these judicial decisions are a strong pointer towards the recognition of an affirmative right to the basic necessities of life under Article 21.<sup>84</sup> In the *Shantisar Builders v Narayan Khimalal Totame*, the expressed that “basic needs of man have traditionally accepted to be three, food, clothing, and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual.”<sup>85</sup> The Court reiterated that “in any civilized society, the right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions, which inhibit his growth. All human rights are designed to achieve this object. Right to life guaranteed in any civilized society implies right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human

<sup>79</sup> *Unnikrishnan*, n.78, p 765.

<sup>80</sup> *M C Mehta v Union of India*, All India Reporter 1987 Supreme Court 1086.

<sup>81</sup> *Pt. Parmanand Katara v Union of India*, All India Reporter 1989 Supreme Court 2039.

<sup>82</sup> *Shantisar Builders v N K Totame*, All India Reporter 1990 Supreme Court 5151.

<sup>83</sup> (1996) 4 Supreme Court Cases 37.

<sup>84</sup> (1989) 4 Supreme Court Cases 155.

<sup>85</sup> (1990) 1 Supreme Court Cases 520; See also, *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, (1997) 11 Supreme Court Cases 123

Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights.”<sup>86</sup>

In *CESC Limited v Subhas Chandra Bose*,<sup>87</sup> the Court signifies importance of socio-economic justice by observing that “Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are “mere cosmetic” rights. Socio-economic and cultural rights are their means and relevant to them to realize the basic aspirations of meaningful right to life. The Universal Declaration, International Covenant on Economic, Social and Cultural Rights recognize their needs which include right to food, clothing, housing education, right to work, leisure, fair wages, decent working conditions, social security, right to physical and mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforces them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right.”<sup>88</sup>

In the case of *PUCL v Union of India*,<sup>89</sup> the Supreme Court made a giant leap in matters of socio-economic rights by passing an order on the matter relating to social welfare policies. The Court expressing its concern on drought identified the area of immediate attention, “To see that food is provided to the aged, infirm, disabled, destitute women, destitute men, who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases of where they or members of the family do not have sufficient funds to provide food for them.” The States were directed to ensure that all the Public Distribution System shops were reopened and made functional. Thereafter the States were asked to identify families below poverty line in a time-bound schedule and information was sought on the implementation of various government schemes that were meant to help people cope with the crisis. Significantly, the Court made a detailed order regarding the policies of the government: ‘the benefits available under eight nutrition related schemes of the government were recognized as entitlement, all the state governments were asked to provide cooked mid-day meals for all children in government and government-assisted schools and governments were asked to adopt specific measures for ensuring public aware-

<sup>86</sup> *Chameli Singh v State of Uttar Pradesh*, (1996) 2 Supreme Court Cases 549.

<sup>87</sup> (1992) 1 Supreme Court Cases 441.

<sup>88</sup> *CESC*, n. 84, para 30.

<sup>89</sup> (2001) 5 SCALE 303.

ness and transparency of the programmes.’<sup>90</sup> The Court moved in an arena of policy making by passing specific orders to the Executive.

The judiciary which started in negative note to directive principles came down as savior of it. In the aftermath of emergency, the Supreme Court carved a role for itself in Indian politics quite differently from that which it had played since independence. The Court’s path breaking decision in *Minerva Mills*<sup>91</sup> was the critical moment in this transformation. The court’s metamorphosis, from an executive serving institution to that of a dynamic one poised to exercise its solemn constitutional responsibility with aplomb and imaginative realism, “was partly an aspect of the post-emergency catharsis.”<sup>92</sup> The Court intervention facilitates viewing the Constitution as a dynamic and evolving document and not merely an expression of the desired objectives in an open-ended time frame. In the face of an inactive or indifferent legislature or executive, it compels the state and civil society to engage as active participants in the scheme for realization of ESCR.<sup>93</sup> The judiciary has been helping millions of homeless and destitute in realizing their dreams through judicial pronouncements. The innovative method entertaining a petition by a public spirited citizen or group has been a great relief to get justice for downtrodden sections of the society.<sup>94</sup>

#### **D. Looking beyond the court**

The judicial interpretation of relationship between fundamental rights and directives principles provided much desired recognition to socio-economic rights. The integrated approach witness up gradation of socio-economic rights in terms of enforceability, though indirectly through the channel of fundamental rights. It would not be wrong to say that the journey of the judiciary entered into such areas which were not permitted by the framers by the Constitution. Nevertheless, despite the judicial activism, the Court has not been very consistent on protecting wide range of socio-economic rights. The judicial pronouncements

<sup>90</sup> PUCL v Union of India, (2001) 7 SCALE 484.

<sup>91</sup> *Minerva Mills*, n. 51. The Court in this case held that the harmony between fundamental rights and directive principles is a basic feature of the Constitution and cannot be taken away by amendment of the Constitution.

<sup>92</sup> *Upendra Baxi*, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, in N. Trichelvan & R Coomaraswamy, *The Role of the Judiciary in Plural Societies*, 1987, p 36.

<sup>93</sup> *S Murlidhar*, Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate, in Yash Ghai and Jill Cotrell, *Economic, Social and Cultural Rights in Practice*, London, 2004, pp 31-32.

<sup>94</sup> See *T N Godavarman v Union of India*, (1997) 2 Supreme Court Cases 267; *Pradeep Kishan v Union of India*, (1996) 8 Supreme Court Cases 599; *Almitra H Patel v Union of India*, (2000) 3 Supreme Court Cases 575.

have created structural bias in favour of civil and political rights. This could be evidenced in the way in which almost all implied rights – livelihood, environment and medical facility – have been read into Article 21 and therefore translated as a civil and political right.<sup>95</sup> Having stated so, the court has reminded that the socio-economic rights are to be viewed through prism of justiciability in court of law. In this process the court enforce the rights which are recognized as fundamental rights or attempts to bring within the fold of fundamental rights. But the mere fact that the courts are unable to do anything about the principles so as long as they were principles, but could enforce them if they were fundamental rights, points out in the direction of ineffectiveness, if not inferiority, of the principles.<sup>96</sup> It brings the argument that enforceability of socio-economic rights is to be perceived outside the domain of judicial institution so that their realization need not depend upon fundamental rights.

Certainly, it has frequently been highly controversial, particularly in recent cases, when it has upheld environmental claims without heeding the consequences for its traditional constituency of the poor and disposed: the workers made unemployed when a polluting industry is shut down;<sup>97</sup> pavement dwellers evicted as part of an urban 'clean up';<sup>98</sup> or people dispersed by dam construction,<sup>99</sup> or reluctance to intervene in the decision of the government to disinvest its share in public sector undertaking on the ground that this was in the realm of economic policy.<sup>100</sup> Adjudication of competing rights is resolved by *ad hoc* balancing, which only cheapens the value of rights. More importantly referring these conflicts to the courts continually thrusts the courts into the role of omnipotent moral arbiter ... which they are neither particularly well suited to perform nor are able safely to perform.<sup>101</sup>

This development inherently lacks much desired focus on socio-economic rights. The judicial mechanism has been resorted to arbiter between two competing interests of individual or groups. It has generally been witnessed that all those who are affected in the

<sup>95</sup> The Constitution (Eighty-Sixth Amendment Act), 2002 conferred status of fundamental rights to right to education which is already a right under directive principle by inserting article 21A. It establishes the point that fundamental rights enjoy better recognition than directive principles.

<sup>96</sup> *M P Singh*, The Statistics and the Dynamics of the Fundamental Rights and the Directive Principles – A Human Rights Perspective, 5 Supreme Court Cases (Journal) 1 (2003).

<sup>97</sup> *M C Mehta v Union of India*, (1996) 1 SCALE 22.

<sup>98</sup> Court on its own motion v Union of India, C W No. 4441 of 1994 and 2112 of 2002.

<sup>99</sup> *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664.

<sup>100</sup> *BALCO Employees' Union v Union of India*, (2002) 2 SCC 333.

<sup>101</sup> *Christie C George*, The Adjudication of Human Rights, Annual Review of Law and Ethics, Vol. 13, 2005, 435.

reconciliation of competing interest are not heard.<sup>102</sup> In giving effect to the specific socio-economic rights, the court has been consistently referring to the economic constraints of the State.<sup>103</sup> Having assumed this discretion, courts have not provided sufficient guidance on the criteria for the exercise of the discretion. It is pertinent to mention that the court, in recognition of socio-economic rights, has failed to draw any minimum core of obligations required for enforcement of such rights which it is inherently incompetent to undertake also. Courts have transgressed into areas such as legislation and administrative policies which have not traditionally belonged to the judiciary. By taking on these functions, they have not always been fully aware, and which they have not had the means to balance. And at least the Indians courts have made decisions whose implementation have been problematic, and so have detracted from the efficacy of the legal process.<sup>104</sup> Socio-economic rights require a process of balancing, trade-offs, elaboration of standards and negotiation. The violation of socio-economic rights is likely to vary over time and across regions. There are no simple notion certainty and fixity. There is a need to indicate the responsibilities, identify ways in which rights have been violated, suggesting frameworks within which policy has to be made and like. The process of realization of socio-economic rights involves various agencies. Hence, the initiatives of the Court are not sufficient to implement the separate rights in the group of socio-economic rights. Each right calls for delineation of issues specific to that right and formulation of separate strategies. In fact, the implementation of socio-economic rights is not feasible and possible through traditional adjudication mechanism. The real and substantial concern for socio-economic rights evaporates due to overemphasis on the judicial intervention. The legislature and the executive evade responsibility to formulate meaningful programme for fulfilling constitutional obligations. In fact, the government is constitutionally obligated to take more realistic steps for fulfillment of the socio-economic needs of individual. More so, the matter comes before the court when there is a violation of the rights, the nature of socio-economic rights warrants attention of enforcing mechanism at the threshold stage. The realization of these rights must be debated outside the judicial realm, if so desired by the Constitution makers. The dynamic nature of rights requires structuring of dedicated methods for their enforcement. The significance of the rights must not be undermined due to unenforceability in a court of law. The socio-economic rights are enforceable interest of individual. The rights are to be

<sup>102</sup> *M C Mehta v Union of India*, (1996) 4 SCC 750.

<sup>103</sup> See *Unnikrishnan v State of Andhra Pradesh*, (1993) 1 SCR 594, 660; *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, AIR 1996 SC 2426, 2432.

<sup>104</sup> *Cottrell & Ghai*, *The Role of the Courts in the Protection of Economic, Social and Cultural Rights*, in Yash Ghai and Jill Cottrell *Economic, Social and Cultural Rights in Practice*, London, 2004, p 89.

backed by adequate implementation mechanism in order to justify the pledge “fundamental in the governance of the country”.

### **E. Enforcement of Socio-Economic Rights**

The concept of enforceability is central to any legal system. Litigation has been widely accepted as means to enforce rights. The need for remedies and accountability need not be automatically equated with judicial remedies. There are many other ways in which socio-economic rights might be effectively vindicated. They include administrative remedies and legislative responsiveness to reports by human rights commission and the like. Greater flexibility and responsiveness of some of those techniques can be better suited than litigation for achieving the goals of socio-economic rights.<sup>105</sup> The enforcement of socio-economic rights indicates adoption of legislative measures so that the right could be enforced.<sup>106</sup> In addition, it has been suggested to undertake measures like administrative, financial, educational and social measures.<sup>107</sup> The conceptualization of enforcement of socio-economic rights needs to be developed in order to ensure complete satisfaction of rights. Effective implementation of these rights can be ensured through ‘enforceability’ which mandated recognition of the same. It does not require specific form of direction to State but identification of denial of rights. Such denial may be remedied by varied method such as, cooperation, compensation, assurance of non-repetition and like. ‘Enforceability’ brings recognition to these rights. Redressal of violation of socio-economic rights needs to be explored through other institutional agency apart from traditional ‘judicial body’. The enforcement of socio-economic rights must cover these aspects, firstly, recognition of rights in measures like legislative or policies and programmes, secondly, identifying minimum core obligations to measure violation of obligations of the State and thirdly, progressive steps to be taken for complete realization. Socio-economic rights warrant continuous monitoring of the implementation of policies in place for realization of such rights. The violation of rights may be successfully cognizable by the judiciary; the non-implementation of rights may not be adequately addressed due to involvement of other players in complete realization. The complete realization requires observance of rights, other than find-breaches of rights. The enforcement involves supervisory functions, identification of indicators, interpretation and applications of norms in implementation of rights. There is a need to review the indicators considering the level of development achieved by a constituency. The

<sup>105</sup> The South African Human Rights Commission has been involved in enforcement of socio-economic rights. Visit [http://www.sahrc.org.za/sahrc cms/publish/cat\\_index\\_28.shtml](http://www.sahrc.org.za/sahrc cms/publish/cat_index_28.shtml).

<sup>106</sup> General Comment No. 3, para 3, E/1991/23.

<sup>107</sup> General Comment, n. 102, para 8.

adjudication in form of writs is not fit for these rights. The court might have succeeded in issuing direction to the state to contain violation of the rights, but it would be also necessary to take effective measures to ensure non-repetition of violations. The need of independent experts in understanding complexities of socio-economic rights indicates introduction of a tailored made institution which should be capable of analyzing statistics and suggest necessary measures in case of violation of rights. The realization of socio-economic rights necessarily implies complete satisfaction of right. The tripartite obligation indicates about duty of State in relation of complete fulfillment of rights.<sup>108</sup> The Court may succeed in enforcing the duty *to respect* and *to protect*, to some extent. But *to promote* constitutes essential element of obligation, particularly for those who are deprived and disadvantaged. The weak judicial determination will lack realization of socio-economic rights – that their coming into being as a real world phenomenon.<sup>109</sup> Thus, the significance of socio-economic rights cannot be mortgaged to weak judicial remedy. The importance of obligation of ‘to fulfill’ cannot be negated due to incompetency of Court in ordering priorities. Hence, it would be better to entrust the responsibility of monitoring tripartite obligation of State in relation to socio-economic rights to an institution which can effectively and efficiently enforce it.

## F. Enforcement Commission and Socio-economic rights

The debate on socio-economic rights indicates need of an independent Commission for Enforcement of Socio-Economic Rights (CESER) capable of addressing all the questions pertaining to nature and realization of rights.<sup>110</sup> The CESER deserves constitutional status due to the nature of function to be entrusted to it. The significance and role of the CESER cannot to be undermined by political compulsions of the day. The CESER will address the concern of rights in order to define precise obligation of the state and non-state players.

<sup>108</sup> The tripartite obligations were embraced in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc.E/CN.4/1987/17, annex (1987), see, <http://www.law.uu.nl/english/sim/instr/limburg.asp>.

<sup>109</sup> M. Tushnet, *Weak Courts Strong Rights*, Princeton, 2008, p 254.

<sup>110</sup> The idea of institutionalizing a Commission to enforce socio-economic rights is of authors. The strength has been drawn for such institution from emergence of many regulatory or other institutions to regulate the market in the present era. Therefore, it is argued to establish an institution to enforce socio-economic rights. See also, M P Singh, *Directive Principles of State Policy in the Constitution of India*, in B V Lal and T R Vakotra, *Fiji and the World*, Vol. 2, Suva, 1997, p 269 where he has argued that “In my view independent machinery similar to the human rights commissions at the national levels and state levels to monitor the implementation of the DPs is necessary.” Prof. M P Singh argues strengthening of existing National and State Human Rights Commissions in order to enforce these rights.

This could involve a formal process for assessing the evolving notion of what constitutes minimum basic needs within the distinct national context as the basis for determining the scope of the rights and setting benchmarks, which could potentially connect to an international forum for comparative discussions. Effective implementation of socio-economic rights requires identification of core content of rights in order to delineate specific obligation of duty-holders. Identification of core content involves deliberations with various branches of government. Collaborative and cooperative approach of all the wings of State through this CESER will help in developing indicators necessary to identify minimum threshold to lead a decent life. Such indicators must be drawn on the consideration of requirement of decent life and not on available resources with the state. The CESER will engage in analysis and lobbying to influence the design of systems of services so the State fulfills the right at stake. It will advocate for the resources essential to fulfill socio-economic rights. And it should also monitor state activities regarding specific obligations to assure and ensure preventive, prohibitive and corrective steps. The identification of minimum core content of rights and core obligations will not be an end of the obligation of the State. It will be only the initiating point of implementation of rights. It will be construed as springboard for further action of the state. It should be seen as a bottom or floor from which states should endeavour to go up. It will play a very instrumental role in observing compliance with the socio-economic goals by the State. Ultimately, it can effectively provide tool to monitor violation of socio-economic rights which will strengthen enforceability of rights. The review of the legislative and the executive action of compliance of directive principles, socio-economic rights in particular, is not only appropriate but also necessary in order to honor the commitments of constitutional values embedded in the Preamble

## G. Conclusion

Emphasis on socio-economic rights underscores the essential importance of human needs and values, which are often overlooked or undervalued in political and economic decision making. Highlighting those rights not only is individually empowering, but unquestionably helps (and inevitably pressures) governments in protecting and promoting those rights, giving them priority, and internalizing the relevant norms.<sup>111</sup> The constitutionalisation of socio-economic rights in the Indian Constitution was well-thought exercise by the framers of the Constitution. The framers of the Constitution provided that the state not only not to violate the civil and political rights of the people but also to take affirmative action for the realization of social and economic rights necessary for the enjoyment of the former. Had

<sup>111</sup> *M J Dennis & D P Stewart*, Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?, 98 AJIL 462 (2004).



they not done so the Constitution and the rule of law on which it is based and which it promotes would have failed even before take off.<sup>112</sup> They were convinced of the fact that the true realization of socio-economic rights, engraved in the large pool of directive principles, will make social parity and economic prosperity a reality which will ensure every Indian a dignified life. It is apt to quote that at the time of adoption of the Constitution Dr. Ambedkar (Chairman of the Drafting Committee of the Constitution), had warned the Assembly that the political democracy envisaged in the Constitution could not last long if the economic and social democracy were not brought.<sup>113</sup> The judicial contribution regarding socio-economic rights in India (with whatever limitation) is a tribute to the conviction of framers of Indian Constitution for incorporating socio-economic rights as its integral part. The mark of struggle of independence and values of Indian society is evident in structuring of fundamental rights and directive principles. They are based on premise of non-negotiable principle. Judicial pronouncements, certainly, have brought the debate of realization of rights to the fore and reminded the stakeholders about importance of socio-economic rights in discourse of human rights. However, inherent limitation of judicial institution in dealing with realization of socio-economic rights brings need of institutionalizing alternative mechanism to undertake enforcement of these rights. The constitutionalization of suitable institution to enforce these rights is a need of the hour.

“Poverty is far more inhuman than torture itself” – the statement speaks volumes about the effects of neglect of socio-economic rights in society. The denial of social and economic aspect of life will result in deprivation of mental and physical well-being to individual. Generation after generation will disappear in the absence of realization of subsistence needs of individual. The foundation of just and egalitarian society is based on assurance of enjoyment of dignified life. Non-realization of social and economic needs of individual as a matter of rights will jeopardize the survival of principles of constitutionalism.

<sup>112</sup> *M P Singh*, Human Rights in the Indian Tradition – Alternatives in the Understanding and Realisation of the Human Rights Regime, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 63 (2003) 551.

<sup>113</sup> *Shiva Rao*, n.2, Volume IV.

law by elaborating, operationalizing or developing its content – or it can occur as an alternative to hard law in place, threatening its gradual softening or demise.

Economic and social rights are established legal norms so widely disregarded in practice that the search for alternative routes to advancing implementation becomes a compelling task. The *Voluntary Guidelines on the Right to Food* constitute a pertinent case study to highlight both opportunities and challenges arising where soft law interacts with existing but ineffective economic and social rights. A set of non-binding policy recommendations adopted at the Food and Agricultural Organization in 2004, they are a promising approach to bridge the gap between abstract obligation and policy implication. Yet where states renegotiate the substance of assumed obligations, the extent of congruence between the Guidelines and the legal right to food must be analyzed to avoid that soft law renders voluntary what is already obligatory.

This article argues that soft law, more than mere policy tool or precursor to hard law, can lead to the spread or retrenchment of legalization. Where it is used to complement economic and social rights, it should be confronted with a reasonable combination of impartiality and caution. An analysis of the Right to Food Guidelines shows that only with an understanding of its possible normative impact can the potential of soft law to overcome the alleged weaknesses of socio-economic rights be fully grasped.

### **Socio-Economic Rights in India: Democracy Taking Roots**

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Civilization of a society scales upon realization of human rights. Human rights are inalienable rights of every individual. Every society constitutes certain principles to promote and protect human rights. After tyrannical rule of Britishers, the Indian society also adopted a new dispensation containing human rights. Human rights were distinguished in two categories; fundamental rights as justiciable and directive principles as non-justiciable in court of law. Fundamental rights were largely in the nature of civil and political rights whereas directive principles were in nature of socio-economic rights. The categorization was based upon Indian values and guided by struggle of independence. The judicial approach to non-enforceable rights raised serious doubts about commitment of legislature and executive in implementation of these rights. The judiciary started with negative note realized the importance of socio-economic right in humane development. However, judicial effort is to be viewed in the light of inherent limitations of the institution in ordering priorities based on budget and related factors. Therefore, a study is undertaken to examine the judicial approach in India and to suggest an establishment of suitable enforcement of institution to enforce socio-economic rights so that socio-economic rights need not take shelter of civil and political rights for their enforcement