

JUDICIAL ADJUDICATION OF SOCIO-ECONOMIC RIGHTS: INDIAN PERSPECTIVE

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Prefatory:

Both, Civil-Political Rights and Socio-Economic Rights find mention in the Indian Constitution. Constitution of India stands as the real safeguard of our freedoms.¹ It represents the basic document on which the whole framework of this “Sovereign, Socialist, Secular, Democratic, Republic” stands. The foundations of this Republic have been laid on the bedrock of justice.² The cluster of socio-economic rights represents the hopes and aspirations of millions on which the fabric of this sovereign republic stands.

India, a prominent member of the new world order, was predestined to be a welfare state, deeply committed to twentieth century social and economic goals. The Constitution of India assembled the values of freedom struggle to promise dignified life to all in new dispensation. Genesis of the vision, need, recognition, protection and enforcement of human rights, which lies in the

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¹ “Constitution is the vehicle of nation’s progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future.” H.R.Khanna, Judge, Supreme Court of India (Retd.) Making of India’s Constitution, Eastern Book Company, Second Edition, 2009.

² *Bharat Bank Ltd. v. Employees*, A.I.R 1950 SC 188.

freedom struggle of Indians for more than a century, culminated in the form of Fundamental rights and Directive principles of State Policy on which the mammoth structure of Indian Republic stands today.³ On the one hand, fundamental rights guarantee autonomy to individual and on the other hand, directive principles elaborate on the guidelines for making autonomy meaningful.⁴

Directive principles of State Policy are not the only charter of social and economic rights in India. Social and economic rights like the right to form association and unions,⁵ the right to carry on any occupation, trade or business,⁶ the right to education⁷ and cultural and educational Rights⁸ are placed in the chapter of fundamental rights. Fundamental rights also contain the provisions relating to right against exploitation.⁹

It is interesting to note that all social and economic rights are not clothed in the language of 'rights' in the Constitution. They are formulated in the form of guidelines or objectives to be followed by the state. It is required to chart out the rights which are coloured as guidelines by the framers of the Constitution. Article 39(a) states that "the citizens, men and women, equally have the right to adequate means of livelihood." Article 41 provides "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases unemployment, old age, sickness and disablement, and in other cases of undeserved want." This is the only provision in Part IV of the Indian Constitution which refers to implementation of rights, subject to the economic development of the State. The realization of rights to work,

³ Dadwal, L., *Position of Human Rights: An Indian Profile*, 39 Civil and Military Law Journal (Oct-Dec 2003), 221 at 225.

⁴ Part III and Part IV of the Constitution of India provides for Fundamental Rights and Chapter IV provides for Directive Principles of State Policy respectively.

⁵ Article 19(1)(c) of the Constitution of India.

⁶ Article 19(1)(g) of the Constitution of India.

⁷ Article 21-A of the Constitution of India

⁸ Articles 29 and 30 of the Constitution of India.

⁹ Articles 23 and 24 of the Constitution of India.

education and social security has been qualified to the economic condition. There is a similar condition for implementation of social and economic rights laid down in the International Covenant of Economic, Social and Educational Rights.¹⁰

Apart from these rights, other social and economic rights are imposed as duty upon the state to give effect to them. Rights such as equal pay for equal work,¹¹ childhood and youth are to be protected from exploitation,¹² just and humane conditions of work,¹³ a living wage, conditions of work ensuring decent standard of life and full enjoyment of leisure,¹⁴ free and compulsory primary education,¹⁵ and raising level of nutrition and the standard of living and the improvement of public health¹⁶ are not framed in the language of rights. These are important conditions of life enumerated in the Part IV. Mere non assertion of such essentials of life in the language of rights does not dilute their significance and importance. It is pertinent to note that Article 47 which speaks about 'raising of the level of nutrition and the standard of living... and improvement of public health' is also formulated in the nature of duties for the State.

This article endeavours to chalk the judicial approach towards the adjudication of issues related to socio-economic rights in India. The leitmotif of this article is not to divulgate the scholarly writing's on the aspect of socio-economic rights in India. Instead, this article provides enough food for thought to the very aspect that the fundamental nature of socio-economic rights demand them to be a guarantee by the government. The question of realization of the socio-economic rights is completely based on the question that whether the Courts should sit over the adjudication of socio-economic

¹⁰ Article 2(1) of ICESCR.

¹¹ Article 39(d) of the Constitution of India.

¹² Article 39(f) of the Constitution of India.

¹³ Article 42 of the Constitution of India.

¹⁴ Article 43 of the Constitution of India.

¹⁵ Article 45 of the Constitution of India.

¹⁶ Article 47 of the Constitution of India.

rights or not.¹⁷ Realization of socio-economic rights should be left to the sphere of State. Intervention by Courts might result in detouring the course, which was not what was intended by the Constitution makers.

A more substantive approach to justiciability, looks to the nature of the rights and obligation in question, and whether complaints about their violation are susceptible to a rational and meaningful resolution by a duly empowered decision maker.¹⁸ The judiciary has been efficiently and effectively discharging its responsibility of enforcement of civil and political rights. The determination of violation of social and economic rights by judiciary has failed to gain much desired acceptance in the legal plane. The non-justiciability of social and economic rights is challenged on both the grounds of 'legitimacy' and 'competency'. Most of the constitutions of the world express unwillingness to empower judiciary to examine violation of social and economic rights. Though, the judiciary indirectly exercises power to adjudicate upon these rights by reading general provisions of the constitution,¹⁹ despite such activism, the Court has not been very consistent on protecting wide range of social and economic rights.

The Big Brother: Indian Judiciary

Article 37²⁰ of the Indian Constitution provides that the provisions of Part IV cannot be enforced in any Court. The judicial organ of the State has been deliberately kept away from the matters relating to implementation of the

¹⁷ (This is contrary to the view held by Dr. S. Muralidhar, *Economic, Social & Cultural Rights: An Indian Response to the Justiciability Debate*, in Yash Ghai and Jill Cottrell, *Economic, Social & Cultural Rights in Practice*, Interights, 2004.)

¹⁸ Dennis M J., & Stewart D P., *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, 474 (2004).

¹⁹ The Indian Supreme Court has been expanding the meaning of the right to life to include the right to health, right to shelter, right to livelihood to list a few.

²⁰ "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." Article 37, Constitution of India, 1950.

directive principles. In doing so, the framers of the Constitution had also kept social and economic rights along with other principles of fundamental importance out of the purview of the court.

Supreme Court elaborated upon the relationship between rights enumerated in Part III and Part IV in *Minerava Mills's*²¹ case. While explaining the relationship between the two set of rights in *ABSXS v Union of India*,²² Justice Krishna Iyer gave reason for not making social and economic rights enforceable in these words: "It is now universally recognized that the difference between two sets of rights primarily lies in the fact that the fundamental rights are aimed to bring political freedom to the citizens by protecting them against excessive State Action, while the directive principles are meant for promoting social and economic freedom by appropriate state action while fundamental rights are intended to avoid and prevent the dictatorship rule to secure ideal political democracy, they are of no value unless they can be enforced through court. They are made justiciable. It is also evident but not frequently that they get importance but the directive principles in the very nature cannot be enforced in court of law and it is also unimaginable that no court can compel legislature to make law. If the court can compel legislature to make law that certainly parliamentary democracy

²¹ *Minerva Mills Ltd. v. U.O.I.*, 1981 SCR (1) 206. Justice Bhagwati categorically stated that Directive principles are part of human rights. He observed that: "it is not possible to fit fundamental rights and directive principles into distinct and defined categories, but the reality is that fundamental rights represent civil and political rights while directive principles embody social and economic rights. Both are clearly part of the broad spectrum of human rights. If we look at the declaration of human rights adopted by the general assembly of UNO on 10-12-1948 we find it contains not only rights protecting individual freedom they are from art. 1 to 21 but also social and economic rights intended to secure socio-economic justice to everyone. These are contained form Arts. 22 and 29 to other international covenants adopted by the general assembly for securing human right. One is the international covenant, civil and political rights and other is the economic, social and cultural life. Both are international instrument relating to human rights. It is therefore, not correct to say that the fundamental rights alone are based on human rights while directive principles fall in some categories other than human rights. The section of human rights embodied in directive principles, are as much as part of human rights as the fundamental rights."

²² AIR 1981 SC 246.

shall be reduced to Anarchy of Judges.” In *I R Coelho v State of T.N.*,²³ the Supreme Court reasserted the need of balance between fundamental rights and directive principles.

Indian Courts have been adopting different methodologies to deal with the conflict between the fundamental rights and the directives. Judicial journey, dealing with the conflict between the fundamental rights and the directive principles, can be summarized in four leading steps. The description is in the order of the approach taken by the Court. It is to be noted that the first two approaches stand obsolete today and the latter two govern the current state of affairs at the judicial realm. The authors here provide a picture of the fourth approach as a Pandora box.

The First Rung:

Under the first approach, the judiciary was reading the meaning of “shall not be enforceable” under Article 37 in *strictu sensu*. In doing so, it was conferring a higher status to the fundamental rights over the directive principles. In relation to the first approach, the Court has been interpreting provisions of Article 37 vis-a-vis Article 13 of the constitution to give precedence to Fundamental rights over Directive principles. Thus, the judiciary was critical in conferring status to social and economic rights at par

²³ “The fundamental rights have always enjoyed a special and privileged place in the Constitution. Regarding the status and stature of fundamental rights in the constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. The object of the fundamental rights is to foster a social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive have to be balanced. That balance can be tilted in favour of public good. The balance, however, cannot be overturned completely overriding individual liberty. This balance is an essential feature of the Constitution. ...Part III and Part IV together constitute the core of commitment to social revolution and they together, are the conscience of the Constitution.” (2007) 2 SCC 1.

with civil and political rights.²⁴ The Court, in declaring the directives subordinate to the fundamental rights, had given its verdict primarily on the interpretation to the clause “shall not be enforceable in any court of law”.²⁵

The Second Rung:

Under the second approach, the Court was reading the reason of incorporating directive principles in the Constitution in a sacrosanct manner. Directive principles are aspirations of millions of people to establish a social and economic order. Therefore, the fundamental rights must pave way and can be sacrificed for their effective implementation. In the second approach, the Apex Court realized that the directive principles must be read in much constructive fashion for their meaningful inclusion in shaping the life of an individual. There was recognition of the fact that although the directives were non-justiciable in character, the Courts should recognize their 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 the fundamental rights. The Land Reform legislations were validated on the ground of ‘public purpose’. It was observed that the legislations were giving effect to the interest of the community over the interest of individual.²⁶ These principles were drawn to define the content of reasonable restriction, so as to limit the

²⁴ “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.” *State of Madras v Champakam Dorairajan*, AIR 1951 SC 226; see also *M H Quershi v State of Bihar*, (1959) SCR 629; see also *Kerala Education Bill, 1957, Re*, AIR 1958 SC 956.

²⁵ *Jagwant Kaur v State of Bombay*, AIR 1951 Bom 461; see also *Ajaib Singh v State of Punjab*, AIR 1952 Punj. 309; see also *Biswambhar v State of Orissa*, AIR 1957 Ori 247.

²⁶ *State of Bihar v Kameshwar Singh*, AIR 1952 SC 252; see also *Bijay Cotton Mills v The State of Ajmer*, AIR 1955 SC 33.

freedom guaranteed under article 19.²⁷ The court maintained that the Directives should conform to and run as subsidiary to the chapter on Fundamental Rights.

The Third Rung:

Under the third approach, the court has been reading both fundamental rights and directive principles as a part of integrated constitutional scheme to achieve welfare for all.²⁸ In pursuance of this approach, it has been giving harmonious interpretation to the conflicting legislations.²⁹ In the third approach, the court adopted a purposive role to read the provisions of the directives while interpreting various legislations.³⁰ It started referring to the principles when there was no conflict between the Part III and Part IV of the constitution.³¹ Interestingly, the court completely transformed its approach towards the directives.³² It initiated a method of reading the directives to justify the legislative measures of the State. It started interpreting the

²⁷ *Nuserwanji Balsara v State of Bombay*, AIR 1951 SC 318.

²⁸ “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 Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy.” *State of Kerala v N M Thomas*, AIR 1976 SC 490.

²⁹ “...what was fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual and therefore fundamental rights and DPSP were complementary.” *Keshvanand Bharti v State of Kerala*, (1973) 4 SCC 225.

³⁰ “... 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.” *UP State Electricity Board v Hari Shankar Jain*, AIR 1979 SC 65.

³¹ “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.” *J P Unnikrishnan v State of AP*, AIR 1993 SC 2178.

³² “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.” *State of Karnataka v Ranganatha Reddy*, AIR 1978 SC 215.

various directives to provide meaningful content to welfare legislations like labour laws.³³

The Fourth Rung: The Pandora Box

The fourth approach witnesses assimilation of social and economic rights into fundamental rights. The Court has been reading various social and economic rights as a component of justiciable fundamental rights. The court ushered in a new era by interpreting social and economic rights under the scheme of fundamental rights. It started reading the various rights of Part IV into Part III of the constitution. In *Randhir Singh v Union of India*,³⁴ 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 the right of free legal aid under Article 39 A has been read into Article 21 in *M H Hoskot v State of Maharashtra*.³⁵ Right to free and compulsory education up to the age of 14 years was read into right of life and liberty.³⁶ The whole gamut of environmental jurisprudence has been developed by interpreting Article 21 along with Article 48 A of the constitution.³⁷ Article 49 of the constitution got shelter under Article 21 in the form of direction to protect and maintain national monument in the case of *Rajeeva Mankotia v. Sec. to President of India*.³⁸ The right to life has been read to include the right to doctor's assistance³⁹, the right to a reasonable accommodation to live in⁴⁰, the right to shelter⁴¹ including the necessary

³³ *Bijay Cotton Mills v State of Ajmer*, AIR 1955 SC 33; see also *Crown Aluminum Works v The Workmen*, AIR 1958 SC 30; see also *Express Newspaper Ltd v Union of India*, AIR 1958 SC 578.

³⁴ AIR 1978 SC 1548.

³⁵ (1978) 3 SCC 544.

³⁶ *J P Unnikrishnan v State of Andhra Pradesh*, (1993) 1 SCC 645.

³⁷ *M C Mehta v Union of India*, AIR 1987 SC 1086; see also *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, 1987 Supp SCC 487; see also *Subash Kumar v Union of India*, (1991) 1 SCC 598; see also *N D Jayal v Union of India*, (2004) 9 SCC 362; see also *M C Mehta v Union of India*, (2006) 3 SCC 399.

³⁸ AIR 1997 SC 2766.

³⁹ *Pt. Parmanand Katara v Union of India*, AIR 1989 SC 2039.

⁴⁰ *Shantisar Builders v N K Totame*, AIR 1990 SC 5151.

infrastructure to live with human dignity⁴². The right to life has invoked for the upliftment of and dignified life of prostitute⁴³ and also includes right to reputation⁴⁴. In *Paschim Banga Khet Majdoor Samity v State of West Bengal*,⁴⁵ 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 life. The judicial creativity has been witnessed in a case of *Farhad K Wadia v. Union of India* wherein the court has added new dimensions to right to health in the context of right to freedom from noise pollution..⁴⁶ In *Olga Tellis v Bombay Municipal Corporation*,⁴⁷ the Supreme Court read right to livelihood under the ambit of Article 21. In *Francis Coralie v Union Territory of Delhi*,⁴⁸ the Court read under the enshrined right of life, the right to live with dignity. Under the percussion of human dignity, the Court in *Bandhua Mukti Morcha v Union of India*,⁴⁹ read the right to have access to basic essentials as the part of right to life. The court declared that non-enforcement of welfare legislation like the Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act, 1976 would tantamount to denial of the right to live with

⁴¹ *Gauri Shankar v Union of India*, (1994) 6 SCC 349; see also *Shiv Sagar Tiwari v Union of India*, (1997) 1 SCC 444.

⁴² *Chameli Singh v State of Uttar Pradesh*, (1996) 2 SCC 549; see also *J P Ravidas v Nav Yuvak Harijan Uttapam Society Ltd.*, (1996) 9 SCC 300.

⁴³ *Gaurav Jain v Union of India*, (1997) 8 SCC 114.

⁴⁴ *State of Bihar v L K Advani*, (2003) 8 SCC 361.

⁴⁵ (1996) 4 SCC 37.

⁴⁶ (2009) 2 SCC 442. The Court has observed that “Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being “necessity of silence”, “necessity of sleep”, “process during sleep”, and “rest”, which are biological necessities and essential for health. Silence is considered to golden. It is considered as one of the human rights as noise is injurious to human health which is required to be preserved at any cost.”

⁴⁷ AIR 1986 SC 180. See also, *Centre for Environment and Food Security v. Union of India*, (2011) 5 SCC 676 – Right to livelihood is higher than a mere legal right. It is an integral part of right to life under Art. 21.

⁴⁸ “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.” AIR 1981 SC 746.

⁴⁹ “...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.” AIR 1984 SC 802.

human dignity enshrined under Article 21 of the Constitution. In *Sodan Singh v NDMC*,⁵⁰ 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.”

It is to be noted that the fundamental rights christened in our Constitution represent the negative rights of an individual, whereas the directive principles provide a positive right to an individual.⁵¹ The reading of positive rights under the banner of negative rights presents a parlous state of affairs. Judiciary, while reading the socio-economic rights under the domain of fundamental rights, has walked on unguided straits. It is the responsibility of the state to provide for the realization of socio-economic rights. Realization of the socio-economic rights depends upon the resources of the state. State is entrusted with the duty to provide such rights to the society. By reading them under the umbrella of fundamental rights, the state is casted with a bounden duty of not to violate such rights. Such being not intended by the Constitution, only represent the overzealous attitude of the judiciary. In *CESEC Limited v Subhas Chandra Bose*,⁵² the Court justifies its overzealous attitude by placing importance on socio-economic justice and 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

⁵⁰ (1989) 4 SCC 155.

⁵¹ “Articles 38, 39 and 46 mandate the State, as its economic policy, to provide socio-economic justice to minimize inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlements of life and erection of shelter over their heads to make the right to life meaningful.” *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, (1997) 11 SCC 123.

⁵² (1992) 1 SCC 441.

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.”

The Indian Supreme Court did not limit itself by reading socio-economic rights under part III of the Constitution. The Court has also transgressed in an arena of policy making by passing specific orders to the executive.⁵³ In the case of *PUCL v Union of India*,⁵⁴ the Supreme Court made a giant leap in matters of social and 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. Subsequently, the Court made a detailed order regarding the policies of the government: ‘the benefits available under eight

⁵³ *Consumer Education and Research Center v. U.O.I*, (1995) 3 SCC 42.

⁵⁴ (2001) 5 SCALE 303.

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 awareness and transparency of the programmes.⁵⁵ The Court has, time and again, directed the executive to frame policies on issues of advancement of socio-economic rights.⁵⁶

Rationale for non-justiciability of socio-economic rights:

Non-justiciability of social and economic rights is attributed to three main reasons. They are: firstly, the vagueness of social and economic rights discourages any adventurous step from the judiciary. Judiciary prefers to keep its judicial adjudication process away from imprecise nature of considerations involved in it. Courts have refused to entertain alleged violations of the social and economic rights, reasoning that its “boundless and indeterminate principles” resist judicial application.⁵⁷ Secondly, the perception of positive obligation for the fulfillment of social and economic rights opposes negative judicial intervention. It would be difficult to monitor the obligations of the legislature and the executive in promoting these rights. Courts, generally, hesitate to evaluate commitment of executive and legislature in budgetary allocation, due to the principle of separation of powers. It is pertinent to mention that the adjudication of civil and political rights often involves expenditure of resources by the state. For instance, the judicial dicta regarding maintenance of human condition in prison involves expenditure by the state. There is no reluctance on the state to agree to such determination, involving reordering of priorities of budget in compliance

⁵⁵ Order dated 28th November 2001 in W.P.(C) NO. 196/2001.

⁵⁶ *Karnika Sawhney (3) v. Union of India*, (2007) 15 SCC 637 (Eradication of and rehabilitation of beggars); *Ramakant Rai (3) v. Union of India*, (2007) 15 SCC 645 (Regulation of sterilization procedures).

⁵⁷ Eide, A., *Realisation of Social and Economic Rights and the Minimum Threshold Approach*, in *Human Rights in the World Community*, Richard P Claude & Burns Weston (ed.), 159.

with the pronouncements. Third, the doctrinaire approach of 'progressive realization' defers judicial determination which requires presence of resources for implementation of these rights. The progressive realization requirement contributes to the vagueness of social and economic rights, since; states can never be sure exactly what their obligations are at any particular time.⁵⁸ Moreover, the judicial pronouncements, which are in the nature of "none or all"⁵⁹, do not fit the legal nature of socio-economic rights.

Indian Courts have assumed the jurisdiction to classify as justiciable rights, entitlements, which are not specifically given in the Constitution. Having assumed this discretion, Courts have not provided sufficient guidance on the criteria for the exercise of the discretion.⁶⁰ By taking on these functions, they have not always been fully aware.⁶¹ It has been argued that judiciary lacks competence to examine the details of social and economic rights due to indeterminate and imprecise features.⁶² Another related argument is made against the practicability of legal enforcement: that cases involving social and economic rights are too complex for judges to analyze adequately, as the social and economic issues they raise, tend to be embedded in a complex web of causes and effects.⁶³ It is argued that courts have more difficulty monitoring a government's obligation to take positive steps than its duty simply not to interfere with individuals' existing entitlements.⁶⁴

⁵⁸ Robertson, R., *The Right to Food in International Law, Human Rights in the Twenty-First Century: A Global Challenge*, Kathleen E Mahoney & Paul Mahoney (eds), 1993, 453.

⁵⁹ Scheppele, K L., *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 1921 (2004), 1931.

⁶⁰ "Too much reliance by the Supreme Court on Article 21 and its extensive extension by judicial extrapolation has given rise to the criticism that all sorts of goodness so derived as right from Article 21 are only euphoric – they simply cannot be enforced." Fali S Nariman, *Fifty Years of the Supreme Court – A Balance Sheet of Performance* (R B Datar Memorial Lecture), Lawyers Update, July- December 1999.

⁶¹ Cottrell, J & Ghai, Y., *The Role of the Courts in the Protection of Economic, Social and Cultural Rights*, in Yash Ghai and Jill Cottrell (ed.), *Economic, Social and Cultural Rights in Practice*, Interights, London, 2004, p 89.

⁶² Mureinik, E., *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, (1992) 8 SAJHR 464, 471.

⁶³ "There exist a danger by creating multiplicity of rights without possibility of adequate enforcement", Dr. Anand, Former CJI, Inaugural Speech delivered on August 29, 1999 at the Golden Jubilee Celebration of the Rajasthan High Court.

⁶⁴ Tomasveki, K, *Justiciability of Economic, Social and Cultural Rights*, 55 The Review Int'l Comm'n Jurists, Dec. 1995, 203, 217.

Legitimacy of judicial adjudication of social and economic rights is challenged on the ground of separation of powers. The adjudication process tends to encroach upon the domain of legislature and executive.⁶⁵ The propriety of judicial determination challenges on the nature of order passed by the judiciary. The judiciary expresses reluctance to evaluate measures adopted by the executive in its entirety in order to ascertain the complete realization of rights.⁶⁶ The legitimacy and competency in matters relating to social and economic rights are described by the Supreme Court in *Narmada Bachao Andolan*,⁶⁷ the Court has observed that “if a considered policy decision has been taken, which is not in conflict with any law or is not malafide, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive”⁶⁸. Further, “whether to have an infrastructural project or not and what is the type of project to be undertaken and how it is to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken.”⁶⁹ In an area where the court is of view that the issue is in the realm of executive or legislative policy, it is usually reluctant to intervene although such policy may have implications for social and economic rights.⁷⁰

⁶⁵ *Gainda Ram v. MCD*, (2010) 10 SCC 715 – Interestingly, the court has directed the legislature to enact a law within a stipulated time. It is apt to quote that “With the enactment of the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009, the initial decision making in the field of legislative exercise is complete. It has, of course, to be converted into a law by following the constitutional process. That is why time till 30-6-2011 is given. Within that time, the appropriate Government is directed to legislate and bring out the law to regulate hawking and hawkers’s fundamental right so that the hawkers may precisely know the contours of their rights.”

⁶⁶ *Balco Employees Union v Union of India*, the court refuse to examine disinvestment policy on the ground of public policy; see also *Soobramoney v Minister of Health*, (1997) 12 BCLR 1696, the Court observed that it will not inquire whether other desirable measures or favourable measures could have been adopted or whether public money could have been better spent.

⁶⁷ *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664.

⁶⁸ *Ibid* at 763.

⁶⁹ *Ibid* at 762.

⁷⁰ Murlidhar, S, *Judicial Enforcement of Economic and Social Rights: the Indian Scenario*, in *Justiciability of Economic and Social Rights*, Yash Ghai and Jill Cortell (ed), Intersentia, 2006, p 256.

Social and economic rights require a process of balancing, trade-offs, elaboration of standards and negotiation. Process of realization of social and economic rights involves various agencies. The realization of these rights involves budgetary expenditure, a defined domain of legislature. In fact, the implementation of social and economic rights is not feasible and possible through traditional adjudication mechanism. Real and substantial concern for social and economic rights evaporates due to overemphasis on judicial intervention. The legislature and the executive, in light of the judicial intervention, evade or shrink their responsibility to formulate meaningful programme for fulfilling constitutional obligations. The judicial creativity fails to bring the benefit to the rights in their substance. In fact, the government is constitutionally obligated to take more realistic steps for fulfillment of the socio-economic needs of individual. The fourth approach of the judiciary does not contribute to the progress of the rights in question. It disturbs the constitutional scheme.

Therefore, the social and economic rights enumerated in the Indian Constitution, need focused attention for their realization. The realization of these rights must be debated outside the judicial realm. The dynamic nature of these 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 social and economic rights are enforceable interest of individual. The rights are to be backed by adequate implementation mechanism in order to justify the pledge “fundamental in the governance of the country”.

Peroration:

Social and economic rights are perceived as rights for welfare of an individual as a member of society. Individual enjoys guaranteed right to lead dignified and decent life. These rights are for general welfare of an individual. They ensure well-being of individual for the good of a society.

Generally, these rights come in conflict with the autonomy oriented rights. The conflict is more visible due to conferment of power to the judiciary to enforce autonomy rights. These rights conferred in the Fundamental rights and the Directive principles have also got confronted with each other. The conflict between these two rights had been foreseen by the first Prime Minister of India while referring to relationship between the Directives and the Fundamental rights. He pointed how an occasion for a conflict between the two could arise in the following words: “The Directive principles of State Policy represent a dynamic move towards certain objective. The Fundamental rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime it might so happen that dynamic movement and that static standstill do not quite fit into each other.”⁷¹

The question of determination of welfare principles is being attacked when it comes on the way of civil and political rights. Judiciary empowered to enforce fundamental rights, finds difficult to balance the conflict between them. 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 social and economic rights is not to offend the prime role of protector and guardian of the constitution. The realization of the directive principles, including social and economic rights, involves factors of budget, human resources, and infrastructure and like. The judiciary has been kept away from adjudication on the matters where the state seeks to formulate policies for the society as a whole in respect of social and economic matters. It is arising out of this fact that the nature of rights requires different mechanism and institution of their enforcement.

⁷¹ Parliamentary Debates (Lok Sabha), Part II, 16th May 1951, Constitution (First Amendment Bill), col. 8822.

The enumerated social and economic rights must be read in a spirit of the ideals scripted in the Preamble. The realization of social and economic rights necessarily implies complete satisfaction of rights. The court may succeed in enforcing the duty *to respect* and *to protect*, to some extent, but *to promote*, constitutes essential element of obligations, particularly for those who are deprived and disadvantaged. This tripartite obligation, points to the duty of state in relation to complete fulfillment of rights.⁷² The importance of obligation of '*to fulfill*' should not be negated due to incompetency of Court in ordering priorities. On cautionary note, even if the judiciary is said, allegedly, to be treading on the right path, the complete realization of socio-economic rights falls within the realm of the executive and the legislature as their realization warrants comprehensive implementation and enforcement of policy and dedicated legislative enactment.⁷³ Ideally, the intervention of judiciary should be restricted to the cases of lackadaisical approach of the executive or lop-sided effort of the legislature.⁷⁴

⁷² Avinash Mehrotra v. Union of India, (2009) 6 SCC 398. – The court has observed that “The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child’s safety. State thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of compulsory education.”

⁷³ Swami Shraddananda v. State of Karnataka, (2007) 12 SCC 288 – the court cannot amend the constitution by judicial verdict or legislate or amend the law by process of interpretation.

⁷⁴ Som Lal v. Vijay Laxmi, (2008) 11 SCC 413 – the court should be slow to interfere with the mandate of legislature except for compelling reasons. Refer also, The Prime Minister Shri Manmohan Singh in a Conference of Chief Ministers and Chief Justices cautioned that “the dividing line between judicial activism and judicial overreach is thin one. All organs including, the judiciary must ensure that the dividing line between them is not breached. This calls for harmonious functioning.” (2007) 4 SCC (J) 12.