JUDICIAL IMPLEMENTATION OF DIRECTIVE PRINCIPLES OF STATE POLICY: CRITICAL PERSPECTIVES

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I. INTRODUCTION

The Directive Principles of State Policy set forth the humanitarian precepts that were and are the aims of the Indian social revolution.[1]

The negatively worded civil and political rights enshrined under Part III of the Constitution that the people of independent India gave to themselves, and the positive socio-economic and cultural rights that are sought to be progressively achieved incorporated under Part IV of the Indian Constitution roughly represent the two streams in the evolution of human rights. The distinction on the basis of justiciability therein mirrors the traditional division between civil and political rights, which restrain the State from intruding; and socio-economic rights, which elicit protection by the State against want or need. These in turn reflect two distinct views of liberty: liberty as freedom from State interference; and liberty as freedom from want and fear.[2] Yet it has long been recognized that the two sorts of freedom are inextricably intertwined.

It is noteworthy that the Universal Declaration of Human Rights indicates two sets of Rights- traditional Civil and Political rights[3] and the Economic and Social Rights,[4] and the sets are reflected in the Constitution of India; the first set under Fundamental Rights of the Constitution and the second set under Directive Principle of State Policy respectively. The incorporation of the Directive Principles is in pursuance of the Preambular objective of socio-economic justice. In fact, Part IV has been referred to as the socio-economic Magna Carta of the Indian Constitution.[5] Although it is noted that the framers of the Constitution intended them to guide elected representatives towards improving socioeconomic conditions, yet somehow, the Indian Supreme

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[1] Granville Austin, *The Indian Constitution: Cornerstone of a Nation, p.* 50 (Oxford: Clarendon Press, 1966).

[2] Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, *available at*: http://ssrn.com/abstract=923936 (Visited on January 08, 2014).

[3] Articles 2-21.

[4] Articles 22-28.

[5] *State of Bihar* v. *Kameshwar and Others,* AIR 1952 SC 252.

Court has held that the right to life in Article 21 of the Constitution should be read more broadly to encompass a 'right to live with dignity.'[6] The Court has relied on this interpretation to make many Directive Principles justiciable, including rights to food and education.

There has been much debate and discussion on the Judiciary's attempt to implement the Directive Principles, and these works either criticize the Court for 'judicial activism' or applaud it for proactively defending the rights of the poor and marginalized, for recognizing the fact that existence precedes excellence and that existence is guaranteed by according recognition to socioeconomic rights. The Judiciary, while interpreting these provisions of the Constitution, has apparently not limited the scope of the various Articles to what was laid and understood by the Constitutional framers as reflected in the Constitutional Assembly Debates. Arguably, for the advancement of socioeconomic justice and well-being of the nation as a whole, the Courts have read the Directive Principles of State Policy in the Fundamental rights, and additionally, in this process of deciding case after case on the aspect of human rights of the citizens, the Court has consistently read the scope of human rights as in consonance with the provisions of the Universal Declaration, along with the other International Covenants.

This paper aspires to delve into the origin of incorporation of positive rights in the form of the Directive Principles in the Indian Constitution, taking a cue from the Irish Constitution, proceeding to draw a note of distinction between the two that has not been amply appreciated. The South African model of incorporation of positive rights as justiciable, but moulding the positive duty to reflect the difficulty of providing resources in immediate fulfilment shall be referred to as a replicable model, after delving into the quandary pertaining to whether Directive Principles are mere sentiments or do make sense in the Indian Constitutional fabric. The Indian Judiciary's adventurism of interpreting the positive rights as justiciable within the precincts of Article 21 shall be perused; the ambivalence towards ensuring the right to quality of life and liberty in real sense and the jurisprudential quagmire that Judiciary has drawn itself into that threatens to strike at the Constitution's legitimacy discussed in depth critically.

[6] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 59.

II. INCORPORATION OF DPSPS IN THE INDIAN CONSTITUTION: TAKING A CUE FROM THE IRISH CONSTITUTION

When the people of independent India gave to themselves a Constitution, they chose to embody in Part IV of the Constitution a set of provisions entitled Directive Principles of State Policy. The framers were undeniably inspired by the Irish Constitution of 1937 which contained a similar set of provisions, named 'Directive Principles of Social Policy', but in framing the provisions they did make departures from the Irish model. Article 45 of the Irish Constitution reads:

> The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the case of the Oireachtas exclusively, and *shall not be cognizable in any Court* under any of the provisions of this Constitution.

On the contrary, Article 37 of the Indian Constitution reads:

> 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.

It would be pertinent to note from the semantics of Article 37 that doctrine of separation of powers proposes *non-enforceability* by the Judiciary, and not *non-cognizability* in the Court is literally provided for in the Indian provision, implying that the judicial exclusion is more strongly worded in the Irish Constitution.[7] 'Cognizance' is defined as judicial recognition or hearing of a cause, jurisdiction or right to try and determine causes, and 'justiciable' is defined as the power to be examined in courts of justice, subject to action of court of justice., whereas 'enforceable' means to cause to take effect.[8]

The Irish Constitution places all the directives under one Article while the Indian constitution frames them separately in sixteen Articles. The provisions spread out in different Articles would, thus, receive separate construction unlike when they are placed together in one article. Additionally, homogeneity of language formulating the directives in the Irish Constitution contrasts with the diversity of expressions chosen in the Indian Constitution, the diversity necessarily stemming from the typical Indian conditions as envisaged during the freedom struggle.

[7] *Supra* note 2.
[8] Justice Y.V. Chandrachud (ed.), *P. Ramanatha Aiyar Concise Law Dictionary* (Wadhwa and Company, Nagpur, 2006).

The discretion in timing the action in regard to the directives in the Indian Constitution is quantified in the respective Articles themselves, thus providing the necessary elasticity in devising and timing methods for reaching the given socio-economic objectives. The directives collectively aim at pragmatic socialism, not doctrinaire socialism and it is for that reason all the more commendable in that it seeks to avoid the well-known extremes in other attempts at social welfare, extremes pertaining to usher in overnight reforms, or calling for socio-economic empowerment and upliftment regardless of resource constraints.

However, some scholars including Prof. Upendra Baxi deem the aforementioned differences as minor and not noteworthy.[9] K.P. Krishna Shetty, considering the difference as not material, observed that the only significant change made by the Drafting Committee in the provisions contained in the Supplementary Report was the substitution of the phrase 'shall not be enforceable' for the words 'shall not be cognizable.' The ambit and scope of the provisions, therefore, remained almost the same. [10]

Subsequent to the appreciation of the difference, as noted above, Prof. T. Devidas has gone to the extent of suggesting that clear departures from or oppositions to the directives can be prevented by the court action, for what is contemplated by Article 37 is only *non-enforcement.* It is conceivable to think of State action in furtherance of the directives, neutral vis-à-vis directives and opposed to the directives. Preventing State action which is opposed to the directives would not amount to the enforcement of the directives. It would indeed promote the chances of realizing the constitutionally given socialistic values.[11] This appreciation of the fact that the directives are non-enforceable, and not non-cognizable, in a way, provides for a logical justification of the judicial implementation of the Directives which in the text of the Constitution has not been explicitly imbibed with enforceability by the Courts. A further extension of the justifiability of the justiciability of the Directives under the precincts of Article 21 is discussed hereinafter.

The primary pattern of distinction followed in framing parts III and IV separately is that the latter is not backed with the enforcing power of the law i.e., justiciability. Pursuing his argument from another angle, Prof. T. Devidas contends that this devise can be said to be a matter of policy for there is no compulsion that every rule of law should be backed by a sanction.[12] That Part IV

[9] Upendra Baxi, *Directive Principles and Sociology of Indian Law- A Reply to Dr. Jagat Narain,* 11 JILI 245 (1969).
[10] K.P. Krishna Shetty, *Fundamental Rights and Socio-Economic Justice in the Indian Constitution, p.* 80 (1919).
[11] T. Devidas, *Directive Principles: Sentiment or Sense,* 17 *JILI* 478 (1975).
[12] *Ibid.*

provisions are law can be seen from the following characteristics: *firstly*, they are embodied in the Constitution; *secondly*, they can be altered only by a constitutional amendment; and *thirdly*, they confer power to the State to legislatively formulate restrictions on Part III provisions. Prof. Devidas differs from Prof. Upendra Baxi's view[13] that directive principles can be considered 'a massive footnote to the Preamble,' as it is an accepted cannon of interpretation that the text of the law is a more deliberate exercise of power than the Preamble, which is considered a draftsman's preface to the statute.

Proceeding to focus on the semantics of Article 37, it would be apt to note that the state is made duty bound to apply these principles in law-making. Here, the term 'duty' should be understood jurisprudentially to understand the extent of state's obligation. 'Duty' as it is used in this Article can either be fit into the bracket of Austinian 'absolute duty' or Hohfeldian 'liberty'.[14] Absolute duties are those duties which do not have a correlative right. Absence of corresponding right does not mean anything more than that it can't be enforced by another person. Absolute duties need to be contrasted with Hohfeldian 'duty' which has a clear correlative claim-right. Hohfeldian 'liberty', on the other hand, has its correlative as 'no-claim', which means presence of liberty in one person mean presence of 'no-claim' in other person.

According to Professor P.K. Tripathi, 'duty' means as absolute duty (without a corresponding right) as 'it is a constitutional obligation of the law-making organ of the state to apply the directive principles in making laws' and 'it shall be unconstitutional and illegal on their part to ignore them.'[15] Thus, Tripathi's reading of the constitutional text renders the state as duty-bound to follow the Directives. Ignoring them is not only unconstitutional but even illegal. However, there are other readings of the semantics of the constitutional text. For instance, Joseph Minattur,[16] T. Devidas[17] and many others treat this duty to be a 'liberty' as the state may/may not apply them while making laws. Since these jurists only assert that laws in contravention of Directives are unconstitutional but do not consider laws neutral to Directives obligations as illegal, they do not impose a definite positive obligation to apply these principles.[18] When Supreme Court reads unenforceable Directive

[13] *Ibid.*
[14] R.W.M. Dias, *Jurisprudence,* pp. 26- 31, Aditya Books Private Limited, New Delhi, 1994.
[15] P.K. Tripathi, *Spotlights on Constitutional Interpretation* 293 (N.M. Tripathi Publications, Bombay, 1972).
[16] Joseph Minattur, *Directive Principles: A step towards their Implementation*, 11(3) *Law Quarterly* 162 (1974).
[17] *Supra* note 11.
[18] Latika Vashist, *Enlivening Directive Principles: An Attempt To Save Their Vanishing Present,* 1(2) ILI Law Review 205 (2010).

Principles into enforceable Fundamental Rights, it seems to take Professor Tripathi's position, but when it refrains from striking down a law on the touchstone of Part IV, it is even blind to the observations made by Minattur and Devidas. Thus, if the judiciary does not want to over-reach itself so as to make the Directive Principles enforceable, it can definitely ensure that laws made by the state in contravention with the Directive Principles can be declared as unconstitutional.[19]

III. DIRECTIVE PRINCIPLES IN THE INDIAN CONSTITUTION: SENTIMENT OR SENSE

The trilogy of fundamental rights, directive principles of state policy and fundamental duties is the bedrock of the Indian Constitution. Granville Austin calls them as 'the conscience of the Constitution.'[20] They together constitute the vision of a particular type of society which the Constitution envisages for India; a society which affords an equal opportunity to its entire people for an all-round development, and in which citizens bear responsibilities towards nation and society as such.[21] The Directive Principles embody the philosophy of the Indian Constitution and contain a system of values, some of which are borrowed from the liberal humanitarian traditions of the West,[22] some are peculiar to, and have grown out of the Indian milieu and yet some others represent an attempt to fuse the traditional and modern modes of life and thought.[23] It is notable that though the Fundamental Rights and Directive Principles appear in separate parts of the Constitution, the leaders of the independent movement drew no distinction between the positive and negative obligations of the State.[24] The Assembly separated them on the ground of justiciability. The Fundamental Rights and the Directive Principles were not just formally introduced into the Constitution, but 'they had their roots deep in the struggle for independence' of the country,[25] in the increasing influence of socialism and Gandhian philosophy in the independence movement. One can find explicit manifestation of a demand for both positive and negative rights as early as in the Constitution of India Bill of 1895, Commonwealth of India Bill

[19] *Ibid.*
[20] *Supra* note 1.
[21] Mahendra P. Singh and Surya Deva**,** *The Constitution of India: Symbol of Unity in Diversity,* 53 *Jahrbuch des Offentlichen Rechts der Gegenwart*, Yearbook of Public Law, Germany 649-686 (2005).
[22] Western liberal tradition accords a higher pedestal to conventional civil and political rights or the negative rights than socio-economic or positive rights.
[23] M.P. Dubey, *Directive Principles and the Supreme Court under the Indian Constitution,* 16 Journal of Constitutional and Parliamentary Studies, p. 269 (1982).
[24] *Supra* note 1.
[25] *Ibid.*

introduced by Mrs. Besant in 1925, the Nehru Report, the Karachi Resolution, 1931 and finally the Sapru Report published at the end of 1945.[26]

At the time these directives were drafted into the Constitution, opinions on them varied from 'a variable dustbin of sentiment'[27] to 'the instrument of instructions.'[28] Views were expressed in the Constituent Assembly that the Directive Principles are no more than mere 'pious hopes', 'pious expressions' and 'pious superfluities', that they can be equated to 'resolutions made on New Year's day which are broken at the end of January', that they are 'vague' and 'a drift', that they are 'a cheque on a bank payable when able'. According to Sir Ivor Jennings, Part IV expressed Fabian Socialism without socialism.

Undoubtedly, this animated discussion stemmed from the fact of unenforceability of the directives. Nevertheless, they are not mere platitudes. It is necessarily deemed to flow from the directives that whoever captured power would not be free to do whatever he liked with them, and would have to respect the instrument whilst exercising power. The directives are declared fundamental in the governance of the country and the State is given the duty of applying these principles in making laws. This duty, however, would not be less onerous; though the duty is made not compellable, a departure from the duty can be prevented. A. Gledhill makes the point that laws contravening directive principles can be challenged as unconstitutional by the opposition.[29] And this point is well taken, as the opposition is part of the constitutional scheme for law making by the legislature and as the duty is cast on the State to follow the directives in law making.[30] He may not have to answer for their breach in a court of law and though the directive principles have no legal force behind them, yet it cannot be said that the directives have no binding force.[31] It would, therefore, not be possible for any government to act pursuant to the passions of the moment or the whims of the chance majority of the time. Dr. B. R. Ambedkar observed that in enacting Part IV the Constituent Assembly was giving certain directions to the future legislature and future executive to show in what manner they are to exercise legislative and executive powers they will

[26] *Ibid.*
[27] Per T. T. Krishnamachari, VII Constituent Assembly Debates, (1948-49) 583.
[28] *Id*. at 473.
[29] *Supra* note 11.
[30] *Ibid.*
[31] *Id.* at 476.

have, that these principles should be made the basis of all executive and legislative action that they may be taking hereafter in the matter of the governance of the country.[32]

However, it was only Sir B.N. Rau who, in pursuance of the discussions in Dublin with President De Valera on the working of the Directive Principles in relation to Fundamental Rights under the Irish Constitution,[33] entertained doubts as to the efficacy of the unenforceable positive obligations in the face of the justiciable fundamental rights, and he suggested the addition of a provision that noted that a law made by the State in pursuance of directive principles shall not be void merely on the ground that it contravenes or is inconsistent with fundamental rights. The object behind the suggestion had been to ensure that general welfare prevail over individual's rights.[34] The fact of non-adoption and of implicit rejection by the Drafting Committee of the aforesaid provision which sought to give primacy to the Directive Principles over Fundamental Rights leads us to the implication that legislative implementation of the directive principles was designed to be achieved within the framework of Fundamental Rights. This issue was not adverted to even the Constituent Assembly, although, as already noted, its members believed that in spite of their unenforceable nature, Directive Principles would have to be legislatively implemented as their implementation was fundamental to effective governance. That the judicious use of the intended scope of the directives, the consultation of *travaux preparatoires,* can considerably aid in arriving at the legislative intent, and that the plea obligates the judges to think teleologically and discover a new role for themselves in the implementation of Directive Principles has dawned upon the Judiciary now, and has generated much hue and cry.

IV. A BRIEF PERUSAL OF THE CONSTITUTIONAL PROVISIONS RELATING TO THE DIRECTIVE PRINCIPLES

In the pursuit to attain socioeconomic justice as enshrined in the Preamble, Part IV of the Constitution containing Articles 36-51 deals with Directive Principles. As noted earlier, Directive Principles signify the belief of the Constitution makers in the interdependence of civil and political rights on the one hand and the socio-economic rights on the other.[35] The directives can be broadly

[32] *Ibid.*
[33] Shailja Chander (ed.), *Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles,* p. 59, Deep and Deep Publications Pvt. Ltd., New Delhi, 2003.
[34] B. Errabbi, *The Constitutional Balance and Harmony between Fundamental Rights and Directive Principles of State Policy: Nehru's Perception,* 14(1) Indian Bar Review 151 (1987).
[35] B Shiva Rao (ed.), *The Framing of India's Constitution: A Study,* p. 319 (New Delhi: Indian Institute of Public Administration, 1968)

categorized into eight categories, *viz*., socioeconomic reforms under Articles 38, 39(b) and (c); means of livelihood, right to work and legal welfare under Articles 39(a), (d), (e), 41, 42, 43; women and children welfare and right to education under Articles 39 (e), (f), 42, 45; upliftment of vulnerable sections of the society under Articles 41 and 46; protection of public health and environment under Articles 47and 48A; legal and administrative reforms under Articles 39A, 44, 50; protection of national heritage under Article 49; and promotion of international peace and security under Article 51. Thus, Gandhian principles are reflected under Articles 40, 43, 47 and 48; and Socialistic principles under Articles 38, 39, 39A and 43A. The clauses therein highlight the constitutional objectives of building an egalitarian social order and establishing a welfare state, by bringing about a social revolution assisted by the State.[36] Article 38 signifies the essence of the Directives by enjoining the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice- social, economic, and political- shall inform all the institutions of the national life striving to minimize inequalities in income and endeavour to eliminate inequalities in status, facilities, opportunities amongst individuals and groups of people residing in different areas or engaged in different avocation.[37]. Apart from the Directives contained in Part IV, certain other directive principles have also been laid down for achieving the Preambular goals.[38] Further, in exercising its interpretative role, the Judiciary does at times take note of the ideals of social welfare state even though some of the ideals may not be expressly incorporated in the Constitution.[39]

V. THE MECHANICS OF DIRECTIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

> *The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to preserve certain rights which exist. Both again are right.*[40]
>
> -Jawaharlal Nehru

All the twentieth century Constitutions have given a definite place in their systems to the provisions of social welfare and these provisions have gathered larger sweep, greater emphasis and more definite legal obligations as the lapse of years brought in more of governmental

[36] Durga Das Basu, *Shorter Constitution of India,* pp. 449-450, Wadhwa and Co., Nagpur, 13th Edn., 2003.
[37] *Air India Statutory Corpn.* v. *United Labour Union,* (1997) 9 SCC 377.
[38] Articles 335, 350A, 351 etc.
[39] Mukherjee, C.J., in *Ram Jawaya* v. *State of Punjab,* AIR 1955 SC 549.
[40] In the Lok Sabha in the course of discussion on the Constitution (First Amendment) Bill, quoted by Bhagwati J. in *Minerva Mills Ltd.* v. *Union of India* (1980) 3 SCC 625, at p. 711.

experience to bear.[41] Moving away from the extreme *laissez-faire* position previously taken, we have perceived that there came about a radical change in the outlook of the US Supreme Court after the New Deal Programme, wherein it took an enlightened view of the new balance between the Fundamental rights and social needs, and permitted the governmental authority enough leeway for efficient action. British Courts also gradually relaxed the restrictions on governmental agencies and permitted greater scope for their discretion in response to the same new social needs as in the USA.[42]

The Indian Constitution is, at core, a social document.[43] Yet, there had been less conviction about the utility of the Directive Principles as well as their justifiability. Their justifiability was tested mostly in relation the fundamental rights and the directives were relegated to a subordinate position. The implementation of the Directive Principles of State Policy have placed great strain and demand on the legislative power of the State at times running counter to the Fundamental Rights guaranteed under Part III of the Constitution. This dialectical and dynamic conflict that arises between the directive principles and the fundamental rights is one of most enduring interest in Indian Constitution. The interrelation among the Fundamental Rights and the Directive Principles is manifested clearly in the judicial decisions, especially in the last two decades, as the judiciary has relied on one of these to interpret the contents of the other or even of the rest of the Constitution.

Initially, the difference pertaining to justifiability led the Supreme Court to hold that the directive principles have to conform to run as subsidiary to the chapter of fundamental rights.[44]This position was disapproved through constitutional changes, [45] juristic writings,[46] and subsequent judicial decisions. In the second wave, we have perceived in *M.H. Qureshi* v. *State of Bihar*[47] the Court adopted the rule of harmonious interpretation, so as to implement the directive principles in such a way as not to take away or abridge fundamental rights. Imparting a slightly more emphatic form to the doctrine of harmonious interpretation, the Court noted in *Kerala Education Bill, In re*[48]

[41] P.K. Tripathi, *Directive Principles of State Policy: The Lawyer's Approach to them Hitherto, Parochial Injurious and Unconstitutional,* 17 SCJ 7 (1954).
[42] *Supra* note 23.
[43] *Supra* note 1.
[44] *State of Madras* v. *Champakam Dorairajan* AIR 1951 SC 226.
[45] The Constitution (First Amendment) Act, 1951, Section 2.
[46] *Supra* note 41.
[47] AIR 1958 SC 731.
[48] AIR 1958 SC 956.

that in determining the scope and ambit of the fundamental rights, the court may not entirely ignore the directive principles, but should adopt the principle of harmonious interpretation and should attempt to give effect to both as much as possible. In the case of *Chandra Bhawan Boarding* v. *State of Mysore*[49] J. Hegde observed in obiter that fundamental rights and directive principles are complimentary and supplementary to each other and hence there is no conflict between them.

The position that emerged upon drawing of logical inference is that where a legislation violates fundamental rights, its validity cannot be upheld on the basis of directive principles; but, where a legislation has not violated any fundamental right, the court can rely on the directive principles for the supporting the validity thereof, relying for the purposes of upholding reasonableness of restrictions, and for finding out the public purpose in legislation.

In the case of *State of Bihar* v. *Kameshwar Singh*[50] the Supreme Court relied upon article 39 in arriving at its decision that certain *zamindari* abolition legislations had been passed for a public purpose within the meaning of Article 31 of the constitution. The Court recognized that the reasonableness or public purpose concepts on the basis of which legislation would be made to stand or fall in relation to the fundamental rights could be justifiably given a content with reference to the ideals of the directive principles. The same approach was adopted by the Court in the cases of *Bijay Cotton Mills* v. *State of Ajmer*[51] and in *Pathermma* v. *State of Kerala.*[52]

Further, the Supreme Court has held that every executive action, whether in pursuance of a law or otherwise, must be 'reasonable and informed with public interest and the yardstick for determining for reasonableness and public interest is to be found in the directive principles and therefore if any executive action is taken by the government for giving effect to a directive principle, it would ordinarily *prima facie* be reasonable and in public interest.'[53]

Apparently proceeding to accord primacy to the directive principles over the fundamental rights and to realize consequentially the Preambular socio-economic ideal, 25th[54] and 42nd[55] Constitutional Amendment Acts were enacted. The former was held valid by the Supreme Court

[49] AIR 1970 SC 2042.
[50] AIR 1952 SC 52.
[51] AIR 1955 SC 33.
[52] (1978) 2 SCC 1.
[53] *Kasturi Lal* v. *State of Jammu and Kashmir* AIR 1980 SC 1992.
[54] In 1972, Article 31C was inserted by virtue of which the directive principles contained in Article 39 (b) and (c) were conferred a status superior to the fundamental rights guaranteed under Articles 14, 19 and 31.
[55] Alteration of Article 31C under Section 4 of the Amendment Act, authorizing the State to make law giving effect to all or any of the principles laid down in Part IV which shall not be void on the ground of inconsistency or abridgement of fundamental rights guaranteed under Articles 14, 19 and 31.

in *Kesavananda Bharati* v. *State of Kerala,*[56] wherein J. Chandrachud noted that the principles should not be permitted to become 'a mere rope of sand' and that together, the principles and the fundamental rights, form 'the core of the Constitution.' Similar views were expressed by the Court in the case of *Narendra Prasad* v. *State of Gujarat.*[57] The latter was struck down in *Minerva Mills* v. *Union of India.*[58] J. Chandrachud noted that the Indian Constitution was founded on the bedrock of balance between Parts III and IV of the Constitution and that to give absolute primacy to one over the other was to disturb this harmony and balance between Fundamental Rights and Directive Principles, and this harmony and balance constitutes an essential feature of the Basic structure of the Constitution. He opined that the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms.

Justice Bhagwati, in his dissent, pained to emphasize that under the present socio-economic system it was the liberty of the few that was in conflict with the liberty of the many and that the directive principles impose a positive obligation on the State to bring about an egalitarian social order with social and economic justice to all so that the individual liberty would become a cherished value not only for a few privileged persons, but the entire people of the country.[59]

The expectation of the Indian society today has been appropriately elucidated by Madon, J. in the following words:

> The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep with at least a roof over their head…..that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but the Judges whose constitutional task is to interpret and apply the law.[60]

This has definitely set in action a new movement. Mandate has been given to the State to implement the principles as and when the time is ripe economically, socially and politically. But we have perceived lack of political will or legislative effort, and economic incapacity or mis-utilization or non-utilization of resources, which has necessitated the proactive role of judiciary

[56] AIR 1973 SC 1461; the first part of Article 31C was upheld, the second part declared unconstitutional.
[57] AIR 1975 SC 2098.
[58] AIR 1980 SC 1789.
[59] *Id.* at 1847.
[60] Conference Paper Proceeding of the Third International Conference of Appellate Judges, New Delhi, March 1984, Supreme Court of India, 210, *Cf.,* Anand Kumar, "*Purpose and Objectives of Directive Principles of State Policy: Its Relevance in 21st Century*" 8 MLJ 20 (2012).

that is so commended and so deprecated. Within the widening precinct of right to life under Article 21, the right to free legal aid (Article 39A),[61] the right to live in a pollution free environment and right to ecological protection (Article 48A),[62] right to equal pay for equal work (Art 39(d)),[63] right to education (Article 45)[64] and right to health (Article 47)[65] have been read, the list being merely illustrative! No doubt, Max Weber has noted that the Judiciary has by and large served as an agent of positive change.[66] Since then the Court has invoked the Directive Principles not only to uphold the validity of legislative measures directed towards socio-economic welfare[67] but also to derive the contents of Fundamental Rights. The right to life and personal liberty under Article 21 has almost become a residuary Fundamental Right encompassing each and every aspect of dignified and meaningful life.

This trend of integration of Fundamental Rights and Directive Principles, in a way, indicates that the executive and legislature have not always taken their mandatory obligations under Part IV seriously, and the Judiciary has to remind them again and again about their constitutional mandate.[68] But one positive outcome is that the government has not resisted such integration and has, in fact, amended the Constitution to acknowledge such integration by making right to education, to all children between the age of 6 to 14, a Fundamental Right.[69] It can be expected that more Directive Principles would cross the bridge in near future, though the impact of such crossing over on realization of rights is an issue that the questions the very legitimacy of the Constitution, as discussed hereafter. It might be noted in this context that the NCRWC has

[61] Case of *M.H. Hoscot,* AIR 1978 SC 1548.
[62] *M.C.Mehta* v. *UOI,* (1987) 4 SCC 463.
[63] *Randhir Singh* v. *Union of India,* AIR 1982 SC 879.
[64] *Mohini Jain v State of Karnataka,* (1992) 3 SCC 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.
[65] *Consumer Education & Research Centre* v. *U.O.I.* AIR 1995 SC 922.
[66] G. Bikshapathi Reddy, "The Changing Facet of Directive Principles of State Policy and Fundamental Rights: the Role of Judicial Activism" 1 *SCJ* 56 (1997).
[67] For example, *State of Bombay v. F. N. Balsara,* AIR 1951 SC 318; *State of Bihar v. Kameshwar Singh,* AIR 1952 SC 352; *Mohd. Hanif Qureshi v. State of Bihar* AIR 1958 SC 731; *Orient Weaving Mills v. Union of India* AIR 1963 SC 98.
[68] Article 45 originally had provided that that state shall provide 'free and compulsory' education to all children up to the age of 14 years 'within a period of ten years from the commencement of the Constitution'. Failure of state to do so even after 42 years lead to the judicial recognition of right to education as a FR in *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645. See also the obligation to enact the Uniform Civil Code under Article 44 and the Supreme Court judgments in *Mohd Ahmed Khan v Shah Bano Begum,* AIR 1985 SC 945 and *Sarla Mudgal v Union of India,* AIR 1995 SC 1531.
[69] The Constitution (86th Amendment) Act 2002 inserted Article 21A in the Constitution and also made appropriate modifications in corresponding DP under Article 45.

recommended for establishing a body which can review the level of implementation of Directive Principles.[70]

Verbose doubts have been expressed with respect to the issue whether Directive Principles hold the same status in the Constitution as the Fundamental Rights. The most elaborate expression of such doubts finds place in the monumental work of H.M. Seervai.[71] He agrees with the initial position taken by the Court and disapproves subsequent efforts to raise the Directive Principles to the position of equality with the Fundamental Rights. He revives the old argument that non-justiciability of Directive Principles excludes them from the category of law, and therefore from the category of constitutional law.[72] The Directives are in the Constitution, but are not a part thereof, and nothing would have happened if Directive Principles 'had been struck out of the Constitution, but if fundamental rights 'had not been enacted or struck out, the result would have been disaster'.[73] Such a view is undeniably deeply rooted in the Austinian positivist tradition, and stands negated in view of the realization that sanctions are not the only factors that impart authoritativeness. Justiciability has indeed ceased to exercise the determining influence it once so unquestionably wielded. Article 37 does, no doubt, withdraw from the courts the jurisdiction to enforce them but it takes due care to emphasize their obligatory nature.[74] The point gets corroborated by the fact that there are several other provisions in the Constitution which exclude matters from the preview of courts, but which are, nevertheless, treated as law.[75] Some of the Fundamental Rights also, by their very nature are judicially unenforceable unless suitable laws are made in support of them,[76] so judicial enforceability is dependent on laws enacted. Directive Principles are not very different from these Fundamental Rights as once a law is enacted based on a Directive Principles the courts get the authority to enforce that Directive Principles through the enacted law. This is a contingent condition on which enforceability of Directive Principles rests

[70] The Report of the National Commission to Review the Working of the Constitution (2002), vol. I, paras 3.35.2 and 3.35.3. The Commission has also suggested insertion of certain new principles and a change in the heading of Part IV. It has recommended for the insertion of the term 'Action' in the heading of Part IV so as to read as 'Directive Principles of State Policy and Action'. *Id.*, para 3.26.3., *available at*: http//lawmin.nic.in/ncrwc/finalreport.htm (Visited on Jan 08, 2014).

[71] H.M. Seervai, *Constitutional Law of India*, Vol. 1-3 (4th Edn, 1991-96).

[72] U. Baxi, *The Little Done and Vast Undone- Some Reflections on Reading Granville Austin's The Indian Constitution,* 9 JILI 322, 362 (1967).

[73] *Supra* note 71.

[74] *Supra* note 15 at 295.

[75] Articles 74(2), 122, 163(2), 212, 329, 350, 350A, 350B, 351 and 363.

[76] Articles 17 and 23 could never be invoked until the supportive laws were made.

but even prior to the fulfilment of this condition, Directive Principles are as much a part of constitutional law as Fundamental Rights, or any other part of the Constitution. Thus, the argument of judicial non-enforceability is unwisely employed to indicate the inferiority of Directive Principles against Fundamental Rights.[77]

However, two more implicit doubts could be inferred from the processes of development of law. Firstly, for quite some time a process of incorporation of Directive Principles into the Fundamental Rights through judicial interpretation has been on, and the mere fact that the courts are unable to do anything about the Directive Principles so long as they are Directive Principles, but could enforce them if they were Fundamental Rights, points out in the direction of ineffectiveness, if not inferiority of the directives. Secondly, a process of explicitly shifting those directives to the chapter of fundamental rights through constitutional amendments has been set in, and such selective transfer implies the primacy of fundamental rights over the directives as well as further weakens the position of the directive principles, especially the ones left. This would disturb the balance between the fundamental rights and the directive principles, which the Court has held to be a basic feature of the Constitution in *Minerva Mills.*[78]

VI. JUDICIAL IMPLEMENTATION OF DIRECTIVE PRINCIPLES AND OBJECTIONS THERETO

Analyzing from a Rawlsian perspective, whilst addressing concerns of judicial overreach, it is argued that the Supreme Court's reasoning for locating justiciable socioeconomic rights in the Indian Constitution raises a more fundamental concern: it threatens the Constitution's legitimacy.

According to John Rawls's liberal principle of legitimacy, political power is justified only when it is exercised in accordance with a Constitution that all citizens would accept assuming they are rationally self-interested and reasonable.[79] Extending this premise, Michelman questions the wisdom of conferring constitutional status on socioeconomic rights.[80] He makes a positive case for including socioeconomic rights in a Constitution, which must overcome two major objections. The first is a 'democratic objection', where broad 'social citizenship rights' would leave 'no

[77] Latika Vashist, *Enlivening Directive Principles: An Attempt To Save Their Vanishing Present,* 1(2) ILI Law Review 205 (2010).
[78] AIR 1980 SC 1789.
[79] John Rawls, *Political Liberalism,* 217 (1993).
[80] Frank I. Michelman, "The Constitution, Social Rights, and Liberal Political Justification", in *Exploring Social Rights: Between Theory And Practice* (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

leading issue…untouched' in the political sphere.[81] Therefore, a Constitution that includes enforceable rights to housing, food and clean water would constrain policy choices in any area involving the allocation and distribution of resources, including taxation, trade, immigration and education. In extreme cases, representative democracy would be rendered meaningless, as elected representatives would not be able to 'make the basic choices of political economy.'[82]

Conferring constitutional status on socioeconomic rights also invites a 'contractarian objection'.[83] Social contractarians believe that a Constitution is legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them. To accept a constitution's terms, citizens must be able to determine whether their government actually abides by constitutional principles. If they cannot make this determination, they will not regard the Constitution as a legitimate basis for political rule.

However, the indeterminacy with respect to gauging if a government satisfies socioeconomic rights, and furthers the dictates of an individual citizen's views of distributive justice, is potentially fatal for contractarian legitimacy, as citizens cannot determine when their government violates socioeconomic rights.[84] Rawlsian theory avoids this difficulty by defining as 'legitimate' a constitutional scheme that includes certain 'constitutionally essential' civil and political rights. Judicial and policy decisions with respect to socioeconomic rights are held to a lesser standard – what Rawls calls the 'constraint of public reason.'[85]

While the U.S. Constitution has no provisions pertaining directly to socio-economic justice and the South African Constitution has enumerated socioeconomic rights,[86] India's Constitution takes the middle ground. It does not include binding socioeconomic rights, but lists them as Directive Principles of State Policy. They empowered the Supreme Court to enforce fundamental rights through Articles 32, 21 but specified in Article 37 that directive principles are not justiciable. Nevertheless, these principles give 'a certain inflection to political public reason' to guide legislators towards the progressive realization of socioeconomic justice.[87]

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[81] *Id.* at 30-33.
[82] *Id.* at 33.
[83] *Id.* 35-37.
[84] *Id.* at 35.
[85] John Rawls, *Justice As Fairness: A Restatement* 90 (2001)at 214-21: public reason requires citizens (including elected representatives and judges) to present publicly acceptable reasons to each other for their views, at least with regard to basic justice (which includes socioeconomic justice) and constitutional essentials.
[86] Sections 26, 27.
[87] *Supra* note 80 at 39.

Giving socioeconomic guarantees this non-justiciable status should have avoided both the democratic and contractarian objections. When directive principles do not legally bind elected officials, but guide them towards improving socioeconomic conditions, then no serious democratic objection arises. Also, if representatives make policy decisions reflecting their honest judgment of how to best pursue socioeconomic justice and they are willing to fully and transparently explain their votes to citizens- that is, they fulfill the constraint of public reason- then the contractarian objection does not arise.

Surveying the evolving constitutional status of socioeconomic rights, it would be pertinent to note that over the past forty years, the Indian Supreme Court has moved away from its early precedents and understanding of the Indian Constitution, and has ruled that the Constitution confers on citizens enforceable socioeconomic rights that, if violated, can be redressed in court. Under this prevailing interpretation, India faces serious democratic and contractarian objections to its basic constitutional framework.

The Court has required both central and state governments to adopt specific distributive policies. This robust exercise of judicial review prevents elected officials from deliberating, negotiating and crafting policies concerning socioeconomic justice. The Court does not simply declare socioeconomic policies unconstitutional, but creates and enforces its own policy solutions.[88] In several cases, the Court has essentially dictated policies to elected officials that allocate resources to assist disadvantaged communities. It has even instituted timelines for the completion of these policies, which it enforces through interim orders.[89] This sort of policymaking is precisely what the democratic objection opposes, as it appears to seriously undermine representative democracy.

For Rawls, however, a robust form of judicial review may be acceptable in some societies. He stated that judicial review 'can perhaps be defended given certain historical circumstances and conditions of political culture.'[90] Since India is beset with chronic inequality, poverty and malnourishment that its elected representatives have been unable or unwilling to improve, it has arguably fallen to the Supreme Court to remedy these conditions. In other words, justice might

[88] *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.
[89] *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001).
[90] *Supra* note 79 at 231.

require the Court's intrusion into matters usually assigned to the elected branches given these political and historical circumstances.

Article 21 of the Indian Constitution states that no person shall be deprived of his life...except according to procedure established by law. The Indian Supreme Court has held that socioeconomic guarantees are judicially enforceable by interpreting this provision to encompass a broader right to 'live with dignity.' It has since held that rights to adequate food, education and shelter, *inter alia*, are essential for citizens to live with dignity and are justiciable under Article 21. Through this capacious reading of Article 21, the Indian Supreme Court has essentially shoehorned socioeconomic guarantees into a 'constitutionally essential' civil right. This judicial sleight of hand makes the right to life indeterminate under the Indian Constitution, as a right to 'live with dignity' could extend to a range of guarantees that rational citizens could not reasonably foresee and therefore could not endorse. More troublingly, the Court does not explain how it gets past the clear textual command in Article 37 of the Constitution that directive principles 'shall not be enforceable by any court.'

Rawls called the Supreme Court the 'exemplar of public reason'[91] to convey that it has a greater obligation than other branches of government to justify its decisions with transparent and clearly articulated reasons that are acceptable to all rational and reasonable citizens. When it fails to set forth such reasons, as with its expansive interpretation of Article 21, citizens might not assent to be governed by the Constitution, as they could not know with any clarity or certainty what this constitutionally essential right requires and therefore could not determine if it is being met.

VII. CONCLUSION

According to Granville Austin the Directive Principles were incorporated in our Constitution with the hope and expectation that someday the tree of true liberty would bloom in India.[92] The State, in addition to obeying the Constitution's negative injunctions not to interfere with certain of the citizen's liberties, must fulfill its positive obligation to protect the citizen's rights from encroachment by society. He further notes that the directive principles aim at making the Indian masses free in the real sense, and by establishing these positive obligations of the State, the members of the Constituent Assembly made it responsibility of the future Indian Governments to

[91] *Ibid.*
[92] *Supra* note 1.

find a middle way between individual liberty and public good.[93] It needs no reiteration that the Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy.

Though the Directive Principles are not justiciable, they 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'.[94] It could be argued that there is a difference in the nature of enforceability enjoyed by Fundamental Rights and Directive Principles; the former are enforceable in the court whereas the latter are enforceable by the electorates. However, mere lack of justiciability should not be a ground for discrediting their importance vis-à-vis the Fundamental Rights or otherwise,[95] although that the Fundamental Rights tend to override the Directive Principles is a fact that has been established in unambiguous terms. It is when these Directive Principles are read into Fundamental Rights, within the precincts of Article 21by the creative construction of the Judiciary that they tend to enjoy a status equivalent to Fundamental Rights. And, it is this mode of implementation by the Judiciary that has drawn both bouquets and brickbats. The view that the Constitution of India envisages necessarily that Parts III and IV have to operate complementary to each other, that the fundamental rights and directive principles enshrined in the Constitution forms an 'integrated scheme' and are elastic enough to respond to the changing needs of the society,[96] is praiseworthy and reflects a shift from the *Champakam Dorairajan*[97] days. However, if the first stage of declaring the Directive Principles subservient to Fundamental Rights drew criticism, paving way for harmonious construction of the two, the imparting of judicial enforceability thereto despite the explicit restraint under Article 37 has drawn a whole panoply of objections. Judiciary has indeed gone into the domain of enforcing them, under the pretext of effectuating that could have been permissible by noting the linguistic differences in the Irish and Indian Constitutions. The new wave of selectively transferring Directive Principles to Fundamental Rights' domain appears to be incorrect, although deemed good in intent.

A legitimate constitutional system requires more than acceptable institutional arrangements and desirable political outcomes- it demands honesty and clarity in the reasoning employed by

[93] *Ibid*.
[94] Article 37.
[95] M.P. Singh, *The Statics and Dynamics of the Fundamental Rights and the Directive Principles- A Human Rights Perspective,* 5 SCC 1-14(2003).
[96] Subba Rao, J. in *Golaknath* v. *State of Punjab* (1967) 2 SCJ 486.
[97] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

public institutions on matters of basic justice and constitutional essentials. The Court has not only expanded the meaning of Article 21 to make socioeconomic rights justiciable under the Constitution, but has also overseen several modifications to fundamental rights litigation under Article 32.[98] Three significant changes emerge from the Court's approach, the first is substantive and the latter two are procedural: firstly, the judiciary can enforce a greater number of rights; secondly, through relaxed standing rules, public interest groups and concerned citizens may file petitions under Article 32; and thirdly, courts have become significant players in formulating and enforcing socioeconomic policy.

The democratic objection implicates both the substantive and procedural changes described above, as the Court today does not simply adjudicate on a greater number of issues, but has become the central forum for social movements and public interest organizations to affect far-reaching policy changes with regard to socioeconomic justice. The contractarian objection, though, forces us to distinguish among the substantive and procedural changes in the Court's jurisprudence. While all three changes contribute to the democratic objection, the contractarian objection only arises in response to the substantive change- the Court's broad reading of Article 21, and evasion of Article 37, to make socioeconomic rights justiciable. As discussed, the Court's interpretation of Article 21 is not justified by the text or clearly explained in the Court's opinions and therefore fails to meet the constraint of public reason.

Therefore, it would be appropriate to suggest an alternative. An alternative model sees socio-economic rights as justiciable, but moulds the positive duty to reflect the difficulty of providing resources in immediate fulfilment. Thus, under the International Covenant for Economic, Social and Cultural Rights each State Party undertakes 'to take steps to the maximum of its available resources, with a view to achieving progressively the full realization' of the rights in the Covenant.[99] This has been adapted by the South African Constitution, which makes socio-economic rights justiciable, while expressly providing that the duty on the State is to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realization' of each of the rights. Herein, firstly, although the State need not achieve the full realization immediately, it does have an immediate duty to construct a programme to

[98] P.P. Craig and S.L. Deshpande, *"Rights, Autonomy and Process: Public Interest Litigation in India"* 9 *Oxford J. Legal Stud* 356 (1989).
[99] ICESCR, Article 2(1).

realize the duty. Secondly, every State party has a 'minimum core obligation' to ensure minimum levels of essential foodstuffs, primary health care, basic shelter and housing, and basic forms of education. State parties 'must demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[100]

The recognition of structural constraints on individual autonomy has led to a well-established acknowledgment of State responsibility to provide for the welfare of individuals. At the same time, as newer ideas of active citizenship suggest, freedom consists in people being actively involved in promoting and shaping their own destiny rather than being passive recipients. Thus, as Amartya Sen argues, the State's role is to safeguard and strengthen human capability through supportive and facilitative measures, rather than through a readymade delivery.[101] Similarly, poverty should not just be seen as low income, but should include other sources of deprivation of basic capabilities.[102] Thus the right is not only a transfer of income or package of goods. It also includes a facilitative dimension, enhancing individuals' capability to achieve their desired functioning. Therefore, the aforesaid minimum core obligations must enshrine the measures aimed at empowerment, and not just upliftment, aspiring to invest in human capital.

[100] General Comment No 3.
[101] A Sen, *Development as Freedom* 53 (OUP Oxford 1999).
[102] *Id.* at 87.