Chapter VII

Conclusion & Suggestions

The hypothesis with which the study was initiated stated that the socio-economic rights adjudication is compatible with the democratic conception of judicial role and judicial enforcement of socio-economic rights is necessary and effective means of socio-economic rights protection in India. In order to test the veracity of this claim following issues were identified as being central to testing the correctness of the hypothesis. The first being the conception of judicial role in Indian democracy in the light of socio-economic rights adjudication. The second issue associated with the first one was to find out the scope for reconciliation between the ideals of democracy and that of constitutionalism in relation to the socio-economic rights adjudication. The third issue being the enquiry into the correctness of the theoretical divides between civil and political rights & socio-economic rights, followed by the consequent issue of examining the theoretical divide between the positive and negative rights in relation to the adjudication of socio-economic rights. Finally, the quest for an ideal, legitimate principled and effective form of socio-economic rights adjudication was the last issue identified.

The first issue identified addresses the perennial charge against the constitutional adjudication of socio-economic rights by the court that such an exercise amounts to the usurpation of the democratic mandate of the legislature and the executive by the courts and therefore owing to its inconsistency with the doctrine of separation of powers and functions as ordained by the Constitution of India, such adjudicatory measures are both undemocratic and unconstitutional. It is submitted that the charge of judicial usurpation would have been justified perhaps, had
the courts completely closed the debate on the issue of the realisation of various socio-economic rights, but what is being called constitutional adjudication of socio-economic rights by the courts in India needs to be understood in its proper context. The courts rather than completely occupying the space for the debate in relation to various socio-economic rights are actually only providing an additional forum for such debate to take place. Most importantly it allows actual space for an informed dialogue between the people, court and the government in relation to people’s need. The fact that beyond the emphasis and articulation of the strong socio-economic rights of citizens there is very little empirical evidence of a ‘minimum core’ form of socio-economic rights adjudication ensuring individual remedies bears ample testimony to this fact that the charge of usurpation of governance space in relation to socio-economic rights is exaggerated.

The global constitutional dynamics towards the assertion of a strong constitutional socio-economic rights, either being part of the right to life or as separate socio-economic rights must find some echo with reality as well and therefore for articulation of strong socio-economic rights to continue some semblance of its actual adjudicatory nature had to be spelt out specially in a country like India where the empty rhetoric in favour of strong socio-economic rights as implicit in the fundamental right to life would have achieved very little. Therefore, insistence on the traditionally fixed constitutional roles for the organs of the State would not be in sync with the realities of the contemporary times. The growing acceptance of human dignity as a fundamental right and encompassing various socio-economic rights cannot

709 Id. at 344, Brinks and Gauri also argue that court in India have only occasionally made forays into extensive implications of the vague statements about the right to life apart from the strong articulation of socio-economic rights. Indian Court have focused more on the compliance with the existing legal framework rather than crafting a new framework or even addressing its shortcomings.
simply be paid lip-service in order to ensure the traditionally conceived deference for the legislature and the executive. Such conception of judicial role, therefore rather than being contrary to the ideals of democracy, it actually strengthens democracy by making it more inclusive.

The traditionally conceived procedural conception of democracy must give way to an outcome oriented conception of democracy in India. Socio-economic right are to be programmatically achieved over a period of time does not mean its operation therefore has been suspended and if there is evidence to this effect that owing to catering to the interest of those who are politically marginalised in a democratic set-up, socio-economic rights have never become the pressing concern of the government in the manner in which it should have been, it is only prudent and expedient that a scope for mainstreaming such concerns remains within the system by means of adjudicatory forums. Amartya Sen and Jean Dreze have argued for the need of impatience in relation to mainstreaming the issue of basic human needs by the media and civil society. They have provided an empirical account of the successive government’s apathy towards the socio-economic rights in India. Growth in gross domestic product (GDP) over the years has failed to bridge the abysmal state of social and economic deprivations and therefore putting the argument of entitlement over basic human needs being antithetic to the acceleration of growth and growth in itself being good enough to bridge this pervasive socio-economic inequality, is a facetious argument, at least in the Indian context.

Constitutionalism is about putting the government under check and about devising means to ensure that the governmental power is exercised with civility and not in an arbitrary manner.

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So, a *laissez-faire* principle of working for a State would be consistent with the ideals of constitutionalism. However, abdication of governance imperatives by way of omission of fundamental governance duties by the State cannot be allowed to go unchallenged on the basis of it being not a case of State acting arbitrarily and therefore perhaps there is a strong case for broadening our understanding of constitutionalism to include within its fold arbitrary and unexplained omissions in relation to fundamental governance imperatives as well. It is also significant that fundamental governance imperatives do not flow from directive principles only; even fundamental rights impose positive obligations and therefore positive obligations of State even by the narrative of fundamental rights being only obligatory cannot be placed outside the confines of constitutionalism.

The expansive reading of Article 21 to encompass positive civil and political rights has certainly widened the ambit of constitutional imperatives for the government. It is also significant to note here that courts in India have not tried to make directive principles enforceable directly; rather some of the basic human needs like food, shelter and education have been read as implicit in the guarantee of right to life under Article 21 which ensures a life of dignity. Further, the express provisions in Part III of the Constitution like Article 17, 23 and 21A imposing positive obligations upon the State add to the strength of the argument that even civil and political rights impose positive obligations and that positive obligations are not unique to socio-economic rights only.

Ironically, Article 23, a fundamental right remained suspended for more than quarter century owing to legislative indifference till 1976 when the Bonded Labour Prohibition Act was enacted by the Indian Parliament and despite its enactment the Act is yet to achieve its
intended objective in its entirety.\(^{711}\) So, practically speaking even a fundamental right under Article 23 also becomes a goal to be achieved gradually over a period of time. This illustration tells us that constitutionalism also must be understood in its cultural context and this Indian example of an expressed positive fundamental right makes out a definite case for the theorisation of Indian constitutionalism as encompassing positive rights. Therefore, constitutionalism and socio-economic rights were not divorced in the Indian context in such a manner that the constitutional adjudication of socio-economic rights would be *per se* at loggerheads with the principle of constitutionalism. Certainly, as a site for justification and mystification of formative practices Indian constitutionalism has sufficient scope for the judicial review in case of breach of socio-economic rights as well; breach that includes the breach of both positive and negative socio-economic rights.

Democratic legitimacy challenge to socio-economic rights adjudication is also based on the contractarian objection of the lack of measurable standards to measure the government’s non compliance to socio-economic rights of people. This actually is a challenge for the votaries of judicially enforceable socio-economic rights in India as we are still grappling with the potential ways of adjudicating constitutional socio-economic rights. However, despite this, what this challenge conveniently ignores is the fact that even in relation to civil and political rights the measurable standards for non-compliance remain nebulous as several of such issues are actually dependent on some kind of value judgement. If civil and political rights despite its obvious dependence on value judgment by the courts can remain constitutionally enforceable fundamental rights, then there seems no reason to deny

\(^{711}\) See, *Supra* note 43 at 1.
the same favour to socio-economic rights. The dependence on value judgment is not unique to the adjudication of negative civil and political rights only, rather the fact that positive civil and political rights adjudication is also taken up by the courts further dilutes the argument of indeterminacy against socio-economic rights on the ground of it being a positive right. Since elements of indeterminacy attributable to socio-economic rights being mainly positive are also present in relation to the positive civil and political right.

In fact there is a need to bust the myth that fundamental rights enforceable under the Indian Constitution are negative rights. The reality is that the fundamental rights are both negative and positive and courts can be involved in the adjudication of both the facets of rights. Like is the case with socio-economic rights, though in the popular theorisation, socio-economic rights are positive entitlements, there can be a case of negative socio-economic rights as well. A negative right to shelter of not being deprived of the shelter presently occupied by the right holder without there being a provision for the alternative accommodation was acknowledged by the Supreme Court of India in *Olga Tellis* to a certain extent. Determining the extent of the entitlement is something that remains nebulous and fluid but that cannot be the reason to reject the existence of both positive and negative rights in relation to both the civil and political rights & socio-economic rights. The need therefore is for a complementarity thesis encompassing both the positive and negative rights in relation to socio-economic rights as well. It is true that negative constitutional socio-economic rights iteration can be counter-productive as it would be tantamount to rewarding illegality, for example rewarding encroachers of public land with a right to shelter can have very difficult practical ramifications but in the light of shelter being a basic essential to live a life worthy of being
called dignified certainly a reconciliation between the socio-economic right holder and putting a premium on acts of illegality has to be attempted.

Coming finally, to the quest for an ideal, legitimate, principled and effective form of constitutional socio-economic rights adjudication in India; courts in India could get involved in socio-economic rights adjudication if any of the following three conditions exists: 712 (a) if there are no laws and no legal framework in relation to the issue raised (judgements in 1980s and 1990s which transformed socio-economic rights into justiciable rights); (b) the legal framework exists as envisaged by the legislation and executive schemes but it is not implemented or poorly implemented; or (c) the legal framework is inadequate in the wake of challenged posed by the socio-economic rights realisation. First one is a thing of past now, especially after the closure of the Right to Food case. The second one is the most resorted to by the Supreme Court in the recent past and this is referred to as the conditional social rights adjudication. 713 The third pretext of this aforesaid judicial engagement is the most contentious and amenable to challenge both on the ground of its inconsistency with principle of separation of powers and judicial inability to comprehend the issues and provide effective measures for the problems, since the issues mostly is polycentric. The concomitant issues are also there about the principled and effective socio-economic rights adjudication.

However, rather than generalising the nature and mode of adjudication, the task must be to ensure that the issue at hand in each case is so taken up by the court that the purpose of its intervention is well served. The conflict of competences in case of socio-economic rights adjudication is between the competence of the legislature and the government to take


\[713\] See, Supra note 708 at 344.
decisions about the socio-economic rights of the people and the competence of the courts to
control such decisions. Sometimes however, lack of decision on the part of the legislature or
the executive can also be the pretext for court’s intervention; however such intervention
would no longer be about controlling the decisions, rather it would be about coaxing the
government to use its competence and take decisions. Substitution of the government by the
courts in relation to the exercise of legislative and executive competence would make such
excursions by the court vulnerable to the charge of judicial usurpation and incapacity of the
court to tackle polycentric questions. The better course therefore, would be to emphasise more
on the declaratory aspect of socio-economic rights violation owing to governance omission to
exercise its competence in relation to socio-economic rights. Keeping a supervisory vigil in
the nature of continuous mandamus can make such intervention effective, as well as the
government will have to answer for its omissions in future hearings.

In relation to instances where the legislature and the executive have used its competence, then
there is a case for the balancing of competing competences of the government to act and that
of the courts to control. The easier and less confrontationist path to tread on for the courts is to
not scrutinise the decisions taken, rather to confine its job to simply ensuring effective
implementation of the decisions taken. The description for such interventions by the court is
called conditional socio-economic rights adjudication. In this kind of intervention, the
executive or the legislature will not have the moral standing to question the judicial
interventions as implementation of legislative and executive decisions cannot be argued as
discretionary. An examination of the important judicial decisions of the Supreme Court
clearly establish that the Court is quite willing to use this kind of adjudicatory model for the
realisation of constitutional socio-economic rights.
However, a constitutional entitlement emanating from fundamental right to life in its declaratory sense gets considerably weakened if only judicial resort possible is that of ensuring implementation of existing government measures. The normative edifice of socio-economic rights in the Indian Constitution as articulated by the Supreme Court has sufficient space for not only a strong articulation of declaratory right, rather it could extend to enabling courts to ask questions about the effectiveness or reasonableness of the existing measures of the government as well. However, this is not to say that an individualised remedial minimum core form of judicial intervention is possible. The fact must not be lost sight of that a positive right adjudication should not be viewed as an individual grievance, even if an individual has come to the courts seeking redressal of its grievances. Since, the grievances about positive rights are the grievances about the operation of public policy which affects the people in general and therefore the person aggrieved, is not only the person who has sought judicial intervention. Public interest litigation therefore plays a pivotal role in the task of courting the people. In some cases though, individual remedy is possible, for example if there are persons who happen to be the beneficiary of legislative or the executive measures, then the order of the court may actually enable them to get that benefit.

The problematic aspect though is to balance the competing competences when the legislature or the executive have taken decisions exercising their competence in relation to socio-economic rights. It is submitted that the normative force of the declaratory socio-economic rights wield considerable impact to encompass an adjudicatory approach which is not solely following the conditional socio-economic rights adjudication. The scope for reasonableness and proportionality approaches to socio-economic rights do exists within the space for socio-

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economic rights adjudication.\textsuperscript{715} The proportionality approach may be applied to both negative and positive obligations emanating from rights but owing its popular use in relation to negative dimension of civil and political rights where reasonable inroads by the State into the individual rights are to be examined, the resort to proportionality principle in relation to positive obligations and that too in cases of socio-economic rights is episodic. Proportionality approach is largely a kind of reasonableness approach only, however in technical sense the two differ as in the proportionality test the normative grounding and acceptance of the right in question is strong and as a result it accommodates as compared to the reasonableness approach a lesser extent of deference towards the government.

The proportionality or the reasonableness approach to socio-economic rights adjudication should not conclusively determine the nature and extent of scrutiny by the courts in relation to the response of the government for the questions asked by the court in pursuance of following these approaches. Infact as Matthias Klatt observes\textsuperscript{716} degree of scrutiny therefore has to be established separately. This is to be achieved by balancing the competence of judiciary with the legislative and executive competence of the branches of State. Therefore, as advocated by Klatt a triadic scale must be used determine the intensity of judicial review in individual cases.\textsuperscript{717} The scale consists of light, moderate and serious stages. The weight of competence attributable to legislature to decide and the competence of courts to control can be determined by way of variety of factors. The essence of his argument therefore is to structure the intensity of judicial review by identifying the factors responsible for exercise of choice by the courts in this triadic scale leading to the balancing of competence of the courts and legislature. For the


\textsuperscript{716} See, \textit{Supra} note 119.

\textsuperscript{717} \textit{Id.} at 366.
same, following three factors needs to be identified; first is the ‘quality of decision’ of the legislature, second is the factor of ‘epistemic unreliability’ of the argumentative premises of the decision of the government and the third is the factor of ‘democratic legitimacy’.

Coming to the first factor of the quality of decision of the legislature, better the quality of the decision, lesser would be the scope for judicial intervention. Particularly significant is the issue of ‘meaningful engagement’ with the issue at hand in determining the quality of decision of the legislature. Quality and effectiveness of the particular legal system is also significant in determining the quality of the primary decision. The second factor of epistemic unreliability encompasses both empirical unreliability and normative unreliability. Legislative competence is strengthened by empirical unreliability regarding the prognosis of future development, and likewise contestation of the normative questions add to the competence of the legislature, as in the absence of measurable standards the discretion to decide rests heavily with the legislature. However, the courts have the duty to control whether there is unreliability at all and whether the decision was made following the due procedure and rational grounds.

Regarding the democratic legitimacy, Sandra Fredman’s three key values of democracy, namely accountability, participation and equality must be taken as the minimum normative standards for democracy to be a real one beyond the procedural conception of democracy. Therefore judicial review of socio-economic rights being per se contrary to democracy gets negated; rather it in the present context is a measure to ensure inclusiveness. Therefore, the democratic legitimacy competence of the legislature is dependent upon the performance on this front of the majoritarian legislative process. The extent of failure of the political dispensation on this will add correspondingly to the competence of the courts to control the government’s decision making.
This kind of approach apparently appears to be according too much flexibility to the courts while performing the task of judicial review but a constitutional system can consider relation between competences at an abstract level only. However, the abstract weight of competence to be ascribed would depend upon concrete cases. An abstract attribution of weight to competence principle can also rationalise the abstract differences between the various constitutional systems, so far as judicial review is concerned. So, United Kingdom’s constitutional system would accord greater competence to the legislature whereas a constitutional system may allocate greater abstract weight to the competence of the court, which is dependent upon a greater importance of judicial control – i.e. when the constitutional order is in a transitional situation highly dependent upon the active role of the judiciary as in India. Over a period of time however some crystallisation of these abstract competence principles would happen by way of the principle of precedents allowing some consistence and predictability in the judicial review of socio-economic rights.

The other crucial aspect of socio-economic rights adjudication is the actual fate of the orders passed by the courts. Compliance is more likely when the orders can be implemented within the existing State infrastructures. The Supreme Court, however, while working within the parameters of the Constitution has effectively charged and monitored State governments in implementing its orders about midday meal in the Right to Food case. It has also created bodies to effectively collaborate and monitor the work to be performed by the government in pursuance of the orders of the court. In relation to the standards to assess the performance of

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the government, the court has devised the mechanism of constituting commissions to provide information on standards.

Based on the empirical study by Shylashri Shankar and Pratap Bhanu Mehta; Daniel M. Brinks and Varun Gauri have given an interesting analysis of the effect of adjudication in the realm of right to health and education. They have identified three categories in order to study the impact of such adjudicatory interventions. The first category is ‘Provision Cases’ which includes cases wherein, courts interventions are measured and cautious with limited impact beyond the parties. The order of the court is limited to providing a narrow individual remedy. The second category is that of ‘Regulation Cases’ which includes such cases wherein the decision of the court affects the regulatory policies in the field of socio-economic rights. Such cases, however, generally have the problem of implementation and enforcement of the orders of the court. The third category of cases ‘Obligation Cases’ are those cases wherein, the judicial intervention heightens the obligations on the part of providers and enables the right holder to make use of the existing dispute resolution system. The study shows that in the area of health the ‘Provision Cases; have affected 37 people per million of the population, ‘Regulation Cases’ have affected 6002 people per million of the population and ‘Obligation Cases’ have impacted 11126 people per million of the population. Likewise in the field of education the ‘Provision Cases’ have impacted 1918 people per million of the population, ‘Regulation Cases’ have impacted 10000 people per million population and ‘Obligation Cases’ have affected mere 68 people per million population.


Id. at 330.
This shows that in the area of health Regulation Cases have considerable impact and Provision Cases have the least impact; whereas, in the field of education Regulation Cases have the maximum impact and the Obligations Cases have the minimum impact. Another important data by Daniel M. Brinks and Varun Gauri shows\textsuperscript{721} that compared to every person benefitting directly a number of persons benefit indirectly not being the parties to the litigation. In the area of health for every person benefitted directly 13,195 persons benefitted indirectly and in the area of education for every person benefitted directly 1,696 persons benefitted indirectly. So, compared to education, health has significant number of indirect beneficiaries. The effect in relation various parameters in relation to different socio-economic rights may vary but what this definitely shows is that the socio-economic rights adjudication certainly has its impact and only a more structured mode of adjudication perhaps can add to the efficacy of this measure.

The another indirect effect and the most significant one is that judicial intervention in the realm of socio-economic rights even in the declaratory sense has paved the way for the eventual enactment of the legislations for the realisation of different rights. As we all know that courts are corrective institutions and their intervention therefore would be limited even if we include the indirect beneficiaries of the litigation as aforesaid. The real change for the marginalised masses in general can only come through concrete policy framework devised at the behest of the government. Legislative framework recognising rights based entitlement and remedial measure for people can perhaps be the best way to realise this. Constitutional Socio-economic rights adjudication especially strong emphasis on the right of people in relation to various human needs have actually worked as the catalyst in igniting debates around the issue

\textsuperscript{721} Id. at 339.
of the need for legislations, ultimately leading to the enactment of the legislations. Article 21A of the Constitution, The Right of Children to Free and Compulsory Education Act, 2009, Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and The National Food Security Act, 2013 are some of the landmark legislative interventions, wherein, judicial intervention in the field of socio-economic rights can be attributed the catalytic function of enabling these developments. Let us hope that the courts in India; including the High Courts and the existing ‘Social Justice Bench’ of the Supreme Court would continue to pursue the matters concerning socio-economic rights with utmost zeal and strengthen its efficacy by making it more structured and principled negating all apprehensions about courts’ juristocracy turning India into a constitutional adjudicative State by undermining its democratic credentials.