Chapter IV

Democratic Legitimacy of Socio-economic Rights Adjudication

The issue of democratic legitimacy of constitutional socio-economic rights adjudication is the most fundamental issue that relates to the cause of socio-economic rights adjudication. The issue relates to maintainability of socio-economic rights as a constitutionally adjudicatory right. The simplistic accounts, both for, and against this debate mask the real depth of the complexity that marks any attempt to actually answer this question. The simplistic account against the proposition of justiciability of socio-economic rights before a court of law stems from the age old and to a great extent the entrenched narrative of only civil and political rights being constitutionally justiciable and socio-economic rights being non-justiciable.

The reasons attributable for the same being that socio-economic rights are actually dependent on the availability of the resources of the State and therefore the nature of the right is such that it can only be realised in a gradual, programmatic manner and not immediately, unlike civil and political rights which are immediate and independent of availability of resources; therefore judiciary is not suited to adjudicate on such issues. However, the fact that despite the nature of socio-economic rights being perceived as incapable of judicial comprehension, the pressure to still take a call constantly about such programmatic concerns, have gradually made it a ‘mandate’ question, and in a democracy, mandate to take calls not based on

---

288 I call it mandate question because in a democracy the executive and the legislature are elected by the people and therefore elections are the measure to fix their responsibility. They have the liberty therefore to take reasoned decisions on the basis of facts which cannot be empirically proven or disproven in the manner in which it is required before a court of law for the court to base its decision on it. Judges primarily decide by way of justification whereas the executive and the legislature decide by way of the democratic mandate of being the winners in the election. That does not mean that, technically judges do not decide by way of the mandate that they have as judges and the decisions of the executive and legislature are never justified. But primarily, based on
concrete facts and evidences or policy questions rests with the legislature and the executive, and not court; therefore judicial attempt to intervene in this affair is often seen as an act which is undemocratic.

So, democratic legitimacy question here is not based on the premise that judicial review *per se* is undemocratic but the fact that judicial review of socio-economic rights is undemocratic and not that of civil and political rights. It is also important to understand here that when we talk about democratic objection to socio-economic rights adjudication, we are not only debating the legitimacy of the approach of the Indian courts in extending the boundaries of Article 21 by reading welfare rights into it and thereby obliterating the divide between fundamental rights and DPSPs. In fact the democratic legitimacy debate, allows even constitutional arrangements to be challenged based on the argument that the constitutional arrangement provided for is democratically illegitimate. However, the tenuous reading in technical terms of some of the welfare rights identified as DPSPs in the Indian Constitution into Article 21 only makes the argument in favour of the democratic legitimacy of socio-economic rights even more onerous.

### 4.1 Social Contract and Democracy

The theories of social contract have traditionally not included socio-economic rights as the rights which require protection and therefore the duty of State towards the socio-economic rights of the people could not find constitutional acceptance in general. The constitutionalisation of socio-economic rights, itself, therefore, is a problematic conception.

---

289 However, critics like Prof. Jeremy Waldron believe that even the judicial review of civil and political rights is undemocratic.
Democracy tends to lean in so far as decision making is concerned in a State on the organs other than judiciary and therefore constitutionalism as an idea is emphasised by way of Constitution which keeps the Government within checks by ensuring that the power enjoyed by it is not misused or abused. So, the idea of Constitution also presupposes a minimalist State; by minimalist we mean, a State not interfering into the private affairs of citizens. *Laissez-faire* principle therefore appears to be in sync with the notion of constitutionalism and therefore insistence on welfare rights is considered irrelevant for a ‘constitutional cause’. It is important to note here that one of the most powerful and old democracies of the world; the United States of America does not have socio-economic rights recognized in its Constitution. Prof. Frank I. Michelman explaining the possible reasons for this exclusion by the America’s Constitution of the Socio-economic rights argues that perhaps it would make the realisation of socio-economic rights overly dependent upon judicial review.\(^{290}\) He observes that overdependence on judicial review thus provides moral cover for a choice which is condemned by the moral ideal theory that insists on the inclusion of socio-economic rights in the Constitution.\(^{291}\)

John Rawls’ ‘difference principle would ideally insist upon the inclusion of socio-economic rights in the Constitution since it argues for the cause of distributive justice. Rawlsian conclusion argues for basic needs assurances as constitutional essential.\(^{292}\) But the ‘constitutional contract’\(^{293}\) places entrenched reliance on judicial review as an indispensable guarantor of the rule of constitutional law.\(^{294}\) Therefore, the contractarian objection places


\(^{291}\) Ibid.

\(^{292}\) *Id.* at 682.

\(^{293}\) Ibid.

\(^{294}\) Ibid.
explicit and obvious reliance upon the existence of an effective judicial review for the protection of constitutional rights which in case of socio-economic rights is in doubt owing to variety of factors. Rehan Abeyratne\textsuperscript{295} quotes Frank I. Michelman and states that a contractarian objection rests on the problem of measuring the Government’s compliance with socio-economic rights with certainty. It would not be possible to ascertain whether the Government or the other persons are actually complying with their constitutionally ordained obligations corresponding to socio-economic rights.

According to the contractarian objection, this “raging indeterminacy” disables rational citizens, acting reasonably, from determining when their government adheres to or derogates from socio-economic rights.\textsuperscript{296} Constitutional legitimacy is therefore under threat, as citizens will not agree to be governed by a Constitution when they cannot see their Government abiding by what should be globally accepted constitutional commitments. The contractarian objection relies on the distinction between civil and political rights and socio-economic rights. It depends on the premise that it is particularly more difficult to ascertain compliance with or violations of socioeconomic rights than of civil and political rights.\textsuperscript{297} This perceived indeterminacy of socioeconomic rights was instrumental in Rawls's decision to allocate questions of socio-economic justice to the legislative process after the constitutional imperatives (including a scheme of basic liberties or negative rights) are decided.\textsuperscript{298} This permits a range of distributive policies and laws to be acceptable from a contractarian perspective.

\textsuperscript{296} Ibid.
\textsuperscript{297} Id. at 24.
\textsuperscript{298} Ibid.
This is particularly true if socioeconomic guarantees are given the status of “directive principles” rather than “rights.” These principles would guide public decision making on matters of socio-economic justice, being fundamental in the governance of the country but leave it to elected representatives to fashion the most effective laws and policies. The framers of Indian constitution sought to avoid this difficulty by not addressing socio-economic justice as rights but as unenforceable directive principles. So, the Constitution of India is unique in the sense that despite constitutionalizing socio-economic justice it has not recognized it as an enforceable right.

This fine balance, though, to a great extent appears to have been overlooked by the courts in India. The Supreme Court has read in Article 21 of the Constitution, the right to human dignity and consequently a right to have access to basic human needs. Article 21 being an enforceable right, logically basic human needs also become a judicially enforceable right under Article 21. The contractarian objection however, is primarily against the inclusion of socio-economic rights in the Constitution as an enforceable right. This objection in the Indian context gets bolstered by the fact that the framers of the Constitution has avoided the contractarian objection by simultaneously constitutionalizing socio-economic justice, yet not recognizing it as an enforceable right. Article 37 of the Constitution makes the socio-economic justice as enshrined in the DPSPs ‘not enforceable by any court’. Therefore, something that expressly held to be not enforceable has been made enforceable, not by amending the Constitution, rather by way the expansive reading of enforceable right to life under Article 21.

299 Id. at 25.
300 Ibid.
301 Ibid.
The explanation given by Bhagwati J. in Bandhua Mukti Morcha only accounts for the justification of the procedural innovation but the substantive innovation of sidestepping the mandate of article 37 poses a difficult challenge to overcome. So, the contractarian objection is still to be overcome in the sense that for innovations enabling a matter to be undertaken by the court can be rightly justified by the recourse to ‘appropriate proceedings’ under article 32 but the adjudication merits would still have to confront the element of indeterminacy. Therefore, this could only overcome the contrarian objection against the procedural innovation. But the answers are not so simple of these vex questions. For example the unamended version of article 45 under the DPSP ordained that the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. Now this provision were to remain an unenforceable claim then what sanctity can be ascribed to the constitutional promise of education for all upto fourteen years of age to be achieved within ten years from the commencement of this Constitution.

This appears to be the reason why the Supreme Court read a fundamental right to primary education upto fourteen years of age for every child as implicit under Article 21 of the Constitution in Unni Krishnan v. State of A. P. However, this reading of a right to education under Article 21 will certainly not make the right to education a realised right. In fact even the Supreme Court in Unni Krishnan acknowledged the limited resources of the State’s and asked it to ensure that “while allocating the available resources, due regard shall be had to the wise words of the founding fathers in articles 45 and 46. The decision only

302 Supra note 21.
303 Supra note 24 at 68.
304 (1993) 1 SCC 645.
implies that when education is imparted by the State, it must be free, but it does not require that the State must necessarily provide education to all.\textsuperscript{305} The Court only prevented the State from refusing to take measures to provide education within the limits of its economic capacity and such capacity would be determined by the State.\textsuperscript{306} Madhav Khosla has argued\textsuperscript{307} that the constitutional socio-economic rights adjudication by the Supreme Court of India has been what he calls ‘condition social rights model of adjudication’. In this model the court would only enforce what has been promised to the people by the State through legislative and executive measures. So, DPSPs are not unenforceable because they are to be realised subject to the availability of resources but while enforcing, court will not examine the capacity of the State, and rather it will only prevent the State from not taking measures and thereby ignoring its constitutional obligations. Apart from this if by way specific legislations and executive schemes, the State endeavours to realise the goal of DPSP to a certain extent, the court may again intervene to ensure that the beneficiaries of the legislation and executive measures are not denied the benefits. So, the judicial enforcement becomes conditional.

The South African model of reasonableness review\textsuperscript{308} of socio-economic rights is also a model of judicial enforcement of socio-economic rights which appears to withstand the contractarian objection of indeterminacy. Reasonableness review only examines the reasonableness of the measure undertaken by the Government in addressing the socio-economic rights. Reasonableness standard will not enquire whether other more desirable measures could have been adopted or whether the public money could have been better spent. So, reasonableness model puts a lower threshold of compliance for the State. This again to a

\textsuperscript{305} Supra note 51 at 751.
\textsuperscript{306} Ibid.
\textsuperscript{307} See Infra note 647.
\textsuperscript{308} See, Infra note 649.
great extent overcomes the contractarian challenge on substantive questions of adjudication.\textsuperscript{309} So, actually it is only the minimum core/individual remedial model\textsuperscript{310} of socio-economic rights adjudication that is substantially vulnerable to the contractarian challenge.

However, despite all this it is still difficult to argue against the binding effect of Article 37 making DPSPs not justiciable in courts. But even the contractarian objection based on claiming DPSPs to be not justiciable in a court of law as per Article 37, it seems, is not an insurmountable challenge. In \textit{Revanasiddappa v. Mallikarjun}\textsuperscript{311} A. K. Ganguly J. giving the decision of the Supreme Court observed that while interpreting the provisions of a statute the court must have regard to the principles voiced in Part IV (DPSP) of the Indian Constitution. He stated that “In our view it flows from the mandate of Article 37 which provides that it is the duty of the State to apply the principles enshrined in Chapter IV in making laws. It is no longer in dispute that today the State would include the higher judiciary in this country.”\textsuperscript{312} Ganguly J. also quoted Mathew J. in \textit{Kesavanand Bharti v. State of Kerala}\textsuperscript{313} wherein Mathew J. stated that “....... I can see no incongruity in holding, when Article 37 says in its latter part ‘it shall be the duty of the State to apply these principles in making laws’, that judicial process is ‘State action’ and that the judiciary is bound to apply the directive principles in making its judgment.”\textsuperscript{314}

It is an interesting argument considering the fact Article 37 stipulates that the State shall apply these principles in making laws, judiciary certainly is in organ of the State but if that be the

\textsuperscript{309} \textit{Supra} note 24 at 20.
\textsuperscript{310} See \textit{Infra} note 647.
\textsuperscript{311} (2011) 11 SCC 1.
\textsuperscript{312} \textit{Id.} at 11.
\textsuperscript{313} (1973) 4 SCC 225.
\textsuperscript{314} \textit{Id.} at 878.
case what is the meaning that must be given to first part of Article 37 which states that these
principles are not enforceable in any court. Whether the first part bars the court from applying
DPSPs or whether the court interpreting any law is free to interpret it keeping in view these
principles. Like the Supreme Court in Revanasiddappa the Supreme Court while interpreting
section 16(3) of the Hindu Marriage Act, 1955 which recognises the right of children born out
of void and voidable marriages in the property of the parents. The issue was whether parent’s
property should be interpreted as limited to the self acquired property of the parents or it
would even ancestral property in the hands of the parent. The Supreme Court disagreeing with
the past decisions of the Supreme Court\textsuperscript{315} held that parents property cannot be read as limited
to the self acquired property and even ancestral property in the hands of parents is parent’s
property for the purposes of section 16(3) of the Hindu Marriage Act. The court referred to
the principle that beneficial legislations are to be construed liberally and in doing so invoked
the directive principle given in Article 39(f) which states that “the State shall, in particular
direct its policy towards securing - that children are given opportunities and facilities to
develop in a healthy manner and in conditions of freedom and dignity and that childhood and
youth are protected against exploitation and against moral and material abandonment.”

The question that needs to be answered is, that, if while interpreting section 16(3) of Hindu
Marriage Act, reliance can be placed on Article 39(f) then why while reading Article 21 of the
Constitution other DPSPs cannot be read as broadening the ambit of Article 21. An argument
which can be given to distinguish the two can be that while interpreting section 16(3) of the
Hindu Marriage Act, reliance on Article 39(f) is not wrong because this is while interpreting a
legislative provision which is already based on the principles underlying Article 39(f), since

in the absence of such a law the children born out of void and voidable marriage under Hindu Law were not having any right in the property of their parents. So, section 16 of the Hindu Marriage Act, therefore is a law enacted keeping in view the directive principle contained in Article 39(f) by the legislature. As a consequence, this case is different from a case of interpretation of Article 21 relying on principles contained in Part IV. The former does not amount to making directive principles enforceable whereas, the latter violates the stipulation contained in Article 37 prohibiting enforceability. Therefore, the contractarian challenge pertaining to side stepping of Article 37 in making socio-economic rights enforceable as fundamental rights appears to be not answered justifiably despite judicial action qualifying as ‘State action’ in certain respects under Article 37 of the Constitution.

4.2 Conception of Democracy

The Supreme Court of India’s observations in Divisional Manager, Aravali Golf Club v. Chander Hass are an example of the Supreme Court’s insistence on being oblivious to the cause of executive or legislative inactions for the cause of reverence towards the doctrine of separation of powers and consequently, democracy. The court speaking through Markandey Katju, J. came down very heavily on the courts including the Supreme Court for exercising impermissible activism. The Court observed that if the executive or the legislature is not doing its job properly, then it is not for the courts to correct it. The people of India will hold them accountable in the next elections and vote for candidates who will fulfill their expectations. This is not only for the sake of fostering respect for the principle of separation of powers but also due to the fact that judiciary neither has the expertise nor the resources to

\[316\] (2008) 1 SCC 683.
\[317\] Id. at 693.
perform these functions.\textsuperscript{318} Though, these observations were not relevant for the decision of the case and therefore, at the most can only be treated as obiter remarks. At the same time, such strong observations from the Supreme Court definitely cast a shadow of doubt as regards the legitimacy and efficiency of socio-economic rights adjudication.

The conception of democracy is traditionally viewed as opposed to the idea of judicial review and therefore judicial review of civil and political rights also have to be reconciled, not without severe contestation.\textsuperscript{319} Offering a conception of democracy not without any contestation is impossible because it has been used in relation several different political communities that drawing uniformity from its application to variety of political communities is a tumultuous task, open to equivalence. Cecile Fabre while talking about constitutional social rights and democracy bats for a procedural conception of democracy which she asserts is based on a working definition of democracy for the purposes of understanding the relationship between constitutional social rights and democracy.\textsuperscript{320} She cites Barry Holden who pointed out that while offering the conception of democracy, one must distinguish between the defining features of the regime and the conditions necessary for its functioning and survival.\textsuperscript{321} Barry Holden has cited an example to explain this. The defining feature for a butterfly is wings but the necessary condition for its survival is the presence of warm air. Despite being a necessary condition for survival the butterfly is not called butterfly because of

\textsuperscript{318} Ibid.
\textsuperscript{320} Supra note 36 at 111.
\textsuperscript{321} B. Holden, Understanding Liberal Democracy 111(Hemel Hempstead: Harvester and Wheatsheaf, 1993).
warm air, rather it is recognized as butterfly because of wings.\textsuperscript{322} This distinction he argues applies to democracy.\textsuperscript{323}

There are two ways of conceiving democracy. First being the one where decisions are arrived at following a certain procedure. Cecile Fabre calls this as procedural conception of democracy, yet it is something that is the defining feature of democracy.\textsuperscript{324} Contrary to this, there can be another conception of democracy, which is the outcome based conception of democracy. For example C. B. Macpherson argues that “the egalitarian principle inherent in democracy requires not only “one man one vote”, but also “one man, one equal right to live as fully humanly as he may wish.”\textsuperscript{325}

However, while talking about procedural democracy and consequent necessary conditions of survival, it is also important to note that there are certain conditions which are necessary for any democracy to survive and there are certain conditions are necessary for the survival of a particular democratic regime.\textsuperscript{326} For example political stability and people’s willingness to participate in the public forum are necessary conditions, which are necessary for any democratic regime.\textsuperscript{327} However, some democratic regimes can only survive if government heeds to the popular demands organised through mass people movements whereas, other democratic regimes can do without paying heed to such people movements.\textsuperscript{328} Likewise respect for rights of individual is something that is a condition precedent for the survival of any democracy, yet democracies may actually differ when it comes to protecting variety of

\begin{thebibliography}{99}
\bibitem{322} Ibid.
\bibitem{323} Ibid.
\bibitem{324} Id. at 112.
\bibitem{325} Id. at 113.
\bibitem{326} Id. at 112.
\bibitem{327} Ibid.
\bibitem{328} Ibid.
\end{thebibliography}
rights; for example homosexuality, sexual relations outside marriage, privacy of individuals. Thus, when one talks about democratic rights, one must take into account the rights which must be respected for a regime to count as democracy and rights which needs to be respected for any given democratic regime to survive. The former is therefore in itself a defining feature of a democracy and the latter is only a condition necessary for the survival. The former has a very low threshold, so far as meeting the identity criteria for a democratic regime is concerned and therefore in substance close to the procedural conception of democracy.

Ronald Dworkin has asserted that outcome based conception of democracy ‘make democracy a black hole into which all other political virtues collapse’, whereas procedural conceptions of democracy ‘at least have the merit that they explain our sense that democracy is only one among political ideals, that is not the same thing as justice, and that a democratic political system can therefore produce unjust results’. Dworkin argues for a distinction to be maintained between principles and policies. A principle defines and protects an individual right, whereas a policy stipulates a collective goal. Goals are those preferred state of affairs, which the community seeks to pursue. Rights as individual claims operate as ‘trump’ over collective goals. This is also an indictment for a utilitarian justification for right. In a democracy judges do not base their decisions on policy but on principles. Questions of policy concern the collective goals that we wish to pursue: new roads or new hospitals? High

---

329 Ibid.
330 Ibid.
331 Ronald Dworkin, “Equality, Democracy and the Constitution” as cited in Supra note 36 at 114.
332 Supra note 77 at 105.
333 Ibid.
334 Ibid.
335 Id. at 108.
productivity or clean air? Such questions depend on people’s preference. Democratic process is in itself a mechanism for the expression of preferences; legislatures are exposed to these preferences more generally and therefore these preference questions based on policy should be decided democratically and should not be decided by judges.

Upendra Baxi in his response to the portrayal of democracy and constitutional democracy in such a fashion by Ronald Dworkin has written that “The liberal Einbahnstrasse syndrome enables Dworkin to model the contrast between "majoritarian" and "constitutional" democracy in ways that fully ignore a Marxian critique of the forms of bourgeois law and democracy”. Further pointing to the fact as to how the popular constitutional comprehension in the existing postcolonial constitutions has reconciled democracy with constitutional judicial review in a manner which is bereft of historic referent outside the "supposedly authoritative narrative ... in the social formations of Western Europe.”

However, despite this attempt to insulate the constitution from the historical referent which Baxi refers to as the act of ‘constitutional midwifery’ by setting bill of rights on American model but with considerable modification triggering ‘craft hybridities of narratives of origin’. Talking about the directive principles, he calls it the expression of ‘ambivalent politics of desire’ by incorporating the idea from Irish Constitution. Replying to Baxi’s criticism Dworkin observes that I have, therefore, no good response to Baxi’s gentle suggestion that I may be guilty of “not taking the postcolonial liberalism of existing south

\[\text{336 Ibid.}\]
\[\text{337 Ibid.}\]
\[\text{338 Ibid.}\]
\[\text{340 Id. at 575.}\]
\[\text{341 Id. at 565.}\]
\[\text{342 Id. at 574.}\]
\[\text{343 Ibid.}\]
democratic constitutionalisms seriously, beyond the lame admission that I do not feel competent to discuss that postcolonial experience with any authority.\textsuperscript{344}

An understanding of democracy confined itself to minimalist ideas and practices, is incomplete.\textsuperscript{345} Richard Burchill emphasises that “In just the same way as an understanding of human rights that is limited to civil and political rights fails to fully embrace the human experience, democracy understood as certain procedures and institutions fails to provide adequately the individual with the opportunity to participate in the various processes that impact upon their life and denies the chance to realise their true potential.” This is important observation that argues that if human rights include socio-economic rights too and is not limited to civil and political rights only, then democracy cannot be conceived as procedural and therefore outcome based conception of democracy is the true conception of democracy.

The conception of democracy in relation to the constitutionally enforceable socio-economic rights is an important dimension of the cause of constitutional socio-economic rights. It informs us that making socio-economic rights enforceable in a court of law as a constitutional right is an idea that is based on the outcome based conception of democracy directed towards ensuring that democracies remain just democracies, whereas a procedural conception of democracy treats the subject matter of socio-economic rights outside the confines of judicial process and amenable to only to legislative and executive exercises and judicial intervention in the realm of socio-economic justice is considered undemocratic. It must be noted that a procedural conception in the Indian context can even militate against the enforceability of fundamental rights. For example the enforceability of Article 23 was practically withheld by

the Indian State for 26 years, till 1976 when the Bonded Labour Prohibition Act was passed by the Indian Parliament. Likewise the Right of Children to Free and Compulsory Education Act was passed by the Indian Parliament despite it being formally made a fundamental right by the Indian parliament in the year 2002 by way of 86th constitutional amendment inserting Article 21A providing for right to primary education for children from six to fourteen years of age as a new fundamental right. It is interesting to note in terms of nature of obligation for these provisions imposed an obligations similar to the one imposed by the directive principles. Under both these provisions the rights given are to be realised by law and if the obligation to pass such a law is not immediate and subject to the availability of resources; then an obligation pertaining to fundamental rights is at par with the obligation owing directive principles. Therefore, historical context seems very important as argued by Upendra Baxi seems very significant in understanding the conception of democracy in India which embraces within its fold the constitutionally recognised enforceable socio-economic rights.

4.3 Democratic Decision Making and Constitutional Socio-economic Rights

If constitutional socio-economic rights are inconsistent with democratic decision making then in a procedural conception of democracy these rights are extremely vulnerable. The reason being that the tool for ensuring accountability for the democratic decision making is going to the people to seek the fresh mandate to govern after fix time period intervals in elections.346 However, it is impossible to pin attributability to empirical factors which decides voting

346 Dr. B. R. Ambedkar in his speech while moving the Draft Constitution in the Constituent assembly on November 4, 1948 stated – “Who should be in power is left to be determined by people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these Instruments of Instructions which are called ‘Directive Principles’. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time.” B. Shiva Rao, The Framing of India’s Constitution: Selected Documents, Vol. IV 432,433(Government of India Press, Nasik, 1968).
patterns during elections and in a country as diverse as India it is all the more complex and bordering on impossibility. It is not possible to argue based on empirical factors that the reason for the enactment of the Bonded Labour Prohibition Act in the year 1976 is the constitutional promise of fundamental rights given in Article 23 or for that matter the passage of Right of Children to Free and Compulsory Education Act in the year 2009 is actually attributable to the existence of the right to education formally as a fundamental right under Article 21A for seven years. If that would have been the case these enactments would not have to wait for so long to be enacted despite being warranted because of the fulfilment of expressed fundamental rights.

It is difficult to argue that in the absence of amenability of socio-economic rights to judicial process these developments would never have taken place but the fact that the measure of ensuring adherence with these constitutional guarantees, be it fundamental rights or directive principles, are not robust enough to force immediate attention of the legislature and the executive is in itself a good case for making socio-economic rights amenable to some form of judicial process, so as to make it more accountable in an empirical way toward its constitutional obligations. The concession of procedural conception of democracy should not be extended to an unlimited extent so as tolerate the democratic regime despite there being no redressal of the cause of socio-economic justice which relates to the cause of people deprived of access to basic human needs. This statement though appears heavily prejudiced and judgemental towards the preferences of the Government in power and therefore, one must refrain from generalisation. This also perhaps is the reason that the constitutional socio-
economic rights adjudication has actually been noticeable phenomenon for the world community especially in the developing countries.\textsuperscript{347}

This again tells that the continuous struggle between adhering to borrowed constitutional ideals, perhaps has not been assimilated and the cultural differences are being manifested through these developments in these countries. Upendra Baxi has aptly observed in this context that “This carnival of "original intents" marks the moment of mimesis as well of originality in some bewildering proportion. Multicultural hybridities shape the text, interpretations, and tradition in different modes from those apparent in relatively monocultural constitutional productions.”\textsuperscript{348} Baxi has said this especially in the context of India, refuting Dworkin’s objection of policy goals being policy prescriptions and therefore, should never be made amenable to judicial process being based on preferences not principles to which Dworkin acknowledge that he does not have the expertise of studying postcolonial Constitutions.\textsuperscript{349}

Aharon Barak rejects the argument that institutional non-justiciability is implicit in the principle of the separation of power.\textsuperscript{350} The separation of powers is not a permit for a branch of State to violate the Constitution or a statute.\textsuperscript{351} It is natural for the political branch of the State to take political considerations into account while arriving at a decision, at the same time the judiciary should examine whether these political considerations are consistent with

\textsuperscript{347} There are innumerable books and research articles dedicated to studying the procedure, measures and effects of the inclusion of socio-economic rights within the bill of rights enforceable by the courts by the South African Constitution. Apart from that much of the available literature on the socio-economic rights adjudication actually stems from the development in this field that has taken place in India, Brazil, Columbia, Nigeria, Indonesia etc.


\textsuperscript{350} Supra note 185 at 185.

\textsuperscript{351} Ibid.
the Constitution or the statute, no matter how prudent are the political considerations.\footnote{Ibid.} Focusing on the legality of the act rather than on institutional non-justiciability enhances people’s faith in the State and enables the court to realize its role in a democracy.\footnote{Id. at 189.} Arguing against the judicial review of legislations based on normative constitutional rights as undemocratic since disagreements about rights can be better addressed by the legislatures, Jeremy Waldron has argued that the decision of the courts in such judicial review is actually ‘a rather insulting form of disenfranchisement and legalistic obfuscation of the moral issues at stake in our disagreements about rights’.\footnote{Jeremy Waldron, “The Core of the Case Against Judicial Review”, 115 Yale L. J. 1346 at 1406.} Cecile Fabre, while talking about Waldron’s objection observes that Waldron objects to bills of rights for the reasons that they entrust the judiciary with the task of safeguarding rights, thus preventing people from having their say in decisions concerning those rights.\footnote{Supra note 36 at 145.} This objection becomes all the more significant in the context of constitutional social rights.\footnote{Ibid.} Fabre argues that entrenching socio-economic rights is a stringent constraint on the democratic decision making but it does not deprive the democratic majority from all say in matters concerning socio-economic rights.\footnote{Ibid.}

Fabre has also attempted therefore to debunk the two arguments against constitutional socio-economic rights.\footnote{Id. at 146.} First being that the enforcement of socio-economic rights is always more expensive than civil and political rights.\footnote{Ibid.} She says that this may not always be the case and cites the example of setting up of juvenile prisons and rehabilitation centres for younger
likewise addressing the second argument against the constitutional socio-economic rights which is based on the assumption that constitutional the socio-economic rights leave no room for democratic decision making; she argues that in fact the two can coexist. So, court should remind the government of its duties and ask them to fulfill the duties within a reasonable time frame without spelling out in any details as to how it should be done.

This kind of judicial role, however, is an attempt to reconcile constitutional socio-economic rights with the democratic decision making and it rules out individual remedial/minimum core form of socio-economic rights adjudication. Different models of judicial function in this regard and their relative consistency with the democratic decision making has been dealt with at a later stage.

4.3.1 Balancing Judicial Review of Positive Rights

Matthias Klatt says that the judicial review of positive rights (positives rights which include both civil and political rights and socio-economic rights) gives rise to number of problems that can be categorised under the four categories of justification, content, structure and competence. The justification problem is the political question addressing the question of the extent of inclusion positive rights in the catalogue of rights. These questions address the issue as to whether the questions of positive rights are the questions of rights or the questions of politics and morals. It also therefore has a cultural constitutional context as this question

---

360 Ibid.
361 Id. at 151.
362 Ibid.
363 Infra note 647.
364 Supra note 119 at 355.
365 Ibid.
366 Ibid.
will always be answered in that context.\textsuperscript{367} For example the South African Constitution makes positive rights, the questions of rights whereas the United Kingdom’s Constitutional traditions resist the idea of settling positive rights by way of constitutional entitlements.\textsuperscript{368} Indian Constitution seems to follow a middle path by constitutionalising socio-economic rights but majorly keeping it as principles fundamental in the governance of the country and consequently outside the confines of judicial scrutiny. In the present context though, the constitutionalisation of socio-economic rights appears to have been assimilated into recognising the positive rights more as questions of constitutional entitlements by the interpretation placed on the fundamental right of right to life, recognised by the Constitution in Article 21.

The second category of content would depend upon colliding interests such as financial resources and interests of others and understanding the content would require clear understanding of structure of positive rights, which is the third category of problems.\textsuperscript{369} Understanding the structure of positive rights remains a challenge to overcome in its entirety, however relationship between positive rights and proportionality tests throws some light on the structure of positive rights.\textsuperscript{370} The fourth problem is the problem of competence or justiciability.\textsuperscript{371} It is important to understand the distinction between justification and competence questions. Justification question only relates the issue of positive rights being constitutional entitlements or political obligations of the State, whereas, the competence

\textsuperscript{367} Ibid.
\textsuperscript{368} Ibid.
\textsuperscript{369} Id. at 356.
\textsuperscript{370} Ibid.
\textsuperscript{371} Ibid.
question is the proper role of court in making positive rights effective in respect of the role of the legislature for the realisation of positive rights.\textsuperscript{372}

Competence problems are the major thrust upon which the challenge to positive rights adjudication rests based on the assumption of its democratic illegitimacy. However, it is important to note that competence problem does not only occur with positive rights.\textsuperscript{373} Competence problem is the reason behind the challenge to human rights adjudication too, as judicial review ranks priority to majority among the unelected and unaccountable judges in a democracy rather than leaving it to the discretion of elected and accountable legislature.\textsuperscript{374} This dilemma is present, regardless whether the right in question is negative or positive. However, challenge to competence of courts based on democratic objection stipulates that positive right adjudication destroys the balance of power enshrined in the Constitution and the real power is therefore taken away from democratically elected representative to the courts. This resulted in the transformation of parliamentary legislative State into a “constitutional adjudicate State” or a “juristocracy”.\textsuperscript{375}

The competence problem like justification problem is linked to the cultural constitutional context and therefore having a universal constitutional theory of positive rights judicial review competence for constitutional court is something which remains elusive. Different constitutional systems are quite diverse.\textsuperscript{376} The spectrum ranges from non-constitutionalisation (debatable in case of positive civil and political rights in many systems) as in USA and UK to constitutionalisation but judicially unenforceable as in Ireland to

\textsuperscript{372} Ibid.
\textsuperscript{373} Id. at 357.
\textsuperscript{375} Ran Hirschl, Towards Juristocracy: The Organs and Consequences of the New Constitutionalism (2004) as cited in Supra note 119 at 359.
\textsuperscript{376} Supra note 119 at 359
judicial enforcement with considerable legislative deference as in the reasonableness approach in South Africa to strong justiciability in Brazil and post authoritarian Constitutions in Central and Eastern Europe.\textsuperscript{377} This depiction of constitutional systems matches with the typology of judicial review of socio-economic rights provided by Katharine Young.\textsuperscript{378} She adopts a triadic typology of detached, engaged and supremacist courts in relation to judicially unenforceable positive rights, judicial enforcement with legislative deference and substantive decision making by the courts by way of rigorous scrutiny of governmental policy and legislations respectively. The supremacist can be referred to as a kind of judicial usurpation, whereas detached form can be called as judicial abdication. Therefore, both these approaches should be avoided and focus should therefore be on identifying and distinguishing the degrees of deference.\textsuperscript{379}

Klatt identifies three degrees of deference; namely, a light intensity of control and consequent high degree of deference, a moderate or intermediate intensity of control leading to a moderate degree of deference and lastly serious intensity of control and the resultant small degree of deference. Competence questions are questions of principles and principles possess the element of balancing and therefore an either or discourse can be avoided in relation to competence questions.\textsuperscript{380} Klatt argues that proportionality review is misunderstood widely as amounting to serious or strict judicial review whereas reasonableness is also wrongly considered equivalent to a more deferential approach.\textsuperscript{381} Instead, he argues that “proportionality and reasonableness are merely different sets of questions to ask which do not predetermine the scrutiny with which the answers given to them by the primary decision

\textsuperscript{377} \textit{Ibid.}
\textsuperscript{378} Katharine Young, \textit{Constituting Economic and Social Rights} 142 (Oxford University Press, Oxford, 2012).
\textsuperscript{379} \textit{Supra} note 119 at 362.
\textsuperscript{380} \textit{Id.} at 363, 364.
\textsuperscript{381} \textit{Id.} at 357.
maker are controlled by the courts.”\textsuperscript{382} Degree of scrutiny therefore has to be established separately.\textsuperscript{383} This is to be achieved by balancing the competence of judiciary with the legislative and executive competence of the branches of State.

Klatt argues for triadic scale to determine the intensity of judicial review in individual cases.\textsuperscript{384} 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.\textsuperscript{385} 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.\textsuperscript{386} For the same he identifies three factors; 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’.\textsuperscript{387} It is important to note that Klatt acknowledges the legislature’s capacity to decide and court’s role being limited to controlling the decision of the legislature.\textsuperscript{388}

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. Klatt particularly highlights the significance of ‘meaningful engagement’ with the issue at hand as an important factor in determining the quality of decision of the legislature.\textsuperscript{389} Quality and effectiveness of the

\begin{footnotesize}
\textsuperscript{382} Ibid.
\textsuperscript{383} Ibid.
\textsuperscript{384} Id. at 366.
\textsuperscript{385} Id. at 367.
\textsuperscript{386} Ibid.
\textsuperscript{387} Id. at 367-373.
\textsuperscript{388} In India, when we say legislature, we should mean legislature including the executive because of the fusion of executive with the legislature.
\textsuperscript{389} Supra note 119 at 367.
\end{footnotesize}
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, Klatt approvingly quotes Sandra Fredman has employed three key values of democracy, namely accountability, participation and equality. Therefore judicial review 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 approach apparently appears to accord too much flexibility but a constitutional system can consider relation between competences at an abstract level only. However, the abstract weight of competence principles to be ascribed would depend upon

390 Ibid.
391 Id. at 369.
392 Id. at 369.
393 Id. at 370.
394 Supra note 14 at 103-113.
395 Id. at 371.
396 Id. at 370.
397 Id. at 373.
concrete cases.\textsuperscript{398} 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.\textsuperscript{399} 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.\textsuperscript{400} 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 positive rights.\textsuperscript{401}

4.4 Strong and Weak Form Judicial Review

Associated closely with the issue of the effectiveness and legitimacy of socio-economic rights adjudication is the issue of nature of socio-economic rights adjudication. Feasibility of the implementation of the binding orders passed by the court has a direct bearing on the effectiveness of such a judicial exercise; lack of binding orders or passing of mere declaratory orders will open such adjudication to the charge of being ineffective and on the contrary the underlying coercion in binding judicial orders forcing the executive to perform certain acts, apparently takes such judicial exercise proximate to the territory of illegitimacy. Strong articulation of rights and remedies in the area of economic and social right may bring courts into disrepute and instigate a popular backlash within civil society against the very interests

\textsuperscript{398} Ibid.
\textsuperscript{399} Ibid.
\textsuperscript{400} Ibid.
\textsuperscript{401} Id. at 374.
that the rights purport to protect. This is mainly because such a conception of socio-economic rights will raise serious questions about its democratic legitimacy. Therefore, it appears that effectiveness and legitimacy are inversely proportional to each other, when it comes to socio-economic rights adjudication. This only adds to the conundrum of socio-economic adjudication.

Prof. Mark Tushnet in his paper has thrown light on what he calls a twentieth century invention of weak form system of judicial review. In strong form judicial review, the courts have general authority to determine what Constitution means and the court’s interpretation are authoritative and binding on other branches of the government, at least in short to medium run. The mark of weak form review is not that the scope of judicial review is narrow. Courts in weak form systems have the power to evaluate all legislation to determine whether it is consistent with all of the Constitution’s provisions without exception. The mark of weak form review is that the ordinary legislative majorities can displace judicial interpretation of the Constitution in the relatively short run. Tushnet argues that weak form judicial review tries to address the criticism that the strong form judicial review allows the courts with an ‘attenuated democratic pedigree’ to trump the decisions taken by bodies that have stronger democratic pedigree. However, according to Tushnet, weak form review raises another important concern by reducing constitutional provisions to ordinary legislative

---

402 Supra note 2 at 385, 391.
404 Ibid.
405 Id. at 2784.
406 Id. at 2786.
407 Ibid.
408 Ibid.
409 Ibid.
provisions alterable at the wish of legislative majorities.\textsuperscript{410} However, this is based on the assumption that judicial review must involve coercive orders.

Weak form judicial review also has the bearing on the content of right. A legal right theoretically is the one which is constituted owing to strong form judicial review by enabling courts to pass coercive orders. However, weak form judicial review cannot be relegated to the extent of it being treated at par with the system of non-justiciability of rights. A strong and vibrant democracy will certainly take judicial declarations about breach of rights seriously, despite the fact that the declarations are not accompanied by concomitant remedies, legally obligating the government to fulfill its constitutional commitments. Such rights therefore, are not necessarily undermined by weak form review; rather it can be a tool to assert that the right needs urgent attention of the political class because of its significance. This appears to be the reason why the countries like Canada, United Kingdom and New Zealand have the system of weak form review even for the enforcement of first generation of rights, i.e., civil and political rights.\textsuperscript{411}

Mark Tushnet also discussed the forms of weak form judicial review.\textsuperscript{412} He identifies non-justiciable rights, declaratory rights, weak rights, strong rights and finally looks for a possible strong right with weak remedies. First is a non-justiciable right, the distinction between a non-justiciable and a declaratory right is very subtle in the sense that declaratory rights will also not entail any judicial remedies apart from a declaration from the court that the right in question has been violated because of government’s inaction or action, whereas in case of

\begin{flushright}
\textsuperscript{410} \textit{Ibid.}
\end{flushright}
non-justiciable rights the rights being non-justiciable, they are not amenable to judicial scrutiny. Tushnet mentions in this regard the approach of Irish Supreme Court in *D. v. Minister of Education*[^413] which while declaring that the government has failed to comply with its obligation of ensuring adequate education for children refused to pass any binding orders against the government articulating the viewpoint that the same violates the principle of separation of powers. It is significant to note that DPSPs insertion in the Constitution of India is inspired from the idea of directive principles as it was enshrined in the Irish Constitution. Talking about weak rights, he refers to the reasonableness review by the Supreme Court in *Grootboom*.[^414]

In Strong rights, Tushnet refers to decision of the Constitutional Court of South Africa in *TAC case*[^415] wherein the Constitutional Court asked the government of South Africa to make available a drug called Nevirapine which inhibits the transmission of HIV/AIDS from pregnant mothers or nursing mothers to their child from about 12 to 25 percent. The government was resisting this claim, not because of budgetary constrain for the cost of medicine but for the accompanied counselling program which was necessary according to it. Another concern was that the widespread use of the drug might actually lead to development of drug resistant virus. Negating the contentions of the government the Court ordered it to make the drug available to everyone without a counselling program as the drug in itself would be beneficial. Regarding the argument of growth of drug resistant virus, the Court stated that the risk is well worth running. In this case the distribution of drugs was to be done by the

[^414]: Supra note 412 at 243, 244
company manufacturing the drug; therefore, the decision despite being clubbed as an instance of strong social and economic rights is actually having no budgetary implications.\footnote{416}{\textit{Supra} note 412 at 247.}

Probing the question as to whether there can be case of strong articulation of rights by the court despite the remedies being weak is a possibility or not, Tushnet concludes that the courts should not enforce strong social and economic rights with weak remedies because this in turn will make the remedy strong and as a consequence the rights will become a weak ones.\footnote{417}{\textit{Id.} at 257 .}

He therefore argues that the best method for the cause of socio-economic rights is to adopt the approach of Irish courts where the declaration of rights being violated without providing for any remedy would continue the permanent articulation of strong socio-economic rights.\footnote{418}{\textit{Id.} at 257, 258 .}

Rosalind Dixon on the other hand insists on a theory of constitutional dialogue between the government and the courts in enforcing socio-economic rights and accepts that compared to the traditional strong model of judicial review it needs to weakened in case of socio-economic rights to ensure consistency with the theories of cooperative constitutionalism, such as departmentalism, constitutional conversationalism and democratic minimalism.\footnote{419}{Rosalind Dixon, “Creating Dialogue about Socio-economic Rights: Strong form versus Weak form Judicial Review Revisited”, \textit{5 Int’l J. Const. L.} 391 (2007) at 418.}

But at the same time she calls upon the constitutional courts to confront the political failures of government in realising socio-economic rights, thereby strengthening the cause of constitutional socio-economic rights enforcement without diluting the concept of democratic minimalism.\footnote{420}{\textit{Ibid.}} In the Indian context it is hard to point towards the model of constitutional socio-economic rights followed by the Indian courts owing to the lack of a
uniform narrative discernible from the judicial practice of socio-economic rights enforcement.\textsuperscript{421}

\section*{4.5 Constitutionalism and Socio-economic Rights}

Conceptualising Constitution, Upendra Baxi identifies three ‘interlocking planes’, namely C1, C2 and C3.\textsuperscript{422} C1 stands for the initially formulated historic constitutional texts and C2 represents constitutional hermeneutics, the site of what is understood in the dominant and the understood discourse as constitutional interpretation or to put it plainly, constitutional law; whereas, C3 signifies “constitutionalism,” which is a set of ideological sites that provide justification and sometimes mystification for constitutional theory and practice.\textsuperscript{423} The protection of constitutional fundamental through common law is the main feature of common law constitutionalism.\textsuperscript{424} However, the popular understanding of constitutionalism is also something that is based on the idea of Constitution ensuring the protection of fundamental rights of individuals against State excesses. So, it is primarily a principle directed towards civilising the State power. But ‘constitutionalism’ as Baxi explains is the ideological site of formative practices giving justification and mystification of constitutional theory and practice. So, constitutionalism therefore justifies or mystifies the dominant constitutional narrative while simultaneously also acting as the premise for the counter narrative.

Baxi, while talking about human rights and constitutionalism in Indian context highlights, the ingenuous way in which the Constitution of India puts it own constitutional theory. He highlights how in Article 17 and 23 the fundamental rights not only include negative

\textsuperscript{422} Upendra Baxi, “Constitutionalism as a Site of State Formative Practices” 21 Cardozo L. Rev. 1183 at 1188.
\textsuperscript{423} Ibid.
obligations of State against State excesses but positive obligations upon State to guard against the excesses of others.\textsuperscript{425} Reservation in public employment and government educational institutions is also an important illustration of something which again flows from the fundamental rights chapter.\textsuperscript{426} He also highlights how Article 37 puts the obligation of expeditiously realising the mandate of directive principles.\textsuperscript{427} He calls the dilution of standing by the Supreme Court of India in public interest litigations as an act of democratising access to judicial power.\textsuperscript{428} So, there is a cultural dimension to India’s constitutionalism and therefore there is a need of contextualising constitutionalism in this respect.

In the very first year of coming into effect of our Constitution it was realized that the fundamental right to equality and freedom of acquiring, holding and disposing of property is coming in the way of realization of the larger goal of social and economic justice. To do away with this difficulty the Parliament in the year 1951 came out with the Constitution (First Amendment) Act, 1951, thereby adding article 31A and 31B along with Schedule IX to the Constitution diluting the fundamental right to equality under Article 14 and freedom of acquiring, holding and disposing of property under article 19 (1) (f)\textsuperscript{429}. Articles 31A and 31B were primarily added to ensure that the State’s action with respect to acquisition of private estates for public purposes and State laws providing for agrarian reforms are not be declared unconstitutional by the courts of law for the violation of fundamental rights enshrined under Article 14 and 19 (1) (f) as these measures were considered necessary in larger public interest. So, the Constitution’s first brush with the resolution of conflict between two minimum cores of life based on the need and value were glaring in its first year of commencement only and

\textsuperscript{425} Id. at 1204.
\textsuperscript{426} Id. at 1205.
\textsuperscript{427} Ibid.
\textsuperscript{428} Id. at 1205.
\textsuperscript{429} Omitted by the Constitution (Forty-fourth Amendment) Act, 1978.
the verdict was in favour of the need based core of life i.e. basic needs. Although it cannot be said that this giving of priority was not envisaged by the framers of our Constitution, because they had made provision for dilution of fundamental right to property in Article 31 also which embodied the fundamental right to property. But they could not have envisaged a situation wherein, dilution of the fundamental right to property would have led to the violation of the fundamental rights enshrined under Article 14 and 19 (1) (f).

It should also be understood that though respect for fundamental rights is essential to the task of ensuring consistency with the principle of constitutionalism but the Indian Parliament has repealed the fundamental right to property and made it a constitutional right after having diluted it on several occasions starting from the first constitutional amendment itself in the year 1951. In fact by the first constitutional amendment Article 31 B was inserted in the Constitution along with Schedule IX and the by this any legislation put in Schedule IX by way of a constitutional amendment was made not amenable to judicial scrutiny even if it violates fundamental rights and the Supreme Court has declared these insertions constitutional. However, interestingly the Supreme Court has also held that this measure despite being constitutional, cannot give blanket protection to any legislation put in IX schedule and therefore if a legislation is put in IX Schedule by the constitutional amendment,

---

430 Article 31(2) as at originally stood read as follows – No property shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

431 In Kameshwar Singh v. State of Bihar, AIR 1951 Pat 91, Patna High Court declared the Bihar Land Reforms Act, unconstitutional on the ground that it is violative of Article 14 and 19 (1) (f).

432 Article 19(1) (f) and Article 31 recognising the right to property repealed by the Forty Forth Constitution (Amendment) Act, 1978. Article 300-A recognizes right to property now as a constitutional right and not a fundamental right.

then the constitutional amendment can still be challenged on the touchstone of basic structure which is unamendable even by a constitutional amendment as held in *Kesavanand Bharti*.

It is significant to note that these amendments diluting and even repealing fundamental rights have actually been enacted with a view bring about a more egalitarian society by the Indian Parliament. The idea behind the dilution and subsequent repeal of fundamental right to property was not to rob an Indian citizen of this right but to ensure a more egalitarian distribution of wealth among the people of India which was impeded by the fact that right to property was a non-derogable enforceable right. Article 31B and Schedule IX were meant to achieve this, primarily.

But the myth of giving precedence to the value based minimum core over need based minimum core in all cases of conflict between the two, was finally exploded by the Constitution (Twenty-fifth Amendment) Act, 1971, which added Article 31C to the Constitution of India giving precedence to the law made with a view to give effect to the policy of the State securing the principles laid down in Articles 39 (b) and 39 (c) of the

---

434 *Supra* note 424.

435 31C. Saving of laws giving effect to certain directive principles. — Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: (The part of the provision in italics was declared unconstitutional by the Supreme Court in *Kesavanand Bharti v. State of Kerala*, (1973) 4 SCC 225)

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

436 39. Certain principles of policy to be followed by the State. — The State shall, in particular, direct its policy towards securing —

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

437 (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
Constitution, over the rights conferred by Article 14 or 19 of the Constitution. The Supreme Court in *Kesavanand Bharti v. State of Kerala*\(^\text{438}\) accorded its approval for the same with this caveat that the court can look into the veracity of such declaration which professes to give effect to the principles of Article 39 (b) and (c) while making a law and hence that much portion of Article 31C was declared *ultra vires* the Constitution which excluded such issues from the purview of judicial scrutiny.\(^\text{439}\) This clearly establishes the fact that if it is proved that any law made actually gives effect to the principles of Article 39 (b) and 39 (c), the same cannot be declared unconstitutional even if it is violative of Article 14 or 19. However the Constitution (Forty-second Amendment) Act, 1976 which tried to make rights under Article 14 and 19 subservient to the laws made in order to give effect to the principles of entire Part IV was declared unconstitutional by the Supreme Court in *Minerva Mills v. Union of India*\(^\text{440}\).

This means that the provisions under Article 39 (b) and 39 (c) has been given priority over Article 14 and 19 but other provisions of Part IV continue to run subservient to all the fundamental rights including the ones given in Article 14 and 19.

These developments, bring to fore, a much nuanced picture of Indian constitutionalism, one wherein, even fundamental rights are not understood as rigid constitutional inscriptions cast in stone. It is also significant, that these measures have actually been undertaken by the legislative bodies in India, led by the Parliament primarily with the view to address the cause of socio-economic rights. This also tells us the fact that the legislature in India has not been completely oblivious to the task of socio-economic rights. But the cause of socio-economic rights is not so much directed against the legislative indifference, than the legislative

\(^{438}\) (1973) 4 SCC 225.

\(^{439}\) See, *Supra* note 435.

\(^{440}\) (1980) 3 SCC 625.
prioritising. However, legislative indifference is also a charge which is not completely baseless. The constitutional adjudication of socio-economic rights brings the focus back upon the fundamental obligations enshrined in the Constitution to fulfill the mandate of Article 37 with the ingenuous mix of constitutional realism that access to basic human needs is a right which flows from Article 21 and therefore for the obligations contained in Article 37, the government becomes accountable before the constitutional courts. Constitutionalism, therefore, is apart from being a tool to ‘civilise’ State power is also a tool to ‘humanise’ State power.

4.6 Inference

The question of democratic legitimacy cannot be examined from an ‘either’, ‘or’ perspective. Excessive deference or excessive intervention, both these approaches therefore are to be avoided which attempt to straight jacket issues in the quest for answers. Reasonableness and proportionality approaches should therefore not be standardised as universal answers, rather a balance needs to be struck and the extent of engagement by the government with the issue at hand must determine the extent of judicial involvement. More is the level of engagement by the government; lesser should be the level of judicial involvement. In this context therefore a case specific approach needs to be adopted as opposed to a generalised one. Apart from this the issue also involves a cultural context and therefore an attempt to theorise the issue as a universal fact is to be avoided, as has been acknowledged by Ronald Dworkin while answering the criticism of Upendra Baxi that he may be guilty of not taking seriously the post-colonial constitutionalism and also that he does not possess the requisite competence to discuss the liberalism of post-colonial south democratic constitutionalism.
Dworkin earlier had argued that outcome based conception of democracy ‘make democracy a black hole into which all other political virtues collapse’, whereas procedural conceptions of democracy ‘at least have the merit that they explain our sense that democracy is only one among political ideals, that is not the same thing as justice, and that a democratic political system can therefore produce unjust results’. Baxi had alleged that such an argument completely ignores a Marxian critique of law and democracy and Dworkin’s acceptance against his prescription being not universal is a testimony to the fact that a procedural conception of democracy is not always suitable in countries which owing to their own historicity would be more inclined towards an outcome based conception of democracy especially in its their quest for attaining socio-economic rights for its people. The fact that the problems associated with the judicial enforcement of positive civil and political rights are similar to socio-economic rights also tend to reconcile socio-economic rights adjudication with the democratic ideals.